



Preparing for a Post-*Roe* America:

The History and Context of Pro-Life Laws in the States

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Key Points

In 1973, the U.S. Supreme Court ruled in *Roe v. Wade* that abortion is protected under the U.S. Constitution on the basis of a supposed right to privacy provided by the Fourteenth Amendment.

In the nearly 50 years since *Roe*, states have enacted numerous laws protecting life in the womb, only for many of them to be blocked by courts citing *Roe*'s legal precedent.

Recent legislation is directly challenging the legal precedent of *Roe*, giving the Supreme Court an opportunity to correct its wrongful decision and return the question of abortion's legality to Congress and the state legislatures.

Since the very beginning of the American experiment, our nation has cherished the right to life. It was the first of three unalienable rights named in our Declaration of Independence, and in the early days of our nation, English common law made actions that infringed upon this right—such as abortion—illegal. As America grew and new states joined, legal protections for the unborn were common. By 1868, 30 of the 37 states had statutory protections for the unborn.¹ This trend continued into the 1900s. By the time Alaska and Hawaii were admitted into the Union, all U.S. states had statutory prohibitions on abortion.

Abortion laws remained relatively the same until the 1960s when pro-abortion advocates lobbied states to create exceptions to their abortion laws for cases like rape and fetal anomalies. It was not until 1970 that Hawaii became the first state to

legalize abortion for any reason. New York, Alaska, and Washington followed suit that same year. However, as of 1972, 30 states still had full protections for the unborn in statute, and 16 states allowed abortion in only specific cases. Only four states had completely removed their protections for the unborn, allowing abortion at any point during pregnancy.²

Then on January 22, 1973, the U.S. Supreme Court ruled in *Roe v. Wade* that abortion is protected under the U.S. Constitution on the basis of a supposed right to privacy provided by the Fourteenth Amendment. This monumental decision blocked nearly every state-level protection for life in the womb and made abortion throughout pregnancy the legal default in the United States unless Congress or the individual states pass laws restricting it.³ In addition, the *Planned Parenthood v. Casey* decision of 1992 added that a state could not impose an “undue burden” on a woman’s attempt to obtain an abortion pre-viability (*i.e.*, the age when an unborn child is considered capable of surviving outside the womb, generally set at 22–24 weeks gestation).

The same day the Court handed down its decision in *Roe*, it handed down an accompanying decision in *Doe v. Bolton*, stating that if any state bans abortion after viability, it must permit a health exception. The Court defined health so broadly as to include emotional and psychological health. With such a large loophole, it is nearly impossible to truly protect life in the womb even after viability.

In the nearly 50 years since the infamous *Roe* decision, states have enacted numerous laws protecting life in the womb, only for many of them to be blocked by the courts. Now, in *Dobbs v. Jackson Women’s Health Organization*, the U.S. Supreme Court is considering the constitutionality of a Mississippi law that directly challenges the legal precedent established in *Roe* and *Casey*. The Gestational Age Act would protect unborn life at 15 weeks gestation, which is pre-viability. With *Dobbs*, the Court has an opportunity to correct its wrongful decision in *Roe* and return the question of abortion’s legality to Congress and the state legislatures.

Development of Pro-Life Laws After *Roe*

In the aftermath of the *Roe* decision, there was an initial rush of states enacting laws to protect unborn lives after the point of viability. Pro-abortion legal groups largely chose not to sue over these viability restrictions so as not to risk the broad precedent for legal abortion established in *Roe*. Numerous states still have these viability protections on the books, but only three states (Florida, New Hampshire, and Pennsylvania) have this viability protection as their strongest pro-life law.

After viability protections became common across U.S. states, the pro-life movement began focusing on other ways to protect unborn life, such as prohibitions of taxpayer funding of abortion modeled after the federal Hyde Amendment. These laws were upheld by the U.S. Supreme Court in the 1980 case *Harris v. McRae*.⁴ After the funding issue took off, states began to enact pro-life laws that would dissuade a woman from choosing an abortion. Laws requiring informed consent, spousal or parental consent (for minors), or waiting periods before undergoing an abortion began to pop up across the states. These laws eventually made their way up to the Supreme Court in the 1992 case, *Casey v. Planned Parenthood*. This case had major expectations that it could overturn *Roe*. Instead, the Court's 5-4 decision upheld the fabricated right to abortion and created a new legal test built on "undue burden."⁵ After 20 years of hard-fought battles in the states and courts, the pro-life movement, in many ways, was back to square one.

Pain-Capable Protections

Once viability protection became standard law in states seeking to protect unborn life, it stayed that way for nearly 37 years. It was not until 2010, 18 years after the *Casey* decision, that a state successfully passed a law to protect unborn life into the second trimester. This came in the form of the Pain-Capable Unborn Child Protection Act, a law designed to protect unborn life at 20 weeks after

conception (*i.e.*, the age at which the medical consensus of the time believed unborn children could feel pain). Nebraska was the first state to ever pass pain-capable protections in 2010.⁶ Since then, 18 states (Alabama, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin) have passed similar laws protecting pain-capable unborn children. Supporters of the legislation thought it might create a new challenge at the U.S. Supreme Court to establish pain as a threshold for which unborn life could be protected. However, 16 out of the 18 pain-capable laws have not been challenged or blocked by the courts, allowing these protections to go into effect.⁷

Heartbeat Protections

Although pain-capable laws successfully gained two more weeks of protection for the unborn, they never achieved the intended effect of creating a new Court challenge to *Roe*. Soon after pain-capable bills began taking off, another legislative concept based around fetal heartbeat began. Janet Porter of Faith2Action was the main architect of the first-ever Heartbeat Protection Act, introduced in the Ohio legislature in 2011.⁸ This bill was designed to protect unborn life from the point at which a fetal heartbeat could be detected (*i.e.*, generally between three to four weeks after conception).

The original bill in Ohio failed to gain any traction, but in 2013, Arkansas passed the first-ever heartbeat law, which protected unborn children 10 weeks after conception.⁹ Not long after, North Dakota followed suit and passed a heartbeat bill that would protect unborn life whenever a fetal heartbeat could be detected, without a specific gestational age limit. This type of bill began gaining more momentum around the states, and now a total of 14 states (Arkansas, Georgia, Idaho, Iowa, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, and Texas) have passed similar heartbeat bills. The main legal issue with heartbeat bills is that they restrict abortion in the first trimester, running counter to the precedent of *Roe* and *Casey*.

The majority of heartbeat laws have been blocked by courts and seemed to be ineffective in creating the next challenge at the Supreme Court to overturn *Roe*—that is until Texas passed a very unique version of the law in 2021.

The Texas heartbeat bill kept the same principle focus on protecting unborn life when a fetal heartbeat is detected. However, it included an enforcement mechanism that directly prohibited the state from enforcing the law. It instead put enforcement in the hands of the citizens of Texas to bring civil suit against any abortionist who violated the law. This law officially went into effect in September 2021 and caught abortion activists by surprise. After several court battles over this unique enforcement mechanism, including two decisions by the U.S. Supreme Court, the law has been allowed to stand.¹⁰ Texas' heartbeat bill marks the strongest protection for the unborn to be successfully enforced since *Roe* was decided in 1973. The law's impact has been readily apparent. Texas has already released its initial abortion statistics for September 2021, and the state saw a 60 percent decline in abortions carried out in that first month the law was in effect.¹¹

Full Protections for the Unborn

The *Roe* decision might have blocked many state-level pro-life laws from being enforced, but the good news is the Court did not invalidate those laws. When a law is ruled unconstitutional (as many pro-life laws were under *Roe*), they are simply prevented from being enforced. However, even though they are unenforceable, they are nevertheless still on the books. Therefore, in the event that *Roe* is overturned, the pro-life laws previously declared unconstitutional should be once again fully enforceable. Since 1973, many states have taken action to repeal their laws that granted full protections for the unborn, most recently Massachusetts in 2018 and New Mexico in 2021.¹² However, eight states (Alabama, Arkansas, Arizona, Michigan, Mississippi, Oklahoma, Texas, West Virginia, and Wisconsin) have left their pre-*Roe* protections on the books, making it likely that they will be able to enforce these laws once

again if *Roe* is overturned. These laws take varying forms. However, the underlining principle is the same—that these states maintain a law to protect unborn life from the moment of conception. It is important that these states maintain these pre-*Roe* protections and enforce them when given the chance; however, the momentum to repeal older protections for the unborn after the *Roe* decision has left other states without protections on the books.

As states continued to experiment with pro-life laws, seeking ways to challenge or get around the *Roe* precedent, the idea of giving full protection to the unborn emerged. In 2005, South Dakota was one of the first states to consider such a law.¹³ South Dakota passed two unique laws signed by Gov. Mike Rounds—one that would grant protections for the unborn from the moment of conception and another that would grant those same protections, but with the caveat that the law would only go into effect if *Roe* is overturned. Unfortunately, in 2006, the full protections for the unborn were repealed by a ballot referendum.¹⁴ However, the law set to go into effect if *Roe* were overturned remained. This type of law also began to gain traction among the states, and now, a total of 12 states (Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and Utah) have full protection for the unborn that would go into effect in the event *Roe* is overturned.

Although these post-*Roe* laws were important for locking in full protection for the unborn in the event that they became enforceable again, the need to challenge the legal precedent of *Roe* remained. Besides South Dakota's attempt to challenge *Roe* in 2006 (which never came to fruition), there was little traction to pass full protections for the unborn until 2019, when the Alabama legislature passed a law protecting unborn life from the moment of conception and only allowing exceptions to save the life of the mother or because of a fetal anomaly.¹⁵ Noticeably absent were the ineffective exceptions for rape and incest, which have become pervasive in pro-life laws passed in the states and Congress. The Alabama law laid down a new marker for the pro-life movement and the Courts. In 2021, not long

after Alabama's full protections law passed, Arkansas became the second state to pass a law protecting unborn life from the moment of conception.¹⁶

These full protection laws have not yet been granted cert by the U.S. Supreme Court, which would have made them a direct challenge to *Roe*. But the Court is reviewing Mississippi's Gestational Age Act, which protects unborn life at 15 weeks gestation. If the Court answers to the opportunity presented to them and overturns the erroneous *Roe* decision, 17 states should have the opportunity to finally enforce their laws protecting unborn life from the moment of conception.

States Using the *Roe* Decision to Allow Late-Term Abortion

Despite the pro-life movement's great momentum, there are still 21 states that allow abortions to take place throughout all nine months of pregnancy. These states allow abortion at any point, for any reason, and do not heavily restrict what type of abortion procedures can take place in those late weeks of pregnancy, when both the unborn child and the mother are at increased risk of severe complications.

The goal of the pro-life movement has always been for every life to be protected. We await the day that no one has to vote on whether a person should have the fundamental right to life. There is a new momentum in the pro-life movement from legal minds such as Robert George, John Finnis, and Josh Craddock.¹⁷ These legal scholars have written academic pieces and filed amici briefs before the U.S. Supreme Court, arguing that the Fourteenth Amendment, properly understood, guarantees the fundamental right to life for the unborn. Although the Court is not expected to rule in favor of full constitutional protections for the unborn in the *Dobbs* case, it is a theory worth noting for the future.

If the Court overturns *Roe* without affirming full constitutional protections for the unborn, the abortion industry will undoubtedly coax, push, and even assist women in traveling across state lines to those 21

states that allow abortion at any point during pregnancy. States like California have already rolled out a comprehensive plan to turn themselves into an abortion mecca, complete with state-taxpayer-funded abortions for out-of-state women.¹⁸

Physician-Only Requirements

In the years following *Roe*, it was very common for states to require physicians to be licensed in order to carry out abortions. This safety precaution was partly in response to claims that, prior to *Roe*, many women died or had severe complications due to undergoing abortions carried out in back alleys by insufficiently trained individuals.¹⁹ By making abortion legal and regulated, it was reasoned that abortion would be safe. However, California amended its abortion law in 2013 to allow non-physicians, including nurse practitioners, physician assistants, and midwives, to carry out abortions. Other states with late-term abortion soon followed suit, making abortion less safe by allowing less-trained professionals to carry out a procedure that kills an unborn child and can put the mother at risk for complications. Now, 14 states allow non-doctors to carry out abortions (California, Colorado, Hawaii, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island [only for chemical abortions], Vermont, Virginia, and Washington).

Conscience Protections

In the aftermath of *Roe*, many states passed laws granting conscience protections to health care professionals who morally object to participating in abortion. Thankfully, only five states do not have any conscience protections. Three of these states allow late-term abortion (Colorado, New Mexico, and Vermont), and the other two protect unborn life at the point of viability (New Hampshire and West Virginia). The remaining 18 states that allow late-term abortion provide clear conscience protections

for individual health care providers, institutional health care providers like hospitals and clinics, or both. It is imperative that these states maintain these conscience protections and adequately enforce them.

Parental Involvement for Minors

The abortion industry preys upon women in unplanned pregnancies and induces them to think abortion is the only answer. This is even more true in the case of minors, who oftentimes can be in an abusive relationship or left to themselves to make life-changing decisions. At a time when minors are being confronted with all sorts of misinformation, it is important that parents are involved and notified when their children are seeking an abortion. Thirty-seven states require some form of parental involvement in order for a minor to obtain an abortion.²⁰ This usually comes in one of two forms: parental consent or parental notification. Of the states that allow late-term abortion, 11 (Alaska, Colorado, Delaware, Maine, Maryland, Minnesota, Nevada, New Jersey, Rhode Island, Virginia, and Wyoming) have either parental consent or parental notification required before a minor can obtain an abortion. Sadly, this means that in 10 states, a minor can legally get an abortion during the 38th or 39th week of pregnancy without a parent's knowledge or consent. Laws requiring parental involvement used to be more common in states that allow late-term abortion. However, in the past two years alone, Illinois,²¹ Massachusetts,²² and New Mexico²³ repealed their parental consent laws as part of a recent trend.

Local Response

Twenty-one states are on track to continue allowing late-term abortion. Even if these states refuse to protect the unborn, the church, civil society, and local governments should do whatever they can to protect unborn life. One great example of a local community stepping up to protect life is Lubbock, Texas. Inspired by the success of the state-wide heartbeat bill, the city enacted a local ordinance

granting full protections for life in the womb.²⁴ By becoming a sanctuary city for the unborn, Lubbock stopped the city's last remaining abortion facility from carrying out abortions. Several other city councils have successfully used zoning laws and building permits to keep abortion facilities from operating in their local areas.²⁵ When the federal government or state government fails to recognize the right to life for the unborn, local governments can use their authority to promote life.

Perhaps the most important factor in protecting unborn life in states that allow late-term abortion is the church and civil society. Pregnancy resource centers, many of which are faith-based, are a vital lifeline to mothers facing an unplanned pregnancy. The church likewise has an important role to fill, not only providing material and emotional support for those considering abortion but also the vital spiritual support to help those families impacted by abortion to know God and His mercy.

Conclusion

Human life is sacred from the very moment of conception. Cultures, religions, and laws have recognized this truth for millennia.²⁶ Even from the very beginning of our nation's history, common law protected the right to life from the very start. This was later reaffirmed and made clear across all 50 states through statutory penalties for those who violated the right to life for the unborn. However, all of this changed in 1970 when Hawaii became the first state to allow abortion for any reason. Three years later, seven non-elected judges fabricated a right to abortion in the U.S. Constitution, forcing the entire country to violate an unborn child's right to life. Almost 50 years and hundreds of pro-life laws later, the U.S. Supreme Court has been presented with a golden opportunity to once and for all right the wrong that was *Roe v. Wade*. May the current nine justices see through the lie that our society needs abortion and allow American institutions to use the force of law to protect life in the womb.

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