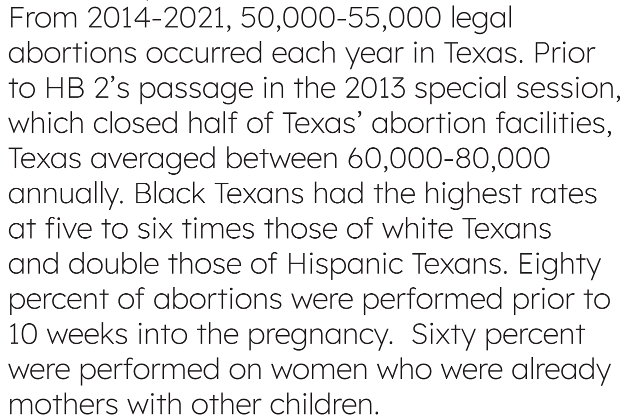
Abortion: Restore Women's Bodily Autonomy

National Positions of Texas Impact Member Institutions

Institution	Statement
United Methodist Church	We recognize tragic conflicts of life with life that may justify abortion, and in such cases, we support the legal option of abortion under proper medical procedures by certified medical providers.
Evangelical Lutheran Church in America	A developing life in the womb does not have an absolute right to be born, nor does a pregnant woman have an absolute right to terminate a pregnancy.
Conservative Judaism	We may permit an abortion according to the Halakhah because of 'great need' and because of pain and suffering.
Unitarian Universalist	The right of individual conscience, and respect for human life are inalienable rights due every person; and the personal right to choose in regard to contraception and abortion is an important aspect of these rights.
National Council of Jewish Women	Every individual has the right to bodily autonomy and privacy, free from governmental, political, and religious interference in all health care decisions.
Christian Church (Disciples of Christ)	We respect differences in religious beliefs concerning abortion and oppose, in accord with the principle of religious liberty, any attempt to legislate a specific religious opinion or belief concerning abortion upon all Americans.
Episcopal Church	Since 1967, The Episcopal Church has maintained its "unequivocal opposition to any legislation on the part of the national or state governments which would abridge or deny the right of individuals to reach informed decisions [about the termination of pregnancy] and to act upon them."
Presbyterian Church USA	We affirm the ability and responsibility of women, guided by the Scriptures and the Holy Spirit, in the context of their communities of faith, to make good moral choices in regard to problem pregnancies.
Cooperative Baptist Fellowship	Each local congregation is autonomous and decides for itself.
United Church of Christ	The United Church of Christ has supported reproductive justice issues since the 1960's. As a human rights issue, reproductive justice promotes the rights of people to bear children they want to have, to not bear children, to raise the children they do have in safe and healthy environments, and express their sexuality without oppression.
Society of Friends	Members of the Society of Friends are not in unity on abortion issues. Therefore, Quakers take no position and do not act either for or against abortion legislation.
Islam	All schools of Muslim law accept that abortion is permitted if continuing the pregnancy would put the mother's life in real danger.



From 2014-2021, 50,000-55,000 legal abortions occurred each year in Texas. Prior to HB 2's passage in the 2013 special session, which closed half of Texas' abortion facilities, Texas averaged between 60,000-80,000 annually. Black Texans had the highest rates at five to six times those of white Texans and double those of Hispanic Texans. Eighty percent of abortions were performed prior to 10 weeks into the pregnancy. Sixty percent were performed on women who were already mothers with other children.

Abortion in Texas is now illegal. In 2021, the Texas Legislature passed HB 1280—a so-called "trigger ban." The U.S. Supreme Court ruling in Dobbs "triggered" the criminal prohibition against abortion to take effect. Under HB 1280, a person may not perform, induce, or attempt an abortion. The only exception is if a physician exercises "reasonable medical judgment" in determining a woman has "a life-threatening physical condition" or is at "a serious risk of substantial impairment of a major bodily function."

Doctors and lawyers have testified that they do not know what constitutes "a serious risk of substantial impairment of a major bodily function." Additionally, "reasonableness" would be a fact question for a jury or judge. Furthermore, while current law does not penalize a woman seeking an abortion, the statute presumably applies to anyone that "aided" the woman. Texas Penal Code Chapter 7 governs "accomplices." Texas's law provides broad prosecutorial discretion that might apply to anyone reimbursing expenses, providing transportation, or even pastoral counseling. If convicted, a person performing, inducing, or attempting the abortion has committed a first degree felony with a punishment range of 5-99 years.

In addition to the criminal penalty, a person is subject to a civil penalty "of not less than $100,000 for each violation." The statute requires the Attorney General to file an action to recover the civil penalty, and the state may recover any attorney fees and costs incurred in bringing the lawsuit, in addition to the penalty. The statute does not prescribe the burden of proof required to recover the civil penalty. Most civil penalties only require the lower burden of "a preponderance of the evidence" rather than the higher burden of "beyond a reasonable doubt." This civil penalty is in addition to the civil lawsuits authorized by SB 8 or elsewhere in law.

Doctors and anyone "aiding and abetting" face a third kind of penalty enforceable by private citizens. Texas passed SB 8 in 2021. SB 8 prohibited abortion after a fetal heartbeat could be detected; however, this provision is now moot because of Dobbs and HB 1280. The part of SB 8 that is far from moot are the private civil enforcement provisions (lawsuits). In these lawsuits, any private citizen can receive monetary compensation from the provider or anyone "aiding and abetting," such as an employer paying travel costs or a family member that provides transportation. Additionally, the suits have unique and pernicious procedures that favor the plaintiff. For instance, a plaintiff is entitled to attorney fees if the plaintiff prevails in court, but the defendant cannot recover attorney fees if they prevail. In another example, a plaintiff can bring a suit in their home county, and a judge may not approve a change of venue unless all parties agree in writing. Litigation challenging the constitutionality of these provisions is ongoing.

Examining the differences between the pre-Roe law and Texas' new trigger ban reveals differing concerns of the legislatures that enacted them. The pre-Roe statute carries a penalty range of only 2-5 years in prison for the termination of a fetus. The trigger ban is 5-99 years in prison. The pre-Roe statute increases the offense to murder if the mother dies during the abortion. The trigger ban does not address what happens

> May we all be mindful of the integrity of women and physicians who are at the center of the controversy and may we be more responsible in nurturing the life that is already among us.
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> —Reverend Dr. J. Herbert Nelson, II, Stated Clerk of the General Assembly, Presbyterian Church (U.S.A.)

if the woman dies. The pre-Roe statute left "medical advice" to the doctor to decide when abortion was necessary "for the purpose of saving the life of the mother." The trigger ban, by contrast, puts doctors—and thereby women—in jeopardy with the vague exception of when there is "serious risk of substantial impairment of a major bodily function," and assigning non-medical professionals the task of deciding the "reasonableness" of that medical decision. Legally, women and doctors in Texas are in a worse position than they were before Roe in 1973.

A Brief History

Prior to the 19th Century, giving birth was the realm of midwives instead of doctors. In the 19th century, doctors entered the marketplace and began to compete. The medical profession was largely unregulated, and doctors offered new "scientific" procedures. In that era, the risk from any abortion procedure was greater than the risk of giving birth. The American Medical Association began advocating in the mid-1850's for criminal abortion laws as a form of patient protection. The criminal offenses of the era applied only to doctors—not pregnant women.

In the 20th century, the widespread use of antiseptics (1900's) and antibiotics (1940's) flipped the risk analysis. A properly performed abortion became safer than normal delivery. Doctors began to view abortion as a medical treatment that could save lives. In the 1960's, more than a million illegal abortions were being performed every year, nationally. At least 5,000 women died, annually—a mortality rate of 500 per 100,000. In Dallas County, health officials estimated that for every four births, there was at least one abortion. In 1966, 41 states outlawed therapeutic abortions, but the debate on whether and how to ease restrictions was well underway. Between 1967 and 1973, four states repealed their abortion bans entirely, and 13 others expanded exceptions.

Texas in the 1960's

Texas followed national trends. Texas's criminal abortion law originated in the 1850's. In the 1960's, the medical community led the efforts to ease restrictions. Legislators filed legislation, held committee hearings, and worked in the interims to achieve consensus. Debate focused on "the extent to which mental health considerations should be included; whether rape cases were being given sufficient attention; and what risks the proposed legislation might create for doctors." The United Methodist Church and the Christian Life Commission of the Baptist General Convention of Texas favored reforms that would permit abortion when birth would endanger the mother; when a child would be grossly deformed; or when pregnancy resulted from rape or incest.

Roe v. Wade

The U.S. Supreme Court's decision in Roe v. Wade stopped the legislative efforts for reform in every state. Rather than ruling narrowly, which would have forced states to continue working on the policy details, the 7-2 decision written by Justice Blackmun proscribed a regulatory framework for all 50 states. The result was that the burgeoning movement being led by doctors and

THE WAY FORWARD FOR TEXAS

- Increase **funding for family planning**
- Secure **access to birth control**
- Expand **Medicaid** under the Affordable Care Act
- Provide **12 months postpartum coverage** under Medicaid
- Limit **civil and criminal penalties for abortion** by shielding medical providers' actions from non-medical evaluation or intervention
- Eliminate **private causes of action** that allow individuals to sue Texans for alleged activities related to abortion
- Affirm **privacy and bodily autonomy** for all Texans
- Repeal **civil or criminal penalties for providing non-medical assistance** to people seeking abortions

women's organizations never fully developed, and Roe became the target for opponents.

The opinion recognizes three competing interests. First, a woman has a fundamental right to privacy under the liberty of the Due Process Clause in the 14th Amendment. Second, the government has a "compelling" interest in protecting maternal health. Finally, the state has an "important," but not compelling, interest in protecting "prenatal life." Justice Blackmun then balanced the woman's interests and the state's interests into a three-trimester framework.

In the first trimester, a state was prohibited from regulating abortion at all. The Court found that abortion had become less risky than delivering a child due to advances in medical science. Therefore, the state's interest in protecting a woman's health no longer applied, and a woman's interest in privacy prevailed. In the second trimester, the risk of an abortion increased. Therefore, the state's interest in protecting maternal health was important. The government could not prohibit abortion in the second trimester, but could regulate the procedure in ways that were reasonably related to maternal health. In the third trimester, a fetus was "viable." Therefore, the government could regulate, and even prohibit, abortion except when necessary to preserve the life of the mother.

The best known argument made by opponents of abortion is that the court gave inadequate weight to the state's interest in protecting prenatal life. Such an argument is premised on a belief about when life begins. Another argument, however, focuses on the problem that Roe aligned the law with the standards of medical science in 1973. The point at which the state's interest in protecting prenatal life becomes "compelling...is at viability." In 1973, "viability" and the third trimester were congruent. As medical science advanced, states enacted laws that tested the boundaries of the state's interest that was premised on science, and courts had to decide between factual viability or a legally rigid trimester framework.

Planned Parenthood v. Casey

From 1973 to 1989, the Court struck down most state abortion regulations. However, compositional changes to the courts led to a shift in jurisprudence. Between 1989 and 1992, Justices Brennan and Marshall retired, and Justices Souter and Thomas were appointed by President Bush. In 1992, when *Planned Parenthood v. Casey* reached the Supreme Court, Justices Kennedy,

O'Connor, and Souter issued an unusual joint opinion. The justices reaffirmed the doctrine of viability, but overruled the three trimester distinctions. Additionally, they overruled the use of the "strict scrutiny test" in abortion cases, and replaced it with an "undue burden" test.

The switch from "strict scrutiny" to "undue burden" proved to be a win for the anti-abortion movement. The change invited state legislatures to enact laws that had been struck down previously. The Supreme Court then overruled many of its own precedents and upheld the state laws under the new standard. The provisions of the Pennsylvania law challenged in Casey became a model law for the anti-abortion movement to push in state legislatures across the country. In the three decades since Casey, states continued to chip away as the elected branches transformed the judiciary. In the 2022 Dobbs decision, they succeeded in inviting the Supreme Court to not just revisit the doctrine of viability with the Mississippi statute in question, but to eliminate the right to abortion as one of the privacy rights. How far the Supreme Court will go in rewriting other rights that fall under the right to privacy implied in the 14th Amendment's Due Process Clause remains to be seen.

Policy Horizons

Legally, Texas women in 2022 are worse off than they were in 1972. The "trigger ban" and "bounty hunter" provisions in SB 8 and HB 1280 are exponentially harsher than Texas' pre-Roe statutes. A doctor is now required to decide whether a patient's particular situation constitutes "a serious risk of substantial impairment of a major bodily function." The "reasonableness" of the doctor's decision will then be scrutinized by a hospital concerned about expensive civil penalties from the state, punitive litigation from bounty hunters, and criminal investigation by law enforcement. If law enforcement, prosecutors, and a judge or jury find the medical decision to be "unreasonable," then the doctors will spend 5-99 years in prison.

The end of Roe is unlikely to be the end of the "pro-life" movement. Establishing a right of "fetal personhood" has been proposed in a number of legislatures, and some members of the Supreme Court have shown support for the notion. Fetal personhood could lead to the Supreme Court imposing a prohibition on abortion across all 50 states. Additionally, an amendment to the U.S. Constitution to prohibit abortion is an idea that has been around since the 1970's, or Congress could prohibit abortion in all 50 states by statute.

In Texas, it is unclear the impact civil bounty hunter lawsuits will have. Corporations are trying to alleviate the concerns of employees located in Texas by offering to pay the expenses of employees that must travel out of state to obtain medical care. However, that has led to 14 state representatives sending a threatening letter and promising punitive legislation next session. Legislation in the 88th Legislature is a virtual certainty. Additionally, paying the expenses of employees might be "aiding and abetting" under SB 8's bounty hunter provisions.

"Pro-life" advocates may attack other forms of healthcare based on a belief that "life begins at conception," or even prior. All reproductive rights are in danger of becoming matters for legislators to decide. In vitro fertilization involves the creation of an embryo. Certain forms of birth control prevent implantation, but not fertilization, and are likely to become targets. In fact, all contraception is opposed by certain faiths whether or not an egg has been fertilized. Like the right to an abortion, the right to contraception is one of the implied privacy rights of the 14th Amendment's Due Process Clause. The same legal rationale that struck down Roe logically extends to the right to contraception and all other Due Process rights to privacy.

Texas Abortion Laws 1977-2021

Date	Regulation	Status
2021	HB 1280 - The “trigger ban” makes all abortion illegal now that Roe v. Wade is overturned. There are no exceptions for incest, rape, or fetal abnormality. Performing an abortion is a 1st degree felony punishable by 5-99 years in prison, plus a $100,000 civil penalty enforceable by the Attorney General. (AG enforcement may not be permissible under TX Constitution under *Stephens v. State*.)	Becomes effective if Roe is overruled or narrowed in Dobbs.
2021	SB 8 - The “heartbeat bill” prohibits abortion after a heartbeat is detected (around 6 weeks). There are no exceptions for incest, rape, or fetal abnormality. SB 8 contains a “private bounty hunter” provision where any person can seek a court order to block the procedure and receive monetary compensation. Those “aiding and abetting” may also be sued.	Current law. Viability contingent on Dobbs; bounty hunter provision contingent on ongoing litigation.
2019	HB 16, the “born alive bill,” which criminalized providers that do not provide medical treatment to a fetus after an abortion. Providers say such a scenario is factually impossible.	Effectively moot, but legally contingent on Dobbs.
2019	SB 22 prohibited all local entities from contracting with any entity that is an affiliate of an abortion provider, cutting off all local support for low-cost clinics that perform basic non-abortion health care.	Unaffected by Dobbs.
2017	The Texas Legislature effectively banned a procedure known as dilation and evacuation used in 2nd trimester abortions by requiring that an injection be administered to stop the fetal heart first. The injection risks infection, uterine perforation, cardiac arrest, and extramural delivery.	Litigation ongoing. Contingent on Dobbs.
2017	The Texas Legislature banned insurers from including coverage for abortion in health insurance plans.	Unaffected by Dobbs.
2016	Texas Health & Human Services Commission required clinics to pay to bury or cremate fetal tissue after abortion.	Unaffected by Dobbs; might still apply to miscarriages.

2015	The Texas Legislature further restricted judicial bypass laws by requiring minors to appear in a court in their county of residence, and meet a higher burden of proof.	Contingent on Dobbs.
2013	HB 2 required doctors to have admitting privileges at a hospital within 30 miles of the abortion facility; banned all abortions after 20 weeks unless the patient was at risk of death or the fetus had severe medical problems; required doctors administering medication abortions to follow a state-mandated protocol; and required all abortion facilities to meet the standards of ambulatory surgical centers, even if the facility provided only pills.	20-week ban changed by SB 8 in 2021; admitting privileges & surgical center requirements struck down; protocols contingent on Dobbs.
2011	HB 15 required doctors to perform a transvaginal sonogram and make the woman listen to the heartbeat. The law also cut off funding for family planning clinics if they were affiliated with a facility that provided abortion.	Transvaginal sonogram contingent on Dobbs. Funding prohibitions unaffected.
2007	Funding for the Alternatives to Abortion program increased.	Unaffected by Dobbs.
2005	Texas Legislature prohibited abortion after 24 weeks; required parental consent (as opposed to notification) for minors; and the Department of State Health Services was prohibited from contracting with health care facilities that provided abortion. The Legislature also created and funded the Alternatives to Abortion program.	24-week ban changed in 2013 and 2021; parental consent, contingent on Dobbs
2003	Texas Legislature mandated that a patient wait 24-hours before an abortion could be performed; that physicians inform about the procedure and alternatives to abortion; and that any abortion after 16 weeks be performed in ambulatory surgical centers.	Contingent on Dobbs.
1999	Texas Legislature passed the initial "parental notification law," and the requirement could only be waived through "judicial bypass," which is the minor obtaining a court order.	Revised in 2005 and 2015. Contingent on Dobbs.
1985	Texas Legislature required that an abortion be performed by a physician-only.	Contingent on Dobbs.
1977	Congress enacted the Hyde Amendment, which prohibited the use of federal funds for abortion in state Medicaid programs. Texas had a provision that if there were no federal funds, then there was no program.	Unaffected by Dobbs; upheld by Texas Supreme Court in Bell v. Low Income Women of Texas in 2002.

> No matter what your views on abortion are, as a church we are made up of members who have had abortions and members who have chosen not to. Among us are pastors, deacons, and others who have counseled with women, girls, and others they love. We are friends, loved ones, and relatives of people who have had to decide whether or not to get an abortion. We are all affected by the divisive discourse and the legal changes.
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> — The Rev. Elizabeth A. Eaton, Presiding Bishop, Evangelical Lutheran Church in America

STAY IN TOUCH

Texas Impact equips people of faith and conscience with information, opportunities, and outreach tools to educate their communities and engage with lawmakers on pressing public policy issues.

Texas Impact Member Institutions

Baptist: Cooperative Baptist Fellowship in Texas **Christian Church (Disciples of Christ):** Trinity-Brazos Area• Bluebonnet Area • Southwest Region **Episcopal Church:** Diocese of West Texas• Diocese of Texas **Evangelical Lutheran Church in America (ELCA): Northern Texas-Northern Louisiana Synod • Southwestern Texas Synod • Texas-Louisiana Gulf Coast Synod Jewish:** Jewish Federation of Greater Dallas • National Council of Jewish Women • Religious Action Center-Texas **Muslim:** Islamic Circle of North America • North Texas Islamic Council • Texas Muslim Women's Foundation **Presbyterian Church (U.S.A.):** Mission Presbytery • Palo Duro Presbytery • Tres Rios Presbytery • Presbytery of the New Covenant **Society of Friends:** South Central Yearly Meeting **United Methodist Church:** Central Texas Conference • North Texas Conference • Northwest Texas Conference • Rio Texas Conference • Texas Conference • Methodist Federation for Social Action: Rio Texas and Central Texas Chapters **United Church of Christ:** South Central Conference **Unitarian Universalist:** Texas Unitarian Universalist Justice Ministry **Ecumenical and Interfaith Groups:** United Women in Faith • Church Women United • Interfaith Action of Central Texas • Interfaith Ministries for Greater Houston • CitySquare • Faith Commons • Faith Forward Dallas • Tarrant Churches Together