

# Post-Roe, could states outlaw abortion pills?

May 5 2022, by Jessica Taylor Price

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“There are strong arguments to say a state can’t [ban abortion pills], but nothing’s guaranteed right now,” says Wendy E. Parmet, Matthews University distinguished professor of law and professor of public. Credit: Matthew MODOONO/Northeastern University

This week, we learned that the U.S. Supreme Court is poised to overturn *Roe v. Wade*, the 1973 case that guaranteed a person's right to have an

abortion in the United States. If this happens, 23 states could institute bans on abortion, NBC News reports, leaving people in those states with few options.

One option that is sure to create friction in the courts in the coming months is abortion pills. Known on the market as mifeprax and misoprostol, the drugs—when taken in combination—are a safe and effective (according to the Kaiser Family foundation, it has a 99.6% success rate) way to terminate a pregnancy at 10 weeks or less.

According to the Guttmacher Institute, this type of abortion accounted for 54% of all terminations at eight weeks or earlier in 2020, with its popularity rising each year. And in December of last year, the U.S. Food & Drug Administration (FDA) made the pills more accessible by removing the requirement that they be prescribed in-person. This opened up the option for patients to order the medication by mail or get a prescription via a telehealth visit.

If Roe is overturned, however, this upward trend in use could come to a halt. If [states](#) are given the power to ban abortion, could this extend to banning a federally approved drug, or preventing it from entering the state?

The answer is complicated, says Wendy Parmet, Matthews Distinguished University Professor of Law at Northeastern. She says the question underscores the ongoing tension between state jurisdiction and federal oversight in the American [legal system](#), and it's hard to predict who will win in future battles over abortion pill access.

On the one hand, Parmet says, federal courts defer to states when it comes to issues like health and safety, and regulating medicine, and that they could do the same when it comes to abortion pills. "At times, although not consistently, the courts will say we give deference to this,"

she says.

At the same time, there's the issue of federal preemption.

"Where the [federal government](#) has authority, it can preempt, or override, state actions," Parmet says. "It does this all the time. It certainly can; for example, the FDA can make a drug illegal and a state can't make it legal."

There are instances, too, of what Parmet calls a "truce" between both sides, like in the case of cannabis. Cannabis is unlawful under the federal Controlled Substances Act. But states are creating their own laws on cannabis sales and use with no federal consequences.

It's unclear under whose jurisdiction abortion pills will fall—federal or state—because, as Parmet says, in the legal system a case like this "goes both ways." Some legal scholars have argued that federal precedent will hold, Parmet says, and that, if Roe is overturned, states should not be allowed to create their own laws in the way they did with cannabis.

But Parmet isn't sure that will be the case under the current legal system, citing recent decisions such as the Supreme Court's ruling against the Occupational Safety and Health Administration federal vaccination mandate and a federal judge's decision to overturn the Centers for Disease Control and Prevention's (CDC) mask mandate.

"I can imagine a [federal court](#) saying abortion is a major question and the federal government can't preempt state authority unless it's absolutely explicit," she says. "I think it would be wrong and troubling, but I can imagine it."

In the meantime, while states may not be able to outlaw the pills, they are working to make them less accessible. In response to the FDA's

loosening of regulations on the medications, state lawmakers have already proposed more than 100 restrictions on abortion pills in 22 states, according to the New York Times. Some states require that the [pill](#) be taken in the presence of a physician, and some prohibit obtaining prescriptions by mail or through a telehealth appointment. These restrictions are legal, Parmet says, likely because they don't conflict with the FDA's regulations outright.

Harsher measures, like criminalizing abortion pills that are received by mail, could be difficult to enforce. States aren't likely to monitor what's being sent via FedEx or USPS, Parmet says. But when it comes to making abortion medications illegal to possess or prescribe, that's up in the air.

"There are strong arguments to say a state can't do it, but nothing's guaranteed right now," she says.

Issues like residency raise even more questions. Can a state criminalize travel to another state to procure an abortion, or [abortion](#) medication? Can someone who lives out of state, or a group of pro-choice advocates, be prosecuted for helping a state resident terminate a pregnancy? Can a person be prosecuted for shipping pills? "We don't know how courts are going to rule on these questions," Parmet says.

The only certainty, it seems, is that it's impossible to predict what a post-Roe America looks like.

"When the court issues its decision in [Dobbs v. Jackson Women's Health Organization], that will not be the end of the story," Parmet says.

Provided by Northeastern University

Citation: Post-Roe, could states outlaw abortion pills? (2022, May 5) retrieved 25 April 2024 from <https://phys.org/news/2022-05-post-roe-states-outlaw-abortion-pills.html>

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