Physicians for Reproductive Health

VIABILITY | FREQUENTLY ASKED QUESTIONS | AUGUST 2024

Adrienne Ramcharan, MPH, Assistant Director of State Policy
MiQuel Davies, JD, Director of Public Policy

INTRODUCTION

The use of viability-based language to determine when abortion care can legally be restricted by the state originated from the Supreme Court's decision in *Roe v. Wade*. The *Roe* decision established viability as a legal framework and held states could not ban abortion "prior to viability," but after viability the state could restrict or ban access to this essential care.[1] While this framing was built into the law, researchers and medical providers who care for pregnant people recognize that viability is not a set point in time. Instead, it occurs along a continuum shaped by an individual's medical history, access to medical care, and demographic characteristics among other things. Viability as a legal framework exists in tension with the way medicine and science understand and determine viability. Medical research and scientific understanding quantifies viability as a complex and nuanced determination based on the individual's unique circumstances and not a fixed point in pregnancy as determined by gestational age or fetal development.

Using and defining viability as a specific point in time has been used as a tactic by policymakers to limit access to abortion care through legislation. As of July 2024, eleven states impose fetal viability limits on abortion with varying narrow exceptions.[2] This includes states that are often considered protective of abortion such as California, Illinois, New York and Washington.[3] More recently, ballot measures to amend state constitutions with the hopes of protecting reproductive health care and abortion care are including viability language in the proposed measure. In order to truly expand access to care, it is important to understand what viability is and why the use of viability frameworks often harm abortion access and do not provide a workable legal framework.

WHAT DOES VIABILITY MEAN IN MEDICINE?

Viability can be interpreted in multiple ways. For example, it may refer to whether a pregnancy is expected to continue developing as expected, or whether a fetus might survive outside of the uterus.[4]

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[1] The 1973 *Roe v. Wade* decision established a national constitutional right to abortion. In 1992 the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* held the core tenants of *Roe* but modified the framework by establishing an "undue burden" test to allow states to restrict abortion if it did not pose an undue burden to the patient. This incremental approach to restricting abortion ultimately led to the 2022 decision in *Dobbs v. Jackson Women's Health Organization* that overturned *Roe.*

[2] Kaiser Family Foundation. "Abortion Gestational Limits and Exceptions." https://www.kff.org/womens-health-policy/state-indicator/gestational-limit-abortions/?currentTimeframe=0&selectedDistributions=statutory-limit-on-abortions&sortModel=%7B%22colId%22:%22Statutory%20Limit%20on%20Abortions%22,%22sort%22:%22asc%22%7D#note-1

[3] California law includes exceptions for life and health based on the good faith medical judgement of physician. Illinois law includes exceptions for life and health based on professional judgement. New York law includes exceptions for life and health based on reasonable and good faith professional judgement. Washington law includes exceptions for life and health based on good faith judgement.

[4] ACOG. "Facts Are Important: Understanding and Navigating Viability." https://www.acog.org/advocacy/facts-are-important/understanding-and-navigating-viability

Viability varies and depends on multiple complex factors including who you are, where you live, access to prenatal, postpartum and neonatal health care including a neonatal intensive care unit or other intensive care resources, life circumstances, social and community supports, ability to raise and sustain a healthy child, and more.

There is no single, formally recognized, clinical or medical definition of viability based on gestational age of the pregnancy. Viability does not occur as a singular event, or specific point in time and no test can definitively determine whether a fetus can survive outside of the uterus. As such, a clinical determination of viability at one point in pregnancy does not always mean that the fetus can survive if delivered later in pregnancy. As medicine and science continue to evolve, so does the concept and our understanding of viability.

WHY DO WE USE VIABILITY IN LAW AND POLICY ABOUT ABORTION?

The constitutionality of abortion was first established by the Supreme Court in *Roe v. Wade* based on a right of personal privacy under the Due Process Clause of the Fourteenth Amendment. When deciding *Roe,* the Supreme Court held that a state could not restrict access to abortion prior to viability; however, after viability, a state had a compelling government interest in "protecting the woman's own health and safety" and protecting "prenatal life."[5] This holding established viability as a legal framework. The Supreme Court, in its opinion, attempted to define viability as when a fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." It then went on to say that "[v]iability is usually placed at about seven months (28-weeks), but may occur earlier, even at 24-weeks." This opinion continues to be used today to equate "viability" in law and policy to 24-weeks gestation. This legal framework of viability does not match the medical reality of pregnancy because, as described above, viability is not a singular event or point in time and depends on a multitude of factors, not only gestational age.

HOW HAS VIABILITY AS A LEGAL FRAMEWORK CHANGED SINCE *ROE V. WADE*?

In 1992, the Supreme Court issued another landmark decision for abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey.* In this decision, the Supreme Court affirmed the constitutional right to abortion upholding the central components of *Roe* that states could not ban abortion prior to viability; however, the decision paved the way for additional restrictions on abortion. In *Casey,* the Court established an "undue burden" standard for evaluating restrictions on abortion. Under this new standard, a state could restrict abortion access as long as those restrictions did not impose an "undue burden" on a person's ability to obtain an abortion. As a result of this change, restrictions on abortion in Pennsylvania were upheld, including parental involvement and parental consent requirements. *Casey* was a response to an incrementalist approach intended to chip away at abortion access while not explicitly banning or restricting abortion.

WHAT ARE THE CONCERNS ABOUT INCLUDING VIABILITY LIMITS IN LAW AND POLICY?

Many advocates and activists have posited that including viability limits in law and policy is not aligned with the desire to create a system of care where abortion is available to everyone without restriction.

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[5] The opinion in *Roe* required laws on abortion to include exceptions to preserve the health of the mother, but subsequent efforts to restrict abortion and court decisions upholding those restrictions demonstrate the shortcomings of exceptions language.

Viability limits inherently place restrictions on abortion care, based on gestational age. In addition, their inclusion creates opportunities for additional restrictions on care to be implemented. This was evident under *Roe.* Under *Roe* and *Casey*'s framework, states enacted numerous abortion restrictions to limit access to care, including parental involvement laws, gestational age bans, reason bans, medically unnecessary facility and provider requirements, extremely narrow health exceptions, and so much more. There is no guarantee that similar restrictions will not continue to prevail if viability limits are enshrined into law today.

Importantly, viability limits perpetuate stigma and disregard the needs and experiences of people seeking abortion care later in pregnancy. There are numerous reasons why someone may need to access abortion care later in pregnancy and written policies to legislate care provision will never account for every unique circumstance. As more and more states ban abortion, pregnant people are forced to delay care as they navigate medically unnecessary barriers. Viability limits ignore these complex realities and pushes abortion care out of reach for many.

WHAT ABOUT PRO-ABORTION STATES THAT HAVE VIABILITY LIMITS?

While some states are considered "protective" of abortion including Washington, California, Illinois and New York, many currently have statutory language embedded in their laws regulating abortion around viability. In order to justify these limitations, some have included various health exceptions. In reality, exceptions are often inoperable in practice and can lead to confusion and uncertainty among clinicians. Clinical providers are tasked with caring for their patients, not attempting to parse out complex legal analyses. While it is important that this language is not currently interpreted in a way to limit access to care, it increases the risk that anti-abortion policymakers and courts could reinterpret such statutory language in a way that could limit access to care. Law and policy must support access to abortion care throughout pregnancy.

HOW DOES VIABILITY SHOW UP IN BALLOT MEASURES?

Since the *Dobbs* decision in 2022 overturned *Roe*, eliminating federal protections for the right to access abortion, numerous states have attempted to create state-level protections for abortion access. These protections have come either via legislation or proposed and voted on ballot measures to amend the state constitution to include a right to abortion. As of July 2024, voters in California, Michigan, Ohio, and Vermont successfully passed ballot measures establishing a constitutional right to abortion. Importantly, these protections do not extend to all who need them. Notably, the language in Michigan and Ohio includes a "viability limit" after which the state can regulate abortion. In November 2024, voters in Maryland, Colorado, Florida, Nevada, and South Dakota will be voting on ballot measures to establish a constitutional right to abortion and an additional five states are considering placing similar measures on

the ballot.[6,7] Of the five confirmed ballot measures, Colorado is the only state to not include a viability or gestational age limit on who can access this care.

WHAT DOES THE PUBLIC THINK ABOUT VIABILITY LIMITS?

There is a common misconception that people inherently believe abortion care should be restricted at a gestational age. This has led to the belief that people will not approve a ballot measure with no limit on abortion care. As such, we frequently see ballot measures on abortion include viability limits. However, new polling is finding the opposite to be true.

In June 2024, The Learning and Accountability Project of National Institute for Reproductive Health released findings from their research exploring the attitudes of pro-abortion supporters on viability limits and abortion later in pregnancy. Researchers found that that many people are supportive of constitutional amendments that allow for abortions after fetal viability and/or without parental involvement. Specifically, among pro-abortion supporters, there was deep resistance against government interference at any point in pregnancy including later in pregnancy. Researchers also found that among Democratic pro-abortion supporters there was potential for backlash against advocates and organizations condoning, supporting, or pushing for viability limits.

In July 2023, PerryUndem and Patient Forward released findings from public polling exploring the impact of viability limits on support for ballot measures. They found that ballot measures with viability language performed worse among respondents compared to ballot measures without viability language. In fact, the ballot measure without viability language elicited stronger support across every segment of voters. This data suggests that a viability limit may have the opposite of the intended effect, dampening strong support for ballot amendments.

CONCLUSION

Since the *Dobbs* decision, nearly all states have moved swiftly to enact new abortion laws and policies—both restrictive bans and proactive protections—either through the state legislature or state constitutional amendment ballot measures. While well intentioned, many attempts to protect abortion have included viability limits. So-called viability limits restrict access to care and may be perceived as minimizes the experiences and need for abortion later in pregnancy. Although laws and policies containing viability limits often include well intended exceptions, exceptions are inoperable in practice and force clinicians to engage in complex legal analyses when they should be focused on providing patients with medical care. We need bold, proactive policy to protect abortion access throughout pregnancy without restrictions.

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[6] Officials in Arizona, Missouri, Pennsylvania, Montana and Nebraska are considering constitutional amendments for the November 2024 ballot at the time of this writing. Additionally, New York has approved a ballot measure to add the Equal Rights Amendment to their state constitution which advocates say will offer protections for reproductive rights. Arkansas's proposed ballot measure was rejected by state election officials, but ballot supporters have sued challenging the decision and asking officials to start counting more than 100,000 submitted signatures.

[7] Kaiser Family Foundation. "Ballot Tracker: Status of Abortion-Related State Constitutional Amendment Measures for the 2024 Election." https://www.kff.org/womens-health-policy/dashboard/ballot-tracker-status-of-abortion-related-state-constitutional-amendment-measures/