

**“THE HUMAN BODY AND THE GOVERNMENT'S PLACE: FEDERAL AND STATES  
POLICY ON ABORTION AND TRANSGENDER RIGHTS”**

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## Abstract

Citizens regard government as institutions composed of actors who work for the betterment of society. From this perception, we develop the belief that our government can be trusted. But what if the ideas we believe were not well-founded and are instead just products of self-interested manipulation? This paper examines the role of government in abortion and transgender rights while questioning its actors' motives. It explores the governments' failure to separate state and religion, legislatures rooted in self-interest, and morals in politics.

With the rise of white evangelicals and conservatives in the Republican party, abortion and transgender rights have become prominent issues within and amongst the states. Women and Transgender people face the prospect of losing their autonomy over their bodies for the sake of two demographics morals. Debates between the right and left have created a hostile environment where consistent punitive federalism is displayed. There has been an increase in state legislatures surrounding the two subjects.

These actions were not mere coincidences. Instead, these are states' attacks on the federal judiciary rulings of Roe v. Wade and the extension of the Civil Rights Act of 1964, and the LGBTQ+ community. White evangelicals use religion to justify their anti-abortion arguments and states use conservative ideology to define morality for all. The conservative shift in the federal judiciary makes this an even more dangerous situation. Political actors aligning their beliefs to these ideas for the sake of votes. These factors create mistrust between the government and its citizens due to actors working for themselves rather than for the people.

Within the Trump era, great measures were taken to establish the boundaries of transgender and abortion policymaking. Most significantly Trump's era can be credited to the federal pullback on LGBTQ rights after the Obama era as well as the push for the more anti-abortion legislature. His presidency empowered not only republicans but also democrats to move quickly in passing legislation. This behavior is also seen in state and federal interaction and more directly in intrastate relations. Debates between the right and left have created a hostile environment where preemptive measures are at a constant. Startle-level examples of this can be seen in North Carolina's passing of the "Public Facilities Privacy and Security Act (HB2) in response to Charlotte's anti-discrimination ordinance. On the federal level, the language used in *Roe v. Wade* and *Planned Parenthood Southeastern Pennsylvania v. Casey* is used as a preemptive measure to prevent states from outright banning abortion.

This paper relies on Joshua C. Wilson's article, "Striving to Rollback or Protect Roe: State Legislation and the Trump-Era Politics" as well as Susan Gluck Mezey's article "Transgender Policy Making: The View From the States" for a look at state and federal policymaking. From these readings, the question of whether or not the states should be trusted with abortion and transgender policymaking or should the burden be left in the hands of the federal government was crafted. The lack of action presented by both entities brings to question their willingness to protect marginalized communities. Also, the incorporation of religion as a tactic to support anti-equality laws creates mistrust between the government and its citizens due to their failure to separate church from state. Which further leaves outliers in the society norms vulnerable.

## Federal and State Abortion Policies

### Federal Policies

With the help of *Roe v. Wade* and the Supreme Court cases that followed, the Federal judiciary has defined the boundaries of the state in abortion politics. Court rulings declared that it was a woman's fundamental right to seek an abortion but it was also in the state's interest to invoke restrictions for the sake of the mother and the potential life. These restrictions included but were not limited to, laws that targeted abortion providers and pre-viability laws. Although seemingly insignificant, these laws have threatened the closure of numerous abortion centers and have brought the right of body autonomy to question.

The first groundbreaking abortion policy came with the Supreme Court ruling in *Roe v. Wade*. The court established that Texas and Georgia's abortion laws interfered with a woman's fundamental right to choose whether or not to have a child. The justification was rooted in the conclusion that the Fourteenth Amendment extends to women and their right to privately choose to seek an abortion (Shimabukuro 2019, 1). This nuance has set a precedent for state legislation by now requiring states to introduce compelling interest to justify their abortion policies and these policies would face scrutiny from the court.

The court has cleared a way for state interest by recognizing the interest of the woman and the potential life of the child. This identification presented states with the chance to regulate abortion by stating a claim of interest in the health of the woman and the potential life. In this case, the trimester system is used as a reasoning element by the states to make claims of the viability of the fetus and risk of death for the woman to further justify their interest in abortion politics.

Following *Roe v. Wade*'s decision, there was an anti-abortion activist who fought this ruling. One significant push came with the lobbying of the "Human Life Amendment" to overturn the decision. The bill was shot down by Congress, and Wilson credits this to the lack of an anti-abortion coalition (2020, 378). Despite a lack of unity, the efforts to protect the health of the mother and potential life were still in action. States passed laws that would require "specific forms of informed, parental, and spousal consent as well as to assign waiting periods for the procedure" (Shimabukuro 2019, 4). These laws were not able to stand court. They did, however, help states gain attention and support from anti-abortion agencies. The Federal government also took strides to fight abortion by cutting its funding. In 1976, the Hyde Amendment was passed by the House of Representatives. The Amendment banned the use of federal funds to pay for abortion through Medicaid, except for women seeking an abortion for life-threatening reasons (Planned Parenthood). Abortion supporters have made efforts to repeal this amendment but have failed.

*Planned Parenthood of Southeastern Pennsylvania v. Casey* also held a pivotal role for states in upholding abortion restrictions made by the state. The court upheld that restrictions on abortion are unconstitutional if they cause undue burden to the woman and before fetal viability. The case ensured the authority states have in regulating abortions, which encouraged states to test their boundaries with their legislation. For example, Arkansas and North Dakota created laws that would ban abortion after a fetal heartbeat detection (Wilson 2020, 376). These laws were, however, struck down by the Court because they violated the pre-viability rule established in *Planned Parenthood v. Casey*.

## States Policies

There has been an increase in political opportunity to restrict abortion with the Supreme Court rulings, the Trump Administration, and the COVID-19 Pandemic. States have used these moments to produce more abortion laws to either increase the difficulty of providing abortions or just banning abortions outright.

As mentioned earlier, Casey empowered many states to test their boundaries with their legislation. States have introduced Targeted Regulation of Abortion Providers (TRAP) Laws to “restrict abortion access through seemingly innocuous health and welfare regulations”(Wilson 2020, 370). In 2013, Texas passed a law that mandated all abortion clinics meet surgical center standards and doctors providing these abortions have admitting privileges at hospitals 30 miles from their clinics. Although they were seemingly innocuous, this mandate threatened the closure of nearly 90% of Texas abortion clinics (Wilson 2020, 373). The issue was brought to the court in the *Whole Woman’s Health v Hellerstedt*. The majority opinion of the court stated, “neither of these provisions offers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a pre-viability abortion, each constitutes an undue burden on abortion access...and each violates the U.S. Constitution (*Whole Woman’s Health*, p. 2).”

The Trump era empowered many states to produce more anti and pro-abortion legislation. Trump’s rhetoric used in his 2016 presidential campaign provided hope and fear that soon the Court decision on *Roe v. Wade* would be overturned. Trump promised to staff the federal judiciary with two more justices during his term and that promise was kept with Brett Kavanaugh and Amy Coney Barret’s appointment. In 2017, nineteen states passed sixty-three new abortion restrictions (Guttmacher Institute 2018). Public funding for family planning

programs and providers was also decreased in Iowa, Kentucky, and South Carolina. In 2018, Alabama and West Virginia passed constitutional amendments that labeled abortions of all kinds as illegal. Alabama's Human Life Protection Act made performing an abortion a felony. Utah, Arkansas, and Missouri passed more laws banning abortion pre-viability of the fetus (Wilson 2020, 385). Other states have followed the lead and introduced more laws that increased the pressure on the abortion provider as well as the abortion recipient. Anti-abortion opposition states such as Hawaii, Delaware, Illinois, California, and New York have each set a precedent with their legislation to support the right of the woman to privately choose whether or not to have a child (Wilson 2020, 388).

More political opportunity to regulate abortion came with the onset of the COVID-19 shutdown. During the lockdown, many states made efforts to block abortion procedures. States sought opportunities to declare abortion as nonessential. Alabama, Ohio, and Tennessee made efforts to close abortion facilities but were blocked by court orders. Alaska, Iowa, Arkansas, Texas, Mississippi, West Virginia, Louisiana, and Kentucky were successful in closing abortion clinics (Sobel et al. 2020).

## Democratic and Republican Response to Abortion Policies

The Republican party has been at the forefront of abortion legislation due to a large number of white evangelicals in the party. The party's politicians and other key figures showed little or no interest in the issue. Wilson points out that Republicans had to learn to care about abortion and once this was achieved an increase in abortion restriction policies began to rise (2020). The same attitude is present in the Democratic Party. According to Pew Research, "The share of Democratic voters who rate abortion as very important has increased 14 percentage

points since 2014 and 23 points since 2008.” (2017). Democrats mainly stayed quiet during abortion discussions. However, the percentage of democratic legislatures enacting policies has increased significantly since Trump's election. The party has rallied together to push more pro-abortion policies to combat Trumps' legislation and rhetoric.

### **Abortion Restriction Implications**

The anti-abortion majority on the Supreme Court may potentially be the force that overturns Roe v. Wade. If this were to happen, this could force women to consider risky alternatives to abort their pregnancy. Data indicates a correlation between unsafe abortion and restrictive abortion laws. The Center for American Progress conducted a study and found that “Between 2010 and 2015, states enacted more abortion restrictions than during any other five-year period since Roe v. Wade in 1973.<sup>5</sup> The maternal mortality rate in the United States grew by 136 percent in the years between 1990 and 2013.” Reuter Health found that women who are denied abortions are more like to live in poverty than those who did not face abortion restrictions. The BCM Women Health conducted a study to identify reasons why a woman would want to seek an abortion. The number two reason was the lack of financial resources that would assist them in raising the child. Raising a child is very expensive and it holds too much of a burden on single women and students. Lastly, and most obvious restricting abortion will strip women of their right to body autonomy.

Leading off on the issue of choice within abortion policies, this issue is also evident in the transgender rights policies. The lack of a nationwide definition of sex discrimination leaves the states with too much room to create discriminatory policies. Which hold damaging effects on transgender people's identity. It further creates a dilemma of choice where they are left to either hiding their true self or be subject to discrimination and harassment.



## Federal and State Transgender Policies

The lack of federal antidiscrimination laws has left states with the responsibility of defining transgender rights. In recent years, there has been a push from the federal government for more control over the situation however, states have filed several lawsuits to challenge the federal government's efforts to protect their stance on abortion. North Carolina argued that it was in their jurisdiction to regulate transgender rights and any push from the federal government would impede on the state's right to sovereignty as well as the privacy of the people as it relates to transgender rights or lack thereof (Mezey 2020, 507).

### **Federal Policies**

The Obama Administration can be credited as the thriving force that pushed LGBT Rights in the frontline. During President Obama's term, the Department of Justice and Department of Education during his term made an effort to create civil rights guarantees for transgender individuals. The departments argued that the prohibition on sex discrimination in Title VII of the 1964 Civil Rights Act and Title IX of the Education Amendment of 1972 applies to discrimination because of gender identity. Efforts made by the Obama Administration were reversed once President Trump took office. Mezey (2020) points out the term "variable speed" and credits the lack of quick congressional action to why the federal government lacks an explicit anti-discrimination policy that protects the right of transgender people.

The Trump Administration has taken different routes to remove transgender protection rights. The administration has sought to remove nondiscrimination protections for LGBT people in health care and health insurance. As well as defined "sex discrimination" as someone who faces discrimination for being male or female which ignores sexual orientation and gender identity being the basis of sex discrimination (Sobel et al. 2020).

Recent actions by the federal government have been taken by the Supreme Court in the 2020 *Bostock v. Clayton County* ruling. The court decision acknowledged gender identity as being an entity protected by the 1964 Civil Rights Amendment. Gender identity is “[a]n internal sense of being male, female or something else” that may not be identical to a birth certificate (*Bostock v. Clayton County, Georgia 2019*). The House of Representatives has also amended Title VII by defining sex discrimination to include both “sexual orientation” and “gender identity” (*Bostock v. Clayton County, Georgia 2019*).

### **State Policies**

Due to a lack of defining the issue on the federal government’s part, transgender policies amongst the states lack consistency. In 2019, only twenty states had laws that explicitly defined gender identity and how it relates to public accommodations (*Mezey 2020, 381*). Twenty-seven states lacked statewide protection against discrimination based on gender identity. A common point of division between the states is their stance on the public restroom (*Mezey 2020, 381*). In 2014, Houston passed the Houston Equal Rights Ordinance, (HERO), intended to ban discrimination based on sex and other protected characteristics. The ordinance was later rejected after opponents created the public fear of sexual predators entering women’s restrooms under the guise of a transgender woman. Amidst this environment, state lawmakers have proposed bills to both protect and restrict transgender rights (*Mezey 2020, 499*).

California has been a model state for the advancement of transgender rights. The state ranked the highest in the Movement Advancement Project study with a score of 18.25 out of 20.5 on the inclusion of gender identity (*MAP 2021*). The method of collecting these scores was through identifying laws and policies that specifically referred to gender identity. From there states received one point for every pro-equality law. Over time, California has introduced several

pro-equality laws that specifically target the Transgender community. In 2005, Governor Schwarzenegger signed the Civil Rights Acts of 2005 which prohibits discrimination in “public accommodations; (2) public facilities; (3) federally assisted programs; (4) equal employment opportunities; (5) housing sales and rentals; and (6) brokerage services” based on sexual orientation (H.R 288 2005). In 2013, California passed the School Success and Opportunity Act (AB 1266) which extended gender identity and gender expression to transgender students. In 2016, the Equal Restroom Access Act (AB 1732) was enacted which required public restrooms to be gender-neutral.

Like California, Massachusetts is also an ideal pro-equality state with a score of 17.25 out of 20.5 (MAP). In 1992, Massachusetts issued an executive order that assured the protection of Transgender students. In 2011, Governor Deval Patrick signed “An Act Relative to Gender Identity ” that allowed people to use the restroom that identified with their gender identity. Five years later the state pushed the Transgender Rights Laws to ban discrimination based on sexual orientation and gender identity in employment, housing, public accommodations, credit, and union practices.

Conversely, North Carolina, Mississippi, Tennessee, and Arkansas have taken the route to increase the restriction on public restrooms. Each state has a score less than or equal to .5 on the MAP gender identity score. North Carolina passed the “Public Facilities Privacy and Security Act, (HB2), in response to Charlotte's anti-discrimination ordinance. HB2 set a statewide law that required students to use restroom and locker rooms that represent the gender assigned to them at birth. Mississippi passed the Protecting Freedom of Conscience from Government Discrimination Act (HB 1523) also known as the “Religious Liberty Accommodation Act. The

Mississippi legislature argued that forcing the state to have pro-equality rights would take away the first amendment right of some of its citizens who held sincere religious beliefs.

Some states have taken preemptive measures to combat their local administration. Tennessee and Arkansas each have taken preemptive measures to keep cities and counties from guaranteeing equal rights for the LGBT community (Mezey 2020). Tennessee was the first state to counteract a local ordinance. The 2011 "Equal Access to Intrastate Commerce Act", amended the "Tennessee Human Rights Act" to prevent cities and counties from extending civil rights protections to groups not covered under the existing state law. Tennessee legislature explicitly states the definition of sex in state laws refers only to the assigned sex given at birth. Similar to Tennessee, Arkansas barred cities and counties from extending civil rights protections to gender identity with the "Intrastate Commerce Improvement Act.

### **Further Implications**

Transgender people are faced with the dilemma of choosing to be who they are but also face backlash from the federal and state governments. Or they choose to live their life in a body that is not their own for safety. The issue of choice is another implication of the lack of pro-equality rights for transgender people. Despite the efforts made by the states or their cities to protect transgender rights, the absence of federal anti-bullying law has left transgender students open to discrimination. The Gay, Lesbian & Straight Education Network 2019 National School Climate reported that transgender students have a higher chance of facing discrimination and harassment in schools than all cisgender students and all genderqueer and other non-binary students. The study also found that 72.7 percent of students in their study chose not to report an incident of harassment because they did not think school staff would do anything about it. They also reported 65.8 percent of students chose not to report because they did not think school

staff's handling of the situation would be effective. This fear is validated through another statistic from GLSEN that shows 59.5 percent of students have reported that teachers never intervened when LGBT students are harassed. The National Center for Transgender Equality 2015 "U.S. Transgender Survey", found that 77% of their respondents choose to hide their identity out of fear of discrimination.

## Conclusion

Despite the conservative dominance in the federal government, efforts to restrict and loosen abortion and transgender policies are still on the rise. The Republican party will continue to push anti-abortion laws to further test the boundaries of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. However, Democrats will continue to apply the same pressure. The same can be said for transgender policymaking. When considering the question of whether or not the states should be trusted with abortion and transgender policymaking. The fact is, the countering views between the Republican and Democratic states create division and a lack of consistency within the country. Transgender people and women who live in states with more anti-abortion or states with a lack of sex discrimination open to discrimination. Also, the presence of religion in state legislation, as seen in Mississippi legislation, allows discrimination against transgender people. The two demographics are then left to lay down their right of choice and identity to prevent harassment and discrimination. To conclude, the answer to this question is no. States should not be trusted with implementing policies on abortion and transgender rights. States should, however, be allowed to voice their opinions but the final say should rest in the federal government to ensure consistency across the border.



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