

The Abortion Policy Landscape Is More Dynamic than Ever: What Americans Need to Know

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KEY TAKEAWAYS

America's abortion policies are long overdue for a course correction. An upcoming Supreme Court case may allow Americans to address outdated and extreme laws.

At the same time, the Left is pushing for a more radical abortion agenda through Congress and the regulatory state, with more emphasis on chemical abortions.

Policymakers should pursue policies rooted in the principle that life is the most basic human freedom, and that it should be protected in public policy.

Nearly half a century ago, the Supreme Court legalized abortion on demand in *Roe v. Wade*. Far from settling the issue of abortion once and for all, *Roe's* lethal legacy has poisoned this country's laws, its courts, and its culture.

On December 1 this year, the Supreme Court is scheduled to hear arguments for *Dobbs v. Jackson Women's Health Organization*,¹ a case that presents the opportunity to establish a more principled basis for abortion jurisprudence than the status quo.

Meanwhile, the Left is using every tool available in Congress and the regulatory state to consolidate its extreme approach to abortion and conscience rights. A new frontier is evolving: Pill-induced at-home abortion enables women to undergo the procedure without interacting with a provider face-to-face.

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This *Issue Brief* details what Americans need to know about this dynamic policy landscape, and why these developments matter for protecting unborn human life.

Legal Landscape Faces Significant Shift

This term, *Dobbs v. Jackson Women's Health Organization*,² which stems from a Mississippi law prohibiting most abortions after 15 weeks, will provide the Supreme Court an opportunity to answer, for the first time, whether all prohibitions on abortion before a child is capable of surviving outside the womb (viability) are unconstitutional.³ This means that the Court may reject the “viability standard” established in *Roe v. Wade*, which means that states may prohibit abortion only after a child is able to survive outside the womb.⁴ In 1992, the Court affirmed that the viability standard is *Roe's* essential holding in *Planned Parenthood v. Casey*, adding that a state may not impose an undue burden on a woman's right to have an abortion. But in doing so, the Court established yet another subjective, unworkable standard that ignores important state interests instead of accounting for them.

If the Supreme Court changes course on the question of pre-viability prohibitions, the decision would be significant. Since 1973, states have enacted more than 1,300 life-affirming policies, and more than 500 in the past decade alone. But these laws are rooted in the viability standard's vague and unworkable framework. *Dobbs* offers the opportunity to make a long-overdue course correction, which would mean that states could account for advances in modern science and technology, as well as pro-life shifts in public sentiment.

The Viability Standard. The so-called viability standard is an arbitrary rule designated by *Roe* without scientific analysis or justification. Viability does not occur at the same point for each baby. Rather, viability varies from pregnancy to pregnancy based on specific circumstances, including individual health conditions and medical facility capabilities. In 1973, a child was considered viable at approximately 28 weeks' gestation (40 weeks is considered full term). Today, viability may occur a full a month and a half sooner; babies have been born and survived as early as 21 weeks.⁵

Advances in technology, including the widespread availability of ultrasound, have displayed the humanity of children in the womb in ways that were generally not possible in 1973.⁶ These advances have significantly changed the ways in which doctors are able to care for unborn children. The field of perinatal medicine has rapidly expanded with options for diagnosing, planning for, and treating various conditions before a child is even born.

Doctors successfully perform surgeries while children are still in the womb to address conditions such as twin-to-twin syndrome⁷ and spina bifida.⁸

The field of perinatal medicine is relatively new, but continues to expand rapidly. A Philadelphia children's hospital—which is responsible for a “quarter of fetal surgeries ever performed”—established its fetal surgery program in 1995 and recently celebrated “the birth of its 2,000th fetal surgery patient.” Marking the momentous occasion, the surgeon-in-chief noted that fetal surgery was considered experimental just 40 years ago, “but now it has become the standard of care, offering a better quality of life to many children and families.”⁹

Likewise, knowledge of fetal development and unborn children's capacity to feel pain continues to evolve, with scientific evidence now suggesting that pain can be felt as early as 12 weeks—far earlier than previously thought.¹⁰

Policy Implications. While policymakers have successfully enacted life-affirming laws, such as informed-consent requirements, mandatory reflection periods, and prohibitions on the inhumane partial-birth abortion procedure, outdated abortion jurisprudence has blocked much state policymaking on pre-viability abortions that accounts for advances in modern science and technology. Notably, most Americans support significant restrictions on abortion, yet America is only one of seven countries in the world that permits elective late-term abortions after 20 weeks (five months) of gestation.¹¹ America is an outlier when it comes to earlier restrictions, too: A recent study found that “47 out of 50 European nations limit elective abortion prior to 15 weeks.”¹²

Should the Supreme Court change course on *Roe*, abortion policy would return to the states and the American people, through the democratic process, could further address outdated and extreme abortion laws with policies that are not subject to the arbitrary and unworkable viability standard. Rather, policymakers could craft laws that acknowledge the humanity of children in the womb and reflect public sentiment that supports protecting unborn children before *and* after viability.

Policy Landscape: The Left Proposes Radical Shifts to Long-standing Pro-Life Consensus Policy

Seeing that *Roe* may be under threat, President Joe Biden and congressional Democrats have pursued policies at the federal level to overturn decades of consensus policy disentangling tax dollars from abortion activity. They also seek to advance radical pro-abortion legislation and administrative policies that undermine life and conscience rights and make sweeping changes to state and federal law.

In Congress. Among these radical proposals is the misnamed Women’s Health Protection Act,¹³ which passed in the House this year. This proposal would endanger policies that disentangle tax dollars from abortion, conscience-protection laws, state-level pro-life laws, and more. In pushing for legislation to repeal hundreds of existing pro-life laws and prohibit states from enacting future pro-life laws, pro-abortion Members of Congress ignore the fact that such policies are in place precisely because elected representatives did what their constituents asked them to do: protect unborn human life and women’s health and safety.

Radical legislation like the Women’s Health Protection Act is not the only item on the pro-abortion agenda; long-standing policies disentangling taxpayer dollars from abortion are under threat as well.

For more than four decades, Congress has incorporated “policy riders” into spending bills that establish conditions or limitations on how federal agencies may spend tax dollars. Such riders include:

- The Hyde Amendment (1976), which prohibits the Department of Health and Human Services from spending taxpayer dollars for most abortions;
- The Helms Amendment (1973), which prohibits foreign aid funds from being used for abortions abroad;
- The Smith Amendment (1983), which prohibits funding for elective abortions in the Federal Employee Health Benefits program;
- The Dornan Amendment (1989), which prohibits funding for elective abortions in Washington, DC; and
- The Weldon Amendment (2004), which protects health care providers from discrimination on the basis of their refusal to provide and pay for abortions or refer women to have them.

Despite long-standing bipartisan consensus on not using tax dollars to fund elective abortions, multiple proposals in the House and Senate—as well as President Biden’s proposed budget¹⁴—seek to reverse these important policy riders. From the fiscal year 2022 appropriations¹⁵ to the behemoth \$3.5 trillion reconciliation spending package (which, unlike regular appropriations, needs a simple majority rather than 60 votes to advance in the Senate),¹⁶ Congress and the Biden Administration have pursued a radical and divisive agenda on multiple fronts to force Americans to pay for abortions.

Disentangling tax dollars from abortion is good, lifesaving policy and has contributed to the encouraging long-term decline of the overall abortion rate.¹⁷ The Hyde Amendment has saved more than 2.4 million lives since its inception,¹⁸ and a majority of Americans support this policy (including 65 percent of independents and 31 percent of Democrats).¹⁹ Likewise, a majority of Americans also supports conscience rights for individuals and entities that object to abortion.²⁰

The Biden Administration. President Biden, at the behest of the abortion industry, also has pursued a pro-abortion administrative agenda. His Administration has:

- Rescinded²¹ the Protecting Life in Global Health Assistance Policy (an expanded version of the Mexico City Policy), which prohibits foreign nongovernmental organizations (NGOs) from performing or promoting abortion abroad in order to receive U.S. funding;²²
- Restored²³ funding for the United Nations Population Fund despite the organization's complicity in China's coercive population-control policies, which include forced abortion and sterilization;²⁴
- Withdrew²⁵ the U.S. from the Geneva Consensus Declaration, which was signed by a coalition of more than 30 countries and sought to preserve human life (including those not yet born), among other goals;²⁶
- Reversed²⁷ a Trump Administration regulation that required grantees receiving funding through Title X, the federal family planning program, to maintain strict physical and financial separation between Title X activity and abortion-related activity;²⁸
- Reversed²⁹ a Trump Administration regulation that required insurers to abide by both the letter and spirit of the Affordable Care Act by fulfilling the law's requirement that insurers collect a separate payment for elective abortion coverage in qualified health plans (QHPs) approved for the Obamacare health insurance exchanges;³⁰ and
- Reversed³¹ the Trump Administration's policies related to unethical and antiquated research using fetal tissue derived from elective abortions,³² including a prohibition on funding for intramural research and a requirement that extramural research be subject to an ethics advisory board.

Chemical Abortion: The New Policy Frontier

Chemical abortion allows women to have abortions at home, without medical supervision. It typically involves a two-part regimen. One pill, mifepristone, causes the death of the unborn child by cutting off the hormone progesterone, which is required to sustain a pregnancy. The second pill, misoprostol, causes contractions to empty the uterus. The abortion-pill regimen is currently approved for up to 70 days (10 weeks) into pregnancy, and is not the same as the “morning after” pill.³³

The rate of chemical abortion in the U.S. has increased by 120 percent in the past decade; today roughly half of annual abortions in the U.S. are chemical rather than surgical.³⁴

Abortion pills are subject to heightened safety restrictions. For example, only certain qualified providers who affirmatively seek permission from mifepristone’s manufacturer may prescribe it, and they must dispense the medication to patients directly in limited health care settings, such as a clinic or hospital. It may not be prescribed for home use by any doctor, nor can it be obtained at retail pharmacies. For now.

Since its approval 20 years ago, mifepristone has been associated with 24 deaths and more than 4,000 adverse events,³⁵ but that number does not account for all complications. That is because in 2016, the Obama Administration also weakened the heightened safety restrictions by making serious adverse-event reporting optional. Life-threatening complications include sepsis and ruptured ectopic pregnancy. Other side effects, such as fever, pelvic inflammatory disease, cramping, and nausea, are not uncommon. The possibility that a woman will experience complications increases the further along she is in her pregnancy.³⁶ Chemical abortion has been found to have a complication rate four times higher than that of surgical abortion.³⁷

Under the Biden Administration, the Food and Drug Administration has—under the guise of COVID-19 containment—stopped enforcing in-person dispensing requirements for abortion pills, opening the door to a telemedicine abortion-pill-by-mail scheme in many states.³⁸

Abortion-industry advocates have called for abortion pills to be widely available, including over the counter,³⁹ or even taken as a monthly preventive measure, rebranding mifepristone as a “missed period pill.”⁴⁰ These campaigns disturbingly downplay the serious and consequential nature of abortion pills, which pose serious health risks to women and end the lives of unborn children.

The Biden Administration has indicated that it will seek more permanent deregulation of abortion pills in the near future; the full scope of deregulation is an open question.⁴¹ Even if the *Dobbs* case results in some states

enacting earlier gestational limits on abortion, abortion pills will be the next frontier of abortion policy battles. Recognizing this shifting landscape, some states are rightly updating their laws on telemedicine and dispensing requirements to protect women and their unborn children from dangerous abortion pills.⁴²

While a Supreme Court decision may open the door to additional pro-life policymaking, abortion pills are becoming more widely available to women early in their pregnancy. Activists have vowed to circulate pills, if need be illegally, regardless of what applicable state and federal law may prescribe, and challenges to addressing chemical abortion may become even more pronounced post-*Dobbs*.

Policymakers in Arizona, Indiana, Montana, Ohio, Oklahoma, South Dakota, and Texas have acted to counter the Biden Administration's expected abortion-pill deregulation. Such policies include prohibitions on telemedicine abortion, heightened informed-consent requirements, and reporting requirements to better track complications. These policies both prioritize women and unborn children's health and safety.

Historical Moment Presents Challenges, Opportunities

From state and federal legislation to President Biden's administrative policies, abortion policy has loomed large in multiple policy debates as all eyes turn to the Supreme Court. After half a century of confusion, the *Dobbs* case is an occasion to replace arbitrary precedent with principled jurisprudence. Policymakers and the American people should keep this fundamental principle in mind: From the moment of conception, every human being has inherent dignity and worth. American law should protect innocent human life, including in the womb.

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