



BEYOND ROE: THE FIGHT FOR OUR FUTURE

On June 24, the U.S. Supreme Court issued its ruling in *Dobbs v. Jackson Women’s Health Organization*. Its decision to overturn *Roe v. Wade* is devastating; for women living on low incomes and disproportionately for women of color, the impact will be catastrophic. And the harm could extend well beyond abortion.

Make no mistake: We will not cede this fight.

We demand action from lawmakers—at all levels of government—who know the public is on our side. We will continue to press ahead in the courts. And we will work to forge stronger constitutional guardrails: jurisprudence that recognizes the fullest scope of reproductive autonomy under the law.

We invite you to explore our microsite msmagazine.com/beyond-roe, where you’ll find an array of essays (excerpted on the following pages) along with audio and video content describing the policy and legal paths forward.

We fight on—for reproductive health, rights and justice—together.

—**Michele Bratcher Goodwin, executive producer, Ms. Studios; Nancy Northup, president and CEO, Center for Reproductive Rights; and Katherine Spillar, executive editor, Ms.**

U.S. Abortion Retrogression in a Global Context

BY LOURDES RIVERA

COUNTRIES WORLDWIDE ARE LIBERALIZING their abortion laws and guaranteeing greater access to abortion services. Many are doing so with the understanding that abortion is necessary to ensuring women’s equality and full participation in society. Several have done so recognizing that access to abortion is integral to the realization of human rights, including the rights to life, health, equality and nondiscrimination, as well as freedom from cruel, inhuman and degrading treatment.

In 2021, the Supreme Court of Mexico issued a groundbreaking decision unanimously recognizing a constitutional right to safe, legal and free abortion services in early pregnancy and in other situations. The court’s landmark ruling, and the inclusive language used in the decision, constitute critically important steps toward decriminalization of abortion in the

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country and its recognition as a human right.

Elsewhere in Latin America, Argentina and, most recently, Colombia have also liberalized abortion access—in what’s been called the “green wave” (for the colored bandanas worn by a sea of abortion-rights demonstrators). Since 1994, nearly 60 countries around the world have liberalized their abortion laws, among them Angola, India, Kenya, New Zealand, Northern Ireland, South Korea and Thailand.

In contrast, the United States is experiencing a profound retrogression on the right to abortion—one that’s also occurring in other countries where democratic institutions have eroded, such as Poland and Nicaragua.

Across the U.S., anti-abortion politicians have been working to dismantle abortion rights for years. In response to the Supreme Court’s rul-

Clockwise from left: The conservative bloc of the Supreme Court joined together to overturn *Roe*; Dr. Savita Halappanavar died of sepsis in Galway, Ireland, in 2012 when doctors refused to perform an abortion—despite the fact that she was miscarrying—because the fetus still had a heartbeat; activists celebrate the Colombian high court’s decision to decriminalize abortion in February.

ing in *Dobbs v. Jackson Women’s Health Organization*, 26 states and three U.S. territories are now likely to prohibit abortion outright—either through new or existing legislation. In fact, within three days of the Court’s decision, seven states had already done so.

Devastating Impact

In El Salvador, where abortion is banned completely, women experiencing stillbirths and miscarriages—especially those who are Indigenous or experiencing poverty and therefore have the least access to healthcare—have been criminally investigated, prosecuted and sentenced to 20, 30 or 40 years in prison. Together with *Colectiva Feminista para el Desarrollo Local* and the *Agrupación Ciudadana por la Despenalización del Aborto*, the Center for Reproductive Rights has been working to set these women free and reform El Salvador’s laws, including through groundbreaking litigation. In 2021, the Inter-American Court of Human Rights ordered El Salvador to reform its legal and healthcare policies that criminalize women for seeking reproductive healthcare.

And we know too well who would be prosecuted here at home. National Advocates for Pregnant Women has long confronted the fact that a variety of



laws—from criminal child endangerment to feticide to antiquated laws criminalizing abortion—are used to prosecute women and girls in the U.S. who have ended or lost a pregnancy, or for other actions or omissions during a pregnancy, including substance use. This punishment disproportionately affects Black, Indigenous and other people of color; immigrant women; and people experiencing poverty.

We also know the significant risks that criminalization of abortion has on women's right to life. The newly issued World Health Organization Abortion Care Guideline highlights that worldwide between 4.7 and 13.2 percent of all maternal deaths are attributed to unsafe abortions. In highly restrictive legal environments, people may be forced to resort to unsafe abortions when they lack resources and information or face other barriers to safely managing abortion care through medication. Here, too, the impact falls most harshly on marginalized communities, a point underscored by the International Federation of Gynecology and Obstetrics in its amicus brief in *Dobbs*.

The Legal Fight Ahead

Empowered by the global momentum, advocates around the world have won landmark victories protecting the right to abortion. Here in the U.S., we draw from that work to fight on—for stronger legal protections in Congress, including the Women's Health Protection Act, which would secure a national right to access abortion, as well as the Equal Access to Abortion Coverage in Health Insurance (EACH) Act, which would ensure that anyone who receives healthcare or insurance through the federal government (e.g., through Medicaid or the Indian Health Service) would have coverage for abortion services. We fight on in state legislatures. And we fight on in the courts, a critical pillar of democracy that we will never cede.

Alongside our movement partners, we will turn the tide. And we will win.

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In the many states that have now enacted criminal bans on abortion, women could be jailed for ending their pregnancies.

Building Protections for Reproductive Autonomy in State Constitutions

BY AMY MYRICK AND
TAMAR EISEN

WITH *ROE V. WADE* OVERTURNED and abortion protections from federal courts devolving, state courts can provide an alternative path. Beyond simply backstopping the loss of *Roe*, state courts have the power to interpret their own state constitutions to advance reproductive autonomy well beyond present frameworks.

Over the past three decades, high courts in 11 states have recognized that their constitutions protect abortion rights independently from and more strongly than the U.S. Constitution or have struck down restrictive laws that the U.S. Supreme Court has upheld. As outlined in our new report, "State Constitutions and Abortion Rights," these opinions have not only protected access within the state but also have collectively influenced positive decisions in other states.

While state courts still have far to go—none have addressed the racial discrimination that undergirds restrictions, for example, or considered the intersection of pregnancy, childbirth and security for families as part of reproductive autonomy—they have built a legal foundation that goes beyond what the federal courts have allowed.

State Traditions of Personal Autonomy

One important way that state courts have avoided pitfalls in federal jurisprudence is by expansively interpreting the text and history of their constitutions to safeguard reproductive rights. This contrasts with many federal courts, where the approach has been to employ narrow, backward-looking analysis to reject rights such as intimacy, same-sex marriage and abortion.

For example, the Kansas Supreme Court recognized that its constitution protects the right to abortion. The court analyzed the constitution's original drafting and found that its framers intended to broadly protect rights to personal autonomy, dignity, bodily integrity and self-determination. Similarly, the Montana Supreme Court held that open-ended constitutional language required judges to expansively define and protect reproductive autonomy, including the right to abortion. And when the Iowa Supreme Court recognized that abortion was a fundamental liberty and equal right under the Iowa Constitution, it noted that restrictions on reproductive rights drew on outdated stereotypes.

Fundamental Right to Privacy

Unlike the federal courts, state courts have been more prone to recognize that privacy rights robustly protect abortion access.

The Alaska Supreme Court held in multiple rulings that the right to privacy in the Alaska Constitution confers the strongest protections for abortion, including for minors and those who receive Medicaid—groups of people whom U.S. Supreme Court decisions have largely deprived of privacy rights. The Florida Supreme Court also recognized that the right to privacy in the Florida Constitution protects against government interference in personal life, including restrictions on abortion. High courts in California, Massachusetts, Minnesota, New Jersey and Montana have also relied on privacy rights to protect abortion as a fundamental right more strongly than federal case law.

Equality Arguments

Given that sex stereotypes about the role of women and discrimination against disfavored groups undergird abortion restrictions, it is plain to many that the right to decide whether to continue a pregnancy is essential for equality. And yet, the U.S. Supreme Court has not held that abortion restrictions violate equal protection guarantees under the U.S. Constitution. In the context of public insurance coverage for abortion, in fact, it directly upheld policies that discriminate against people who are pregnant.

Equality arguments have fared much better in many states, including in Alaska, Arizona, California, Iowa, New Jersey and New Mexico. For example, recognizing that people living on low incomes face insurmountable barriers to abortion access in the absence of public funding, the Alaska Supreme Court struck down a law that excluded abortion from Medicaid coverage. And the New Mexico Supreme Court used its constitution's equal rights amendment to strike down the state Medicaid program's limitations on abortion funding—finding it was sex discrimination.

Building—and Protecting—Precedent

Though only a minority of state courts to date have recognized independent and stronger protections for abortion rights in their state constitutions, those decisions nonetheless have contributed to positive outcomes nationwide. As this body of precedent becomes more robust, it has the potential to become increasingly influential.

However, the politics can be perilous. In Florida and Iowa, for example, state supreme court justices who voted to strike down abortion restrictions were replaced by governors who disfavor abortion rights. In Montana, the state attorney general recently asked the Montana Supreme Court to overrule its nearly quarter-century-old opinion holding that the constitution protects abortion. And in Kansas, abortion opponents have placed an initiative on the ballot to strip abortion rights from the state constitution (see Page 11).

If not protected from partisan and ideological attacks, state courts will find it harder to build a stronger and more inclusive jurisprudence for reproductive autonomy—one that redresses racial and multiple intersecting forms of discrimination, and ties together abortion with the right to be pregnant and have and raise children on one's own terms. And state courts will need to move forward under immense pressure with 26 states and three U.S. territories poised to ban or severely restrict abortion now that *Roe* has fallen.

To safeguard access, maintain past gains and build on the possibilities state constitutions offer to creatively surpass federal case law, there must be concerted efforts to protect and improve state judiciaries. A more expansive vision for reproductive autonomy is necessary—and state courts can lead the way.

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How States Can and Should Protect Abortion Rights and Access

BY ELISABETH SMITH

FOR NEARLY 50 YEARS, *ROE V. WADE* GUARANTEED LEGAL ABORTION throughout the U.S., but individual state policies have always determined whether abortion care is accessible or difficult, affordable or expensive, stigmatized or not. Looking ahead, individual state laws will be paramount to securing abortion rights and ensuring abortion access in the U.S.

Many states already have constitutional provisions or statutes that will ensure abortion remains legal in those states despite the Supreme Court's decision. But there is urgent need for more protections at the state level.

Policies supporting abortion rights and access can be pursued in myriad ways. Reform can originate from voters themselves via ballot initiatives or through elected lawmakers and the legislative process. Protections can be built into new statutes or constitutional amendments. To be clear: Every state has the power to enact laws and policies that protect its residents—as well as anyone who travels there to access abortion care. And an increasing number of states are doing just that.

Proactive Measures

This fall, voters in Vermont will decide whether to amend their state constitution to protect reproductive freedom including, but not limited to, abortion. The Reproductive Liberty Amendment would ensure that Vermonters can choose for

themselves whether and when to become a parent, use temporary or permanent birth control or seek abortion care. Currently, voters in Michigan are gathering signatures to place on the ballot an initiative that would enshrine reproductive freedom in the Michigan Constitution. The Michigan initiative involves the right to make and carry out decisions without political interference about all matters relating to pregnancy, including birth control, abortion, prenatal care and childbirth. Both initiatives recognize that individual decision-making around all pregnancy outcomes, including abortion, should be encouraged and protected.

State statutes that protect abortion rights are another avenue. In recent years, numerous states—including Illinois, New Jersey, New York and, most recently, Colorado—have passed laws codifying the right to abortion. The Reproductive Health Equity Act, for instance, protects reproductive rights as fundamental rights in Colorado and respects individual decision-making regarding contraception and abortion.

Paving the Way for Providers

A critical element to abortion access is enabling as many trained providers to serve as many communities as possible. In recent years, more and more states have repealed or replaced laws requiring that only physicians can perform abortions—allowing advanced practice clinicians (which includes certain nurse practitioners and physician assistants) to do so as well, acknowledging that it is within their scope of practice. In some states, these clinicians provide medication abortion; in others, they

Abortion-rights supporters protest after the draft of the *Dobbs* decision was leaked.



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also provide procedural care. In 2022, Washington and Maryland each passed laws enabling advanced practice clinicians to provide abortions in their states. Maryland's law adds support for clinical education in abortion care—maximizing the number of qualified providers in two ways. Building on an opinion from the state attorney general, Washington's legislation changed its state laws to be gender neutral, protecting and providing for the reproductive healthcare needs of transgender, nonbinary and gender nonconforming people.

Empowering Young People

States hostile to abortion rights have a long history of enacting restrictions that are uniquely harmful to young people. In late 2021, Illinois took the positive step of repealing its long-standing parental notification law. The new legislation also created a youth-focused working group to identify resources in education, housing, employment, food access and childcare. Importantly, young people themselves will be among the members of the working group—a real step forward in respecting and elevating their experience and autonomy.

Making Abortion Affordable

States can increase abortion access by helping with the cost—which poses a tremendous barrier for many. Some states provide funding through state Medicaid programs and require private insurance plans to cover abortion care. In 2022, California and New York strengthened their requirements for private insurance coverage. Oregon just approved the addition of \$15 million to the Oregon Reproductive Health Equity Fund to respond to the logistical needs of state residents and those who travel to Oregon for care.

Countering Clinic Harassment

Finally, states can address clinic harassment, which has long posed disruption and danger. Maine recent-

ly joined a small number of states that enforce medical buffer zones. Maine's law prevents individuals from intentionally blocking entrances and exits, harassing patients or making noise that prevents patients inside the clinic from hearing medical information.

Take Action

What proactive solutions could help people in your state? Reach out to your local and state elected officials and encourage them to introduce, support and advance legislation and policies that protect abortion; ensure an adequate number and mix of providers; respect the dignity and autonomy of young people; provide financial support through insurance mandates and other funding; and allow people to access medical care without harassment and intimidation.

Abortion rights should never depend on someone's ZIP code. Each state must do its part to ensure legal and more equitable access to abortion care. ■

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Read the Series

Check out the rest of Ms.' collaboration with the Center for Reproductive Rights on our website: msmagazine.com/beyond-roe.

- **The Right to Reproductive Autonomy: A 14th Amendment Guarantee** by Diana Kasdan and Risa Kaufman: "We must continue fighting to secure the full promise of the 14th Amendment. Under a correct understanding of its multiple and interdependent guarantees, a future with stronger constitutional protection for reproductive autonomy is both necessary and possible."
- **The Urgency for Reproductive Freedom: From Slavery to the New Jane Crow** by Michele Goodwin: "When states coerce and force women, girls and people with the capacity for pregnancy to remain pregnant against their will, they create human chattel and incubators of them."
- **The Fight to Secure U.S. Abortion Rights Is Global** by Michelle Onello and Elena Sarver: "Abortion policy under the Trump administration provides a preview of what could be next. An emboldened anti-abortion lobby is likely to go even further to police abortion rights throughout the world."
- **Overturing Roe Would Create More Barriers for Asylum-Seekers and Immigrants** by Mary Giovagnoli: "State efforts to criminalize abortion could lead to instances where women may be denied immigration benefits or may be deported. Even with Roe, close to 1,200 women have been arrested under various state laws criminalizing abortion or other maternal behavior."
- **Why Roe Was Never Enough—and What Comes Next** by Jennifer Weiss-Wolf: "Abortion rights and women's rights are directly tied to the health of U.S. democracy. Both are in free fall—and have been for some time."
- **Reimagining the Future of the Reproductive Health, Rights and Justice Movement** by Amber Gavin and Israel Cook: "Our vision is abortion destigmatization. A world where abortion is discussed openly, not shamefully. The ability to access care with no harassment or intimidation. And a future in which abortion clinics are not just secure in their legality, but where communities around them thrive."