THE ONGOING DEBATE

To what extent should abortion rights be protected by the government?

Few issues in recent decades have attracted more nationwide controversy than the morality and constitutionality of abortion. The dispute dates back to 1821, when Connecticut passed the first state law to restrict abortion—a statute prohibiting the use of poison to induce a miscarriage after four months of pregnancy. State after state criminalized abortion over the next century, and by the mid-1960s, the procedure was classified as a felony in 49 states and the District of Columbia.[6]

Yet in the 1960s and early 1970s, the right to a safe and legal abortion became a major issue pertaining to the sexual, political, and economic freedoms of women. In 1971, the Comstock Act—an 1873 federal law that banned the possession or distribution of materials or medication for "unlawful" abortion or contraception—was partially repealed.[7] And by the early 1970s, 20 states had amended their laws to allow abortion in certain circumstances, including four states—Alaska, Hawaii, New York, and Washington—that legalized the procedure entirely.[8]

But the legal landscape changed dramatically in 1973, when the Supreme Court handed down its landmark decision in *Roe v. Wade*. The case began with a lawsuit on behalf of Dallas resident Norma McCorvey—"Jane Roe"—a pregnant woman who claimed a Texas state law that banned all abortions except those necessary to save the life of a mother violated her constitutional rights. The Supreme Court agreed and ruled that the law infringed upon Roe's constitutional right to privacy—a right protected by the 14th Amendment, as previously recognized in *Griswold v. Connecticut* (1965).[9] The Court's decision gave women complete autonomy over the decision to have an abortion during the first trimester of pregnancy, and prohibited states from limiting access to the procedure at that time. But after the first trimester through the point of fetal viability—the point at which the fetus can survive outside the womb—states could enact regulations reasonably related to the protection of maternal health. Only after the

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point of fetal viability could the state enact laws protecting the life of the fetus—and only if an exception was made to protect the life of the mother.[10]

VIDEO: PBS explains the background of the *Roe v. Wade* decision

The *Roe v. Wade* decision was controversial as soon as it was handed down, as it affected the abortion laws of 46 states. In its aftermath, state legislatures began passing new and varied abortion regulations—several of which were ruled on by the Supreme Court.

- *Planned Parenthood of Central Missouri v. Danforth* (1976): The Court struck down a Missouri statute requiring the consent of parents (of minors) and spouses before abortions.[11]
- *Akron v. Akron Center for Reproductive Health* (1983): The Court struck down an Ohio law requiring, among other provisions, that abortions after the first trimester take place in hospitals.[12]
- *Webster v. Reproductive Health Services* (1989): The Court upheld a Missouri law requiring doctors to perform pre-abortion fetal viability tests when a pregnancy has reached 20 weeks.[13]
- *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992): The Court upheld parts of a Pennsylvania law that required a 24-hour waiting period for abortions and for minors to obtain the consent of one parent (with a judicial bypass procedure in place). The Court struck down a provision requiring a woman to notify her husband of her intention to have an abortion. The decision imposed a new standard to judge abortion laws—whether they impose an "undue burden" on women or a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[14]
- *Gonzales v. Carhart* (2007): In 2003, President George W. Bush signed the Partial Birth Abortion Ban Act, a federal law outlawing the late-term procedure known as intact dilation and extraction. The Court upheld the law, ruling for the first time that a specific abortion procedure could be banned.[15]

The aftermath of *Roe v. Wade* has created a national patchwork of different state laws and regulations regarding abortion. As of July 2015, according to the Guttmacher Institute, 38 states required that abortions be performed by licensed physicians, while 21 states required the procedure to be done in a hospital after a certain point in the pregnancy. At the same time, 43 states prohibited abortions after a certain point in pregnancy, except when necessary to protect a woman's health or life. Thirty-eight states required some type of parental involvement in a minor's decision to have an abortion, and 19 states had laws in effect that prohibit "partial-birth" abortion.[16]

MAP: What are the abortion restrictions in your state?

THE CURRENT CONTROVERSY

Should states be allowed to regulate abortion?

Prior to the Supreme Court's decision in *Roe v. Wade,* the states were entirely responsible for deciding how and whether to allow, prohibit, or regulate abortion. But in the wake of the 1973 decision, states retained little authority to regulate the procedure, other than in later-term pregnancies.

LAURA BUCKMAN /STAR-TELEGRAM VIA AP

Pro-life and pro-choice protesters confront each other near a Planned Parenthood facility in Texas. Senator Ted Cruz, R-Texas, inspired nationwide debate after he proposed stripping Planned Parenthood of federal funding.

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Four decades after *Roe v. Wade,* the abortion debate remains highly polarized. And although states cannot ban abortion while *Roe v. Wade* remains in effect, some states have enacted laws imposing certain requirements on women seeking abortions. As of 2015, the Guttmacher Institute found that 17 states mandated that women receive counseling before an abortion, and 28 states required women seeking an abortion to wait for a period of time, usually 24 hours, between receiving counseling and undergoing the procedure.[17]

Supporters of state regulation of abortion argue that it is far more appropriate for democratically elected representatives to craft abortion policy than unelected judges. But opponents insist that state regulations of abortion are only thinly disguised efforts to revoke a woman's right to control her private health decisions.

VIDEO: Senator Orrin Hatch, R-Utah, speaks on the Senate floor against *Roe v. Wade*

VIDEO: Senator Barbara Boxer, D-Calif., speaks in favor of *Roe v. Wade*

Should states be allowed to regulate abortion?

YES: Abortion policy should be decided by elected representatives, not judges.

When the Supreme Court handed down its historic *Roe v. Wade* decision in 1973, it did more than guarantee American women the right to an abortion. The Court unilaterally struck down state abortion laws across the country—laws that were put in place to protect the rights of the unborn. In other words, the opinions of unelected justices took precedence over laws democratically enacted by the representatives of the people.

"In our lifetime has there been a more politically poisonous Supreme Court decision than *Roe v. Wade?*" asked columnist Charles Krauthammer. "I'm talking about the continuing damage to the republic: disenfranchising, instantly and without recourse, an enormous part of the American population; preventing, as even Ruth Bader Ginsburg once said, proper political settlement of the issue by the people and their representatives; making us the only nation in the West to have legalized abortion by judicial fiat rather than by the popular will expressed democratically."[18]

The Supreme Court was wrong to wrest control of abortion policy from the states; after all, there is no right to an abortion written in the text of the Constitution. Furthermore, states have a long tradition of regulating their own health, education, and social welfare policies, in part because different regions of the country have different needs, values, and points of view. Abortion policy should be treated no differently. Yet instead of allowing the voters and representatives of each state set their own abortion policies, the Supreme Court created an arbitrary, one-size-fits-all solution to the issue.

Even with *Roe v. Wade* in place, states have a vital role to play in the regulation of abortion, and many common-sense state laws have helped protect both women and the unborn. Thanks to these laws, 43 states prohibit abortions after a certain point in pregnancy, most often the point of fetal viability; 17 states ensure that women receive counseling before undergoing this stressful and life-altering procedure; and 28 states require women to wait a period of time, often 24 hours, after receiving counseling to undergo the procedure, ensuring they have ample time to consider the decision.[19]

"If abortion is still to be accepted as a misguided outgrowth of a woman's 'choice,' then we should give the woman all of the resources necessary to make her 'choice' in the most educationally sound way possible," said Representative Trent Franks, R-Ariz. "A woman considering abortion should be counseled that the biological form within her womb might be a living human being, and she should be informed that there are other places to take care of her baby once delivered."[20]

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NO: State regulations are a thinly veiled attempt to revoke abortion rights.

In March 2013, Governor Jack Dalrymple, R-N.D., signed a state law that banned most abortions once a fetal heartbeat is detected—something that occurs as early as six weeks into a pregnancy. "North Dakota's governor today effectively banned abortion in the state, with an outrageous and unconstitutional law that will not stand," said Cecile Richards, president of the Planned Parenthood Action Fund.[21]

The North Dakota law was indeed overturned by a federal judge in 2014, but it offered a dangerous example of how state abortion regulations are often an obvious attempt to deny women their constitutional rights.[22] "Today's decision reaffirms that the U.S. Constitution protects women from the legislative attacks of politicians who would deny them their right to safely and legally end a pregnancy," said Nancy Northrup, president of the Center for Reproductive Rights, after the Eighth Circuit Court of Appeals affirmed that the law was unconstitutional.[23]

Even with *Roe v. Wade* in place to protect the constitutional rights of women, states have shown in recent years just how threatening their abortion regulations can be. Between 2011 and 2014, states passed 231 laws to restrict access to abortion—more than during the three prior decades combined. Restrictive state laws have also played a role in limiting access to abortion providers, the number of which decreased by 38 percent between 1982 and 2005.[24] And as of 2015, 45 states had passed laws allowing health care providers to refuse to participate in abortions, while 11 states had restricted coverage of abortion in private health insurance plans.[25] Yet the average first trimester abortion cost $470 in 2009, leaving many patients on the hook for these high costs.[26]

The Supreme Court has long recognized the right of American citizens to make the private decisions that most intimately affect their lives, such as the religions they choose to practice. And in *Roe v. Wade,* the Court understood that women should similarly have control over their own bodies and reproductive choices—including whether or not to terminate a pregnancy. "A woman's reproductive choices should be her own, in consultation with her family, her physician, and her faith," said House Minority Leader Nancy Pelosi, D-Calif. "Politicians have no business inserting themselves into a woman's most personal and private health decisions."[27]

If *Roe v. Wade* is overturned in the future and states regain control of abortion policy, the procedure would likely become illegal in many parts of the country. This would not only violate women's rights—it could lead many pregnant women, especially poor pregnant women, to give birth to children they are not prepared to have or to pursue dangerous illegal abortions.