



NARAL

Reproductive Freedom & Choice

The States of the Fifth Circuit: A Clear and Present Danger to Reproductive Choice

The states that comprise the Fifth Circuit -- Louisiana, Mississippi and Texas -- have enacted some of the most draconian laws in the country restricting a woman's right to choose, with Louisiana and Mississippi among the worst in the country in impeding women's ability to make private decisions about childbearing without government interference.

In Louisiana, for example, a woman with a heart condition unexpectedly became pregnant. Her doctors warned her that carrying a pregnancy to term could be fatal. She decided to have an abortion and asked her physician at the Louisiana State Medical Center to perform the procedure. Under Louisiana law, however, a public hospital cannot perform an abortion unless the life of the woman is endangered. A committee of five doctors concluded that if she carried the pregnancy to term her chance of dying was not greater than 50 percent and denied her an abortion at the medical center.

In NARAL's 2002 *Who Decides?: A State-by-State Review of Abortion and Reproductive Rights*, Louisiana and Mississippi were graded an "F" for the restrictiveness of their abortion statutes and regulations; Texas was graded a "C Minus." Among the federal judicial circuit courts, only the Sixth Circuit -- consisting of Kentucky, Michigan, Ohio and Tennessee -- scores lower.

The Fifth Circuit has one of the highest percentages of minorities and the highest poverty rate of any circuit court in the nation. Therefore, legislative barriers to the free exercise of choice fall even more cruelly on women living in these states than those women residing in more affluent parts of the country.

In the Fifth Circuit, abortion rights are under constant attack from state legislatures and governors. Since 1995, there have been 175 anti-choice legislative measures introduced in the three states of the Fifth Circuit. In 1999, Texas tied with Michigan in enacting more anti-choice legislation than any other state. Louisiana ranks 51st in access to abortion among the states and the District of Columbia. In states where the state courts cannot be relied upon to enforce reproductive rights, the last line of defense for constitutional rights in the area of choice lies with the federal judiciary. If the Fifth Circuit continues its list to

the far right, future anti-choice legislation may fare much better before a sympathetic court.

This state of siege in the Fifth Circuit underlines the importance of the Pickering nomination and strengthens NARAL's argument against his confirmation. The Fifth Circuit is a hotbed of anti-choice law; Charles Pickering, a longtime advocate of overturning a woman's right to choose, does not belong on a court so crucial to the future of reproductive rights.

	LOUISIANA	MISSISSIPPI	TEXAS
<i>Abortion Ban In Place</i>	X	X	X
<i>Scarcity of Abortion Providers</i>	X	X	X
<i>Ban on Public Funding for Abortion</i>	X	X	X
<i>"Informed Consent"/ Waiting Period</i>	X	X	
<i>Restricts Minors' Access</i>	X	X	X
<i>Targeted Regulation of Abortion Providers</i>	X	X	X
<i>Unconstitutional Bans on Procedures</i>	X	X	

Abortion Bans Remain in Place in All Three States

Despite the fact that *Roe v. Wade* has been the law of the land for 29 years, Mississippi and Texas retain their pre-*Roe* abortion laws. Louisiana actually amended and re-enacted its pre-*Roe* abortion ban in 1991. While these bans are currently unconstitutional and unenforceable under *Roe v. Wade*, the status of reproductive freedom is in jeopardy should *Roe* be overturned.

- Louisiana provides for imprisonment for one to ten years at hard labor and a fine from \$10,000 to \$100,000 for abortion providers who perform an abortion not for the purpose of preserving the woman's life or in the case of rape or incest.
- Mississippi provides for one to ten year imprisonment for abortion providers who perform abortions unless necessary to preserve the woman's life or the pregnancy is the result of rape.
- Texas provides for two to five year imprisonment for anyone who performs an abortion not necessary to preserve the woman's life. The law also provides that any person who furnishes the means for an abortion is guilty as an accomplice. This, of course, was the law invalidated – at least for the time being – in *Roe v. Wade*.

Abortion Services are Unavailable for the Vast Majority of Women in All Three States

Constitutional rights are of little use if they only exist in theory, not in practice. The reality for most women in the three states of the Fifth Circuit is that abortion services are extremely limited in most areas of their state.

- 96 percent of Mississippi counties have no abortion provider.
- 93 percent of Texas counties have no abortion provider.
- 92 percent of Louisiana parishes have no abortion provider.

All Three States Ban Public Funding for Abortion

One of the most severe roadblocks to the exercise of choice is a ban on public funding for abortion, falling more heavily on the women of the Fifth Circuit who are more likely to live below the poverty line than in any other circuit court jurisdiction.

- Louisiana bans public funds to pay for an abortion unless it is necessary to preserve the woman's life or the pregnancy is the result of rape or incest reported to a law enforcement official.
- Mississippi bans public funds to pay for an abortion unless the procedure is necessary to save the woman's life, in square violation of the Hyde amendment that provides for public funds for cases of life endangerment and when the pregnancy is the result of rape or incest.
- Texas bans the use of public funds unless the procedure is necessary to preserve the life of a woman or if the pregnancy is the result of rape or incest.

Both Louisiana and Mississippi Have Enacted "Informed" Consent/Waiting Period Requirements

A 24-hour waiting period often spells a much longer wait for women traveling across a state for an abortion procedure, especially those with a limited means to afford an abortion and those with jobs, families, or school obligations. Both Louisiana and Mississippi have 24-hour waiting periods before a woman may obtain an abortion, posing an extreme roadblock for women with no provider

close to their home. Delays in obtaining an abortion, whether to raise funds or clear legal hurdles, increase both the cost of and risks of abortion.

A study of Mississippi's waiting period law by *Family Planning Perspectives* showed that the proportion of procedures performed later in pregnancy increased after the law went into effect. Increases in second-trimester abortions are of serious concern because such procedures are more expensive, more difficult to obtain, and riskier than first-trimester abortions. Additionally, the study found that the number of Mississippi women who left the state to obtain an abortion increased after the waiting period law went into effect.

All Three States Restrict a Minor's Access to an Abortion

- Mississippi is one of only two states to require the written consent of both parents for a minor to obtain an abortion unless the pregnancy results from intercourse with her father, in which case she must obtain the written consent of her mother. A minor can obtain an abortion without the written consent of both parents if she secures a court order.
- In Texas, a minor may not obtain an abortion until at least 48 hours after notice has been delivered to one parent. A minor may obtain an abortion without parental notice if she secures a court order.
- Louisiana has a one parent consent law with a judicial bypass provision.

Both Louisiana and Mississippi Have Enacted Targeted Regulations of Abortion Providers

- Targeted Regulation of Abortion Providers (TRAP) legislation purports to promote maternal health and safety, but in fact simply adds to the cost – sometimes prohibitively – of providing abortion services by imposing onerous and medically unnecessary regulations. Such requirements exceed general requirements placed on physician's offices where comparable outpatient surgery is performed. And no other medical procedure is subjected to such unwarranted regulation.
- Louisiana's law subjects abortion clinics to special licensing as "outpatient abortion facilities."
- Mississippi's law imposes additional administrative, professional qualification, patient and employee testing, and physical plant requirements on providers of abortion services.

Both Louisiana and Mississippi Have Enacted Unconstitutional Bans on Safe and Common Abortion Procedures

Louisiana and Mississippi both have unconstitutional, and therefore unenforceable, bans on safe and common abortion procedures on the books. The U.S. Supreme Court has ruled that a ban on so-called “partial-birth” abortion that lacks an exception to protect a woman’s health and that bans more than one procedure is unconstitutional.

Conclusion

The inventive legislatures of the Fifth Circuit may well enact another law restricting freedom of choice that does not fall within the square holding of *Roe v. Wade*, narrowly interpreted. Any challenge to such a law would likely have its final disposition in the United States Court of Appeals for the Fifth Circuit, where the law could burden reproductive rights for millions of vulnerable women. Worse, the Fifth Circuit could uphold the law, and, if there were a split in the Circuit Courts on the validity of similar legislation, the Supreme Court might take the case and uphold the validity of the state legislation in a way that either reverses *Roe* outright or eviscerates its central protections.

In sum, the stakes are high, and Charles Pickering should not be confirmed to the Fifth Circuit.