



**Abortion Rights
Coalition of Canada**

**Coalition pour le droit à
l'avortement au Canada**

POB 2663, Station Main, Vancouver, BC, V6B 3W3 • info@arcc-cdac.ca • www.arcc-cdac.ca

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Abortion Law and Policy: Comparisons Between the U.S. and Canada

Abortion is legal upon request in both Canada and the United States, but the right to abortion has very different foundations in the two countries. Laws and circumstances have diverged to the point where the legal right to abortion is strong in Canada but vulnerable in the USA.

Canada's Legal Situation

Canada first liberalized its criminal abortion law in 1969, allowing it to be performed in hospitals with the approval of a “therapeutic abortion committee.” But the law resulted in unequal access for women so the Canadian Supreme Court threw out the entire law in 1988. Although the Canadian legislature soon tried to re-criminalize abortion, the bill failed to pass. Governments have said repeatedly over the years that they do not intend to re-legislate against abortion. This leaves Canada as the only democratic, industrialized nation in the world with no laws restricting abortion. (Only two other countries have no laws: China and North Korea). Yet Canada has a relatively low rate of abortion compared to other industrialized countries and one of the lowest rates of abortion-related complications and maternal mortality in the world. Over 90% of abortions are performed before 12 weeks gestation, and 98% before 16 weeks gestation.[1] These statistics prove that no laws are needed to regulate or reduce abortions, and that women and doctors can be trusted to exercise the right responsibly.

The Supreme Court justices grounded the right to abortion in Canada’s constitution, where the primary protection cited was women's right to “security of the person.” One of the judges also found that the abortion law violated women's rights to “freedom of conscience” and “liberty.”[2] Unlike in the USA, women’s equality rights are enshrined in Canada’s constitution, so courts have been very reluctant to confer any rights on fetuses—to do so would interfere with women’s established constitutional rights. Various court rulings since 1988 have denied fetuses any legal recognition in Canada and no abortion restrictions have ever been passed.[3]

Abortion is funded by Medicare in Canada, except for two provinces that refuse to fully fund abortions in clinics as required by law. This is partly because of an anti-choice political bias, but also because Canada frowns on private clinics operating outside its universal healthcare system.

About half of abortions in Canada are performed in public hospitals. However, most hospitals don't even perform abortions, which forces many women to travel long distances from their communities. Access is difficult for women outside major centres.

U.S. Legal Situation

In the United States, abortion was legalized in all 50 states by the Supreme Court in 1973, in the famous *Roe v. Wade* decision. The court grounded abortion rights in a constitutionally-derived right to privacy. Although there is no explicit right to privacy in the American Bill of Rights, it was enshrined as a constitutional right in two prior court decisions that legalized birth control (*Griswold v. Connecticut* in 1965, and *Eisenstadt v. Baird* in 1972). These precedents made the *Roe v. Wade* ruling possible.[4]

But the *Roe v. Wade* decision has led to onerous restrictions on abortion in the USA. Although the ruling freed doctors to perform abortions for any reason during the first trimester (the court did not recognize a woman's right to choose), the court tried to balance women's and fetal rights with a "trimester framework." States could regulate abortion during the second trimester only to protect the woman's health, but during the third trimester (i.e., after "viability"), states could protect fetal life except when abortion was "necessary to preserve the life or health of the mother." Today, 41 states have laws that restrict post-viability abortion.[5]

The trimester framework, plus subsequent Supreme Court decisions that weakened *Roe v. Wade*, provided a basis on which to craft anti-choice laws. Every year in the USA, dozens of anti-abortion bills are introduced in state legislatures, and many have been passed, especially since the election of George W. Bush in 2001.[6] Some courts have proved willing to limit the right to abortion because they don't attach great importance to privacy rights. A few pro-choice legal scholars have lamented the right-to-privacy basis for *Roe v. Wade*, arguing instead that women's right to abortion should be guaranteed under the Constitution's 14th Amendment "equal protection" clause. This clause could be used to invalidate legal restrictions against abortion on the basis that they penalize only women, not men.[7]

The first major abortion restriction in the USA occurred in 1976, when Congress passed the Hyde amendment prohibiting the use of Medicaid funds to pay for poor women's abortions. It's estimated that up to one-third of poor women are forced to carry to term in the USA because they can't afford an abortion. For those poor women who do manage to get one, almost half delay their procedure by 2-3 weeks while trying to find money. [8]

Further Supreme Court decisions allowed states to require parental consent for teenagers' abortions, prohibit the use of public funds and facilities for abortion, and require viability tests after 20 weeks. Many states also mandate waiting periods for abortion, forcing women to visit the clinic at least twice. Others have passed "informed consent" laws that compel abortion providers to give anti-choice propaganda to their patients. The latest strategy is to pass fetal protection laws, such as laws requiring doctors to tell patients that the fetus will suffer "pain" during an abortion, even though the scientific evidence does not support that.[9] A federal law passed in 2004 that bans most 2nd trimester abortions, although appeal courts have been declaring it unconstitutional.

In *Roe v. Wade*, the Supreme Court gave abortion the highest degree of constitutional protection with its "strict scrutiny" standard. This says that any limitation on a right must be the least restrictive way possible to achieve a "compelling state interest." But the Court dropped this standard in 1992 (*Planned Parenthood of Southeastern Pennsylvania v. Casey*) in favour of the much less protective "undue burden" standard—in other words, restrictions that hamper abortion access are constitutional as long as they're not *too* onerous. In the same decision, the Supreme Court eliminated the trimester framework by allowing states to protect "potential life" and maternal health throughout pregnancy.[10]

Conclusion

Both Canada and the United States have learned that legal victories for abortion rights can be hollow without extensive social and government support to back them up. But living without any laws against abortion does put Canada a step ahead of the USA. The Canadian pro-choice community has little to fear from the courts or legislators—although a new Conservative government elected in January 2006 means that the pro-choice community must remain vigilant. One of the biggest fights in Canada right now is to force the remaining holdout provinces to fully fund abortions at private clinics under Medicare. America's big fight right now is just to hold on to legalized abortion, period. President Bush has appointed two new arch-conservative Supreme Court justices, which could be enough to overturn *Roe v. Wade*. If this happens, the legality of abortion will revert back to individual states. About a dozen states still have pre-*Roe* criminal laws against abortion and many could start enforcing them. In 2006, six other states began working on passing near-total bans on abortion in preparation for the gutting of *Roe*. Although the situation is dire, the resilient and battle-hardened pro-choice community in the USA is mobilizing like never before to defeat barriers to women's reproductive rights.

Endnotes

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