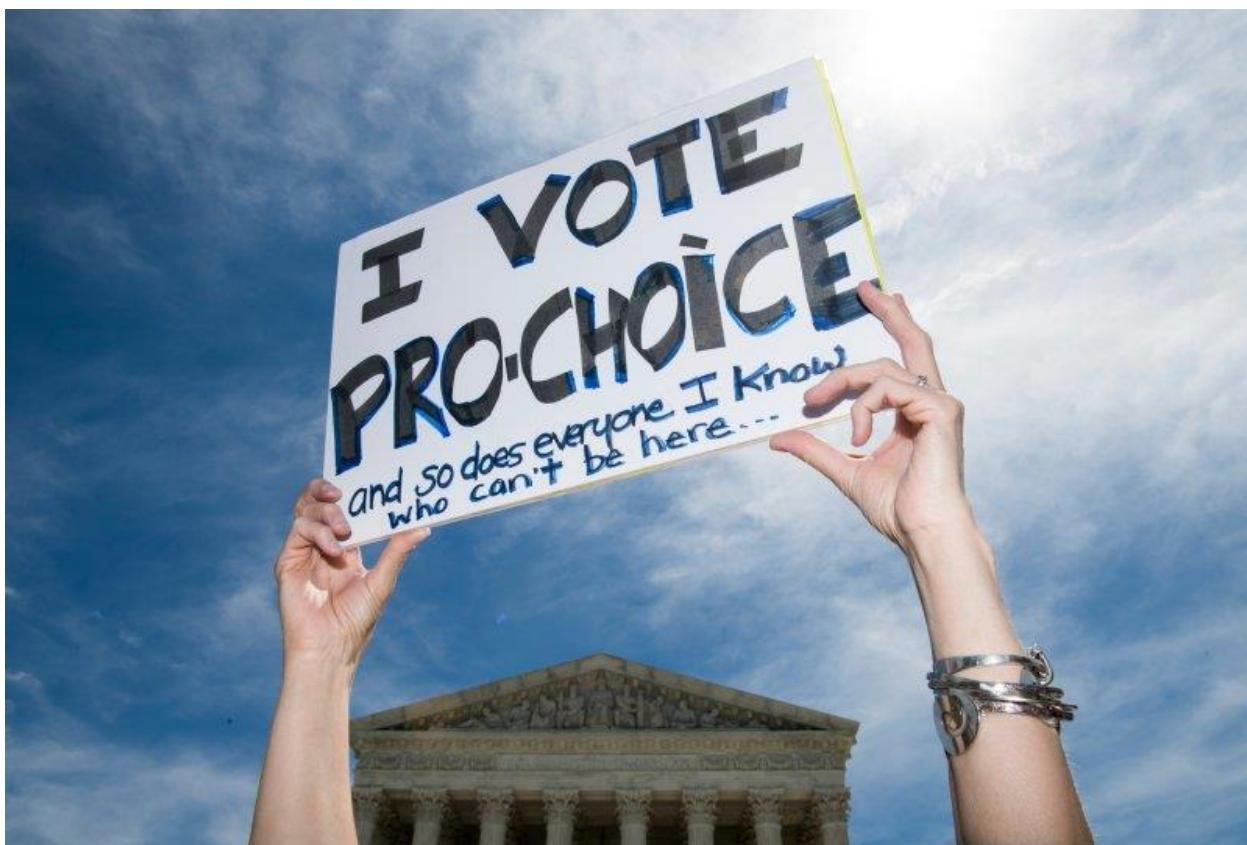


- WE ARGUED THE BIGGEST SUPREME COURT ABORTION CASE SINCE ROE. HERE'S HOW TO PROTECT A WOMAN'S RIGHT TO CHOOSE

# We Argued the Biggest Supreme Court Abortion Case Since *Roe*. Here's How to Protect a Woman's Right to Choose



Abortion-rights activists rally at Supreme Court in Washington to protest new state bans on abortion services on May 21, 2019

Bill Clark—CQ Roll Call/Getty Images

## IDEAS

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Last week, a Supreme Court rift over the role of precedent was exposed. Dissenting in the case *Franchise Tax Board of California v. Hyatt*, the liberal Justices wrote that they were alarmed that “well-reasoned decisions that have caused no serious practical problems in four decades” were in jeopardy. They cautioned that the decision “can only cause us to wonder which cases the Court will overrule next.”

This warning, along with the passage of a draconian law criminalizing abortion in Alabama and other states passing the most restrictive abortion laws in decades, is cause for great concern. Currently pending before the Supreme Court are four requests to hear cases (petitions for certiorari) out of Indiana, Alabama (a provision enacted prior to last week’s ban) and Louisiana. Any of these as well as expected challenges to the more severe Alabama-like laws could be used to seriously erode or effectively reverse *Roe* and *Casey*. The right to choose abortion protected by *Roe v. Wade* and our 1992 case, *Planned Parenthood v. Casey*, is as Justice Harry Blackmun once said, “hanging by a thread.”

If *Roe* and *Casey* are undermined or fall, doctors who perform abortions, and in some states the women who obtain them, may be subject to fines, jail sentences and harassment by anti-abortion District Attorneys. Women will suffer debilitating health effects; some will die from illegal abortion, as women did in the days before *Roe*. Poor women and young women will be affected most. The loss of *Roe* and *Casey* jeopardizes access to birth control and threatens Planned Parenthood and other women’s health clinics that provide the bulk of primary care services to young, low-income women. These assaults on our liberties will happen quickly.

Don't think it won't happen. In fact, in their private conference after oral argument in *Casey*, Chief Justice Rehnquist, joined by Justices White, Scalia, Kennedy, and Thomas, voted to effectively overturn *Roe*. A draft majority opinion, authored by Rehnquist and located in the Library of Congress, concluded that "the Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a 'fundamental right.'" But that language would appear only in the dissent. Had Justice [Kennedy](#) not changed his vote at the eleventh hour, states would have been free to ban or regulate abortion procedures in any way they decided was rationally related to their objectives. Today, Justices Thomas, Alito, Gorsuch and [Kavanaugh](#) are highly likely to give states the go-ahead to return to pre-*Roe* abortion bans.

Some are counting on Chief Justice Roberts to step into Justice Kennedy's role and save the day. But Roberts was mentored by Chief Justice Rehnquist, for whom he served as a law clerk, and Roberts took anti-*Roe* stances before joining the Court. Among other things, as a Deputy Solicitor General in President George H.W. Bush's administration, he argued to the Court that *Roe* was wrongly decided and should be [overturned](#), according to Joan Biskupic in her new book, *The Chief*. As a justice, in ruling on the merits of cases challenging severe restrictions on abortion, he has [sided](#) with the states, voting in 2007 to uphold a federal late-term procedure ban in *Gonzalez v. Carhart* and dissenting in 2016 when the Court struck down onerous Texas provisions that targeted abortion providers and restricted access in that state. While as Chief Justice, Roberts has indicated his concern for the Court's institutional legitimacy and, on occasion, his respect for precedent, he has also voted to overturn precedent, including in *Hyatt*.

Anyone grasping for optimism is mistaken. As is anyone who believes that only abortion rights are at stake. The current court, given the nature of state legislatures and the federal judiciary, is poised to support bad cases that give the government the ability to [cut off funding](#) for family planning or expand religious exemptions to anti-discrimination laws affecting women and LGBTQ Americans, as well as to uphold efforts by the Trump Administration to narrowly read Title VII employment protections and [Title IX](#) rules on sexual harassment. In *Hyatt*, the five conservative justices made it clear that if they disagree with precedent, they are free to overrule or rewrite it — no matter how settled that precedent has become.

**The question remains:** What can pro-choice Americans do to reverse or slow down these losses? Plenty.

We need uniform, nationwide protection for reproductive autonomy that stems from our federal constitution and federal statutes and regulations because state laws cannot provide less protection than federal mandates require. The right to make reproductive health decisions should not depend on where you live or whether you can afford to travel to [New York](#) or California. With Republican control of the Senate and an anti-choice President and no federal constitutional protection if *Roe* is overturned, no remedy will exist at the federal level until we take back the Senate and presidency. That is a powerful incentive to get involved in organizing for the [2020 election](#) and support whoever is the Democratic nominee, even if you don't like all of their policies.

Barring federal protection, pro-choice state legislatures — led by [pro-choice](#) leadership — have the power to better preserve women's access to abortion. But there are too few of these between the coasts. Start by electing pro-choice governors or taking back one chamber of your [state](#)

[legislature](#). This can be done. In Pennsylvania for example, activists have turned five state Senate seats Democratic in 2018 and 2019, and they need to flip only three more seats to win control of the state Senate. Similarly, in Virginia, recent elections have opened up the possibility that by 2019 the legislature will be controlled by pro-choice leadership.

State judicial elections and appointments are also key. States are free — using statutes or their own constitutions — to expand protection for reproductive autonomy beyond what is contained in [federal law](#). When laws that run afoul of these [protections](#) are challenged, the United States Supreme Court cannot review state court decisions based on these independent state provisions.

Invoking these provisions, state courts can and have played an important role in strengthening protection for abortion rights. Most recently, the Kansas Supreme Court struck down a law that would have banned the most commonly used procedure for second-trimester abortions as violative of that state's constitution. [Other states](#) are adding provisions to their state constitutions that can, if properly interpreted, strengthen protection for abortion rights. In January, Delaware added an Equal Rights Amendment to its state constitution, and Vermont is moving forward with a constitutional amendment declaring a right to personal reproductive autonomy. [New York](#) strengthened protection for abortion rights via its Reproductive Health Act, and at least nine other states are considering statutory proposals to protect abortion rights.

If you care about [women's reproductive rights](#), you need to do more than vent your alarm on social media or sign petitions. The real work — phone calls, [canvassing](#) and fundraising for candidates in key state and federal elections — will be the game-changer. Time to get to work.