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## The New Abortion Federalism: What's Next for the States?

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In *Dobbs v. Jackson Women's Health Organization* (2022), the U.S. Supreme Court overturned *Roe v. Wade* (1973), thus returning basic abortion policy to the 50 states, District of Columbia, and U.S. territories. Before *Roe*, abortion was a state matter. After *Roe*, federalism remained in play because states enacted many abortion laws, though all were subject to possible rejection by federal courts. Some states enacted laws intended to overturn *Roe*. This happened in *Dobbs*, which was triggered by a Mississippi law.

“The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion,” wrote the Court’s majority in *Dobbs*. Abortion will therefore be a significant issue in state government and politics for decades. What’s likely to happen?

### TRIGGER LAWS FIRST

Thirteen states have [trigger laws](#) banning or restricting abortion immediately, or within 30 days, of *Roe*’s demise. Minutes after *Dobbs* was announced, Missouri’s attorney general activated his state’s trigger law prohibiting all abortions except for medical emergencies. Some other states have pre-*Roe* bans that have lain dormant since 1973. Some of these laws are old. Wisconsin’s abortion-restriction law was enacted in 1849, Michigan’s in 1931. But many were enacted during Donald Trump’s presidency in anticipation of anti-*Roe* action by his court appointees.

Twenty-one states will probably ban or restrict abortion. In another 20 states, abortion rights will likely be preserved by current constitutional, statutory, or judicial provisions. Nine states could go either way depending on election outcomes. In Pennsylvania, for instance, the Republican legislature and Republican gubernatorial candidate oppose abortion, but the Democratic candidate vows to veto anti-abortion bills if elected governor.

Either way, interest groups will challenge state laws, constitutional provisions, and court rulings for or against abortion in every state. *Abortion federalism will deepen policy diversity among the states and polarization between blue and red states.*

### STATE CONSTITUTIONS IN THE FOREFRONT

The U.S. Supreme Court’s *Dobbs* ruling that the U.S. Constitution contains no abortion right means that pro-choice and pro-life forces will battle state-by-state to embed their policy desires in [state constitutions](#). Both sides view a constitutional provision as better than a statute because a constitutional provision is harder to amend or repeal and more difficult for a state supreme court to counteract.

The first such effort occurred in Kansas on August 2 where citizens rejected, by a large margin, a “Value Them Both” constitutional amendment that would have overturned a 2019 state Supreme Court [ruling](#) holding that [Section 1](#) of Kansas’s Bill of Rights protects a right to abortion.

From a democracy perspective, a constitutional amendment is the best resolution because a constitutional amendment requires voter approval in every state except Delaware. Ordinarily, an amendment is proposed by a super-majority vote of each house of the legislature (except unicameral Nebraska); then voters ratify or reject it. Sixteen states also have a direct initiative whereby enough voter signatures on a petition puts a constitutional amendment on the ballot without legislative action.

### STATE LEGISLATIVE BATTLEFIELDS

Legislative action is the second-best democratic resolution because the legislature is the most representative branch of state government. This was the main reason most early state constitutions allocated the most power to legislatures, leaving most governors weak. Also, many state

constitutions require bills to deal with a single subject and have a clear title so as to foster transparency. Further, the legislative forum offers opportunities for compromise.

Advocates on both sides will step up their lobbying and their efforts to elect legislators who support their preferred constitutional and statutory policies. Whenever abortion becomes a hotly contested legislative issue, national interest groups will pour money and lobbyists into the battle. *Ironically, therefore, returning abortion to the states will further nationalize state politics.*

However, both sides face headwinds from other issues, such as the economy, crime, and education, that also drive voter choices.

## GOVERNORS WIELD VETO POWER

Post-*Roe* abortion politics are already affecting some governors' races such as Michigan, Pennsylvania, and also Florida where Republican Governor Ron DeSantis needs to get re-elected if he wishes to be a presidential candidate. Also, some governors are calling a special session of their legislature to pass new abortion laws.

Governors will be key players because they are elected statewide and can veto bills, though not constitutional-amendment proposals. Hence, legislatures with a sufficient one-party super-majority will try to circumvent gubernatorial vetoes by approving constitutional amendments for voter ratification. Otherwise, governors will affect all statutory matters on abortion.

Another issue is whether pro-choice governors will administer, or administer robustly, pro-life laws and constitutional provisions, and vice versa. Governors, like presidents, engage in selective law-enforcement.

## ATTORNEYS GENERAL ENFORCE LAWS

Attorneys general, who are elected by voters in 43 states, will also be important because they enforce state laws and conduct civil and criminal investigations. [Wisconsin's attorney general](#) announced he will not enforce his state's abortion ban. Others might do the same or litigate to overturn their state's ban. A coalition of 22 [attorneys general](#) announced support for abortion access. By contrast, immediately after *Dobbs*, [Tennessee's attorney general](#) filed an emergency motion in federal court to permit the state to enforce abortion restrictions.

Some local prosecutors and other local law-enforcement officers have also indicated they will not enforce abortion restrictions or prosecute providers or patients.

## SECRETARIES OF STATE ADMINISTER ELECTIONS

Secretaries of state--present in 47 states and elected in 35 states--might become important because they administer elections, oversee vote counting, and sometimes validate signatures on ballot-initiative petitions, issue licenses for medical personnel, and register and authenticate corporate entities. Secretaries of state are already in the news due to controversies over vote counting in the 2020 election. Abortion might further politicize these offices and nationalize secretary-of-state elections.



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## SUPREME COURTS DECIDE CONSTITUTIONAL ISSUES

State high courts will be very important actors because they interpret state laws and constitutions and can declare laws or actions of government officials unconstitutional. Already, in [11 states](#), the high court has ruled that its state constitution protects abortion rights independently from and more strongly than the U.S. Constitution or has struck down restrictions approved by the U.S. Supreme Court.

Most state high courts are different from the U.S. Supreme Court in that state supreme-court justices in 16 states are initially appointed by the governor but then stand for periodic yes-or-no retention elections. In 14 states, justices are elected by voters in nonpartisan elections with no party labels; in eight others, they are elected by voters in partisan elections with party labels. Justices are appointed in the other 12 states, usually by the governor.

*Because justices face the voters in 38 states, they will likely be sensitive to state public opinion on abortion.* In turn, pro-choice and pro-life advocates will escalate their campaigns to influence appointments and elections of supreme-court justices. These elections are already high-priced and partly nationalized. Abortion politics will make them more so.

## INTERSTATE ISSUES

Thousands of women will travel to pro-choice states. Some destination states are ramping up their abortion capacities. Some are allowing nurse practitioners and nurse midwives to perform abortions in addition to physicians. Other states will fund pro-life pregnancy centers.

A key issue is whether pro-life states can punish residents who assist out-of-state abortions. For example, several states, including Idaho, Oklahoma, and Texas, authorize citizens to sue and collect \$10,000 from anyone who helps a woman get an abortion.

The governors of California, Oregon, and Washington announced a multistate effort to protect women who arrive from other states and to dissuade state and local law enforcement from helping out-of-state investigations and arrests involving abortion. Some states are passing laws to prohibit extradition of patients or providers.

[Nineteen states](#) bar people from using telemedicine for abortion services. A patient must participate in a telemedicine consultation from a state that allows abortion, even if it means just stepping across a state border to make the call. Some organizations will set up abortion clinics and pill services along the borders of anti-abortion states. Another issue is the mailing of abortion pills, already prohibited by Texas.

Because these issues implicate the U.S. Constitution's interstate commerce clause, the U.S. Supreme Court might be asked to address such matters.

## CONGRESSIONAL ACTION

Both sides want a national law permitting or prohibiting abortion. There is no clear constitutional basis for either one, although this would not stop determined Democrats or Republicans who could, for example, try to tie abortion laws to federal funding. Imposing a New York-style or Mississippi-style abortion policy on the country would be unpopular and polarizing. We could see policy see-saws: pro-choice legislation when Democrats control Congress and the presidency and pro-life legislation when Republicans gain control.

## CITIZEN ACTION IN A POST-*Roe* COUNTRY

Abortion federalism will require both sides to organize more effectively in all states and many localities. National organizations will need to create or invigorate state and local chapters, while in-state citizens will need to build their own grass-roots organizations.

Abortion issues will wax and wane in every state, and abortion policies will see-saw back and forth in some states as government changes party hands. As such, abortion politics will be democratic in most states; however, the citizens of every state will have to cope with invasions of outside national groups seeking to influence their state government.



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## SOME QUESTIONS TO CONSIDER IN A POST-*Roe* ENVIRONMENT

- How does my state protect, prohibit, or otherwise regulate abortion?
- Should government possess the authority to regulate abortion, or are reproductive decisions private and beyond government's reach?
- In our federal democracy, who should make the ultimate decisions about abortion: the people of each state acting through their legislative and constitutional processes, state supreme courts, the U.S. Congress, the U.S. Supreme Court, or some other institution?
- What rights, if any, do pregnant women and/or their unborn children possess?
- What are the best ways to balance majority rule with minority rights in post-*Roe* state and national politics?
  - In states where democratic majorities prohibit abortion, what rights, if any, are denied or at-risk?
  - In states where democratic majorities protect abortion, what rights, if any, are denied or at-risk?

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