



## Roe v Wade

# Roe v Wade: legal experts see limited opportunities to challenge court ruling

**Legal scholar Lawrence Tribe: 'We're in for a long, tangled, chaotic and, in terms of human suffering, horribly costly struggle'**

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Joe Biden on Saturday renewed his criticism of the supreme court, a day after justices handed down a historic ruling that overturned a ruling that had guaranteed a constitutional right to abortion for almost half a century.

“The supreme court has made some terrible decisions,” Biden said at an event where he signed last week’s bipartisan gun control bill into law. The president said he and the first lady, Jill Biden, knew “how painful and devastating the decision is for so many Americans” and vowed that his administration would focus on how states implement the decision.

But the White House has limited options, leaving constitutional and legal experts to warn on Saturday that there was no short-term way besides statute law to restore federal guarantees to woman's right to abortion after the [US supreme court](#) overruled Roe v Wade on Friday.

The opportunities to challenge the justices' ruling or re-present constitutional law arguments based on equal rights are for now limited.

"We're in for a long, tangled, chaotic and, in terms of human suffering, horribly costly struggle," said the Harvard constitutional law professor Lawrence Tribe, who has described Friday's decision as "unprincipled".

Tribe told the Guardian that it may take generations to completely restore abortion rights but there may be opportunities to minimize the effects of the ruling.

One of those could be for Congress to give powers to the Department of Health and Human Services or the Food and Drug Administration to override state laws. That issue came up on Friday when the attorney general, Merrick Garland, said in a statement that states [cannot ban mifepristone](#), a medication that is used to bring about an abortion, based on disagreement with the federal government on its safety and efficacy.

Mifepristone and misoprostol, another drug used to induce abortion, have been approved by the FDA for use in the first 10 weeks of pregnancy. But some states, including Louisiana, have adopted legislation to make it illegal for doctors to mail the medications.

In a statement, Garland said the justice department "strongly supports efforts by Congress to codify Americans' reproductive rights, which it retains the authority to do". But federal law is unclear as to whether states can ban the medication, and the question would probably return to the same bench that issued Friday's ruling.

Some scholars have gone back to [Roe v Wade](#) to find where that ruling gave the current majority on the bench space to vacate the decision.

One idea that has come up is that the original ruling discussed liberty but not equality.



📷 The attorney general, Merrick Garland, said the justice department 'strongly supports efforts by Congress to codify Americans' reproductive rights'. Photograph: Evelyn Hockstein/Reuters

“It’s foolish really to attempt to explain why the ruling wouldn’t have got the highest grade in a constitutional law class,” says Tribe, who is cited four times in Friday’s ruling. “The court should have talked about equality, no question, but it also talked about liberty and liberty embodies the idea of equality.”

One avenue that could be more fruitful in repairing the right to abortion is in state constitutions that have their own protections around liberty and equality.

“I would expect creative litigants to challenge state laws banning abortion on the basis of the state’s own constitution. If the state courts, which are in many cases elected, look at this through the same lens as the supreme court did, they won’t get anywhere,” Tribe said.

“But it is possible that in some states there are more liberal, progressive or pro-gender equality state courts that would interpret the state constitution as giving more rights to women than they have been given under the federal constitution,” Tribe added.

Kevin O’Brien, a partner at Ford O’Brien Landy, a boutique law firm, pointed out that Roe v Wade was written 50 years ago - a long time in terms of constitutional law.

“It was written in a benignly liberal era where there weren’t ideological tensions. Under the Warren court the writing was a little more casual and the justices wrote a broad sweep. They tucked Roe under this rather vague notion that there was a privacy interest implicit in the constitution.”

O’Brien cited the late justice Ruth Bader Ginsburg, who noted that Roe v Wade was argued on a right to privacy, rather than women’s rights. “Roe isn’t really about the woman’s choice, is it?” Ginsburg once said. That held, of course, until it didn’t. “It didn’t seem to require a lot of arguing among civilized people that people had autonomy in their own bedrooms and women had a right to control their own body, but then we got this revolution in thinking among conservative judges.”

As the federal and some state governments work to navigate new legal barriers, private companies have signaled they will try to bridge the gap. Some of the most recognized US companies, including JPMorgan Chase, Meta (parent of Facebook and Instagram), Walt Disney, Tesla and Apple, have said they will extend coverage to workers who need access to safe, legal abortions.

Conservative lawmakers have warned that companies could face legal action if they support employee abortion travel. Citigroup was warned by a Texas lawmaker that under that state’s abortion law the bank could face criminal charges. In Justice Brett Kavanaugh’s concurring opinion in Friday’s court ruling, the Trump-appointed justice said states cannot bar their residents from traveling to seek abortions.

But, as Tribe pointed out, beyond legislative action guaranteeing abortion rights that few believe is possible, options are limited. “If you mean recourse to completely restoring to before the ruling, that may take generations,” he said. “If you mean minimizing the ruling’s damage, taking steps along the margins to reduce the devastation of the ruling then, yes, that certainly can be done.”

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