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## Summary and Analysis of Leaked *Jackson Women's Health Organization v. Dobbs* Opinion

On May 2, [Politico](#) shared a leaked draft opinion—authored by Justice Alito and confirmed to be authentic by the Supreme Court—in the case *Dobbs v. Jackson Women's Health Organization*, a challenge to Mississippi's unconstitutional ban on abortion. To be clear, this is just a draft and *not* the final opinion of the Court, which may still change. At least for now, *Roe v. Wade* and *Planned Parenthood v. Casey* remain the law of the land. Abortion is still legal.

Nonetheless, the leaked draft is extremely disturbing. It would hold that the U.S. Constitution does not protect the right to obtain an abortion. If this decision becomes final, it would be the first time that the United States Supreme Court has taken away a fundamental constitutional right—a right that people have relied on for nearly 50 years.

Beyond that, the draft opinion wholly disregards the devastating impact overturning *Roe* would have on the health and lives of women and all people who can become pregnant. And the draft contains dangerous legal reasoning that could signal a rollback of other fundamental rights, including the rights to contraception, same-sex marriage, and consensual sexual relations, among others.

### The Draft Opinion Would Overturn *Roe* and *Casey* and Get Rid of the Constitutional Right to Abortion

Justice Alito's draft opinion would overturn nearly 50 years of precedent by holding that abortion is no longer a fundamental constitutional right. The opinion would overrule *Roe* and *Casey* explicitly and would permit states to ban or regulate abortion. And it would require federal courts to essentially defer to legislators who are intent on restricting or banning abortion, meaning almost every abortion ban or restriction would be upheld.

- The first half of the draft opinion is devoted to a critique of the past 50 years of caselaw supporting the constitutional right to abortion. The draft opinion would hold that those cases were wrongly decided and that the right to obtain an abortion is not an aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment, as recognized by a 7-2 majority in *Roe v. Wade* and repeatedly reaffirmed over the past four decades. This conclusion rests heavily on the draft's determination that "a right to abortion is not deeply rooted in the Nation's history and traditions." This is an outrageous claim that flies in the face of the exhaustive analysis this Court already undertook in both *Roe* and *Casey*.
- The second half of the draft is devoted to why principles of *stare decisis*—or respect for precedent—do not apply to *Roe*. The draft compares *Roe* to *Plessy v. Ferguson*—the Supreme Court's appalling decision in 1896 upholding "separate but equal" race-segregated facilities, which was overturned by *Brown v. Board of Education*—stating that like *Plessy*, *Roe* was "egregiously wrong and deeply damaging." The leaked draft (ironically) accuses the *Roe* Court of "wielding nothing but raw judicial power." And it criticizes the standards set by *Roe* and *Casey* for determining the constitutionality of abortion regulations as "unworkable," even though the Supreme Court has already held the opposite.

### The Draft Would Uphold Mississippi's Abortion Ban and Create a Standard for Virtually Any Abortion Restriction to be Upheld in Federal Court

The draft states that laws regulating abortion would be entitled to a "strong presumption of validity" and that state legislatures have legitimate interests in "respect for preservation of prenatal life at

all stages of development.” This would lead to almost every abortion restriction or ban being upheld by federal courts. In this case, Justice Alito would uphold Mississippi’s abortion ban—even though it applies before viability and only allows an exception in the most extreme and narrow of circumstances (when there is a “medical emergency” or “severe fetal abnormality”). Applying this new test, Justice Alito would uphold that law simply because Mississippi stated that it has an “interest in protecting the life of the unborn.”

### **The Draft Opinion Repudiates Abortion as Part of Gender Equality and Seeks to Return Us to a Time When Women—and Many Others—Were Not Equal in the Eyes of the Law**

The primary focus of Justice Alito’s draft opinion is a lengthy review of common law court decisions, 19<sup>th</sup> century statutes, and historical legal treatises—all written by men memorializing the law at a time when women generally had no independent legal status—to conclude that the right to liberty does not encompass the right to abortion. In this way, the draft relies on a sexist history of men denying rights to women in order to deny rights to women and all who can become pregnant.

- In holding that the Constitution does not protect the right to abortion, the draft devotes a single, cursory paragraph to rejecting the argument that the right to abortion is protected by the Equal Protection Clause of the Fourteenth Amendment. Without engaging any of the arguments advanced by the National Women’s Law Center and other *amici* about how the right to abortion is critical to the equality of women and all who can become pregnant, the draft concludes that the Equal Protection argument is “squarely foreclosed by our precedents.” In so holding, the draft fails to grapple with many recent anti-discrimination cases and instead relies on an outdated and disfavored decision from 1974, *Geduldig v. Aiello*, in which the Supreme Court took the remarkable position that discrimination on the basis of pregnancy is somehow not discrimination on the basis of sex—a position that was specifically repudiated by Congress through the passage of the Pregnancy Discrimination Act.
- Critically, the draft minimizes and ignores the reliance interests individuals have in the right to abortion that were central to *Casey*. In *Casey*, the Court emphasized that people had “organized intimate relationships and made choices that define their views of themselves and their places in society in reliance on the availability of abortion” and that the “ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>1</sup> Justice Alito’s draft opinion dismisses these interests as not “concrete,” like property or contract rights, and therefore not something that the Court has “the authority or expertise to adjudicate.” In this cursory discussion, the draft notably cites the National Women’s Law Center’s *amicus* brief but fails to engage with the brief’s thorough explanation of how abortion is critical to the autonomy, health, economic opportunity, and equality of women and all who can become pregnant.

It’s not only women and people who can become pregnant who would be left out of Justice Alito’s reading of the Constitution. The reasoning Justice Alito employs in the leaked draft would also dangerously limit the scope of constitutional rights to only those “deeply rooted” at the drafting of the Constitution, when people of color, people with disabilities, LGBTQ people, and so many others also wholly lacked legal rights.

### **The Leaked Draft Barely Mentions Women Or Others Who Can Get Pregnant—Except To Wrongly Suggest That Forced Pregnancies Will Not Harm Them**

Those who will be harmed by this decision—if it becomes final—receive only a few paragraphs of discussion in a nearly 70-page opinion. The draft fails entirely to grapple with how the right to abortion is critical to the personal autonomy and bodily integrity of women and all people who can become pregnant.

When Justice Alito does discuss people who can get pregnant, he dismissively suggests that they will not be harmed by forced pregnancy because, he claims, attitudes have shifted about pregnancy outside of marriage, federal and state laws ban discrimination based on pregnancy and provide for parental leave and insurance coverage, and safe haven laws allow parents to put babies up for adoption

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<sup>1</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992).

without facing criminal prosecution.<sup>2</sup> As the National Women’s Law Center emphasized in our amicus brief, however, these protections are not nearly enough to prevent harm to those who will be forced to carry pregnancies.

- The draft fails to grapple with the physical toll of pregnancy and childbirth, including the potential long-term health implications as well as the risk of maternal mortality, particularly among Black women who face crisis-level pregnancy-related mortality rates.
- The draft blithely overlooks the glaring gaps in the protections it cites to. Pregnant and parenting students and workers continue to face discrimination, job insecurity, loss of earnings, and diminished professional and educational opportunities. Childbirth and parenting continue to impose significant costs. And many of the states with the most restrictive abortion laws fail to support pregnant people, children, and families. In fact, in Mississippi, the very state who is banning abortion in the case before the Court, there is no guaranteed paid family leave, no accommodations for pregnancy in the workplace, and the state has the worst infant mortality rate in the country. Justice Alito ignores all of this.

Finally, Justice Alito cynically suggests that “[w]omen are not without electoral or political power” and “returning the issue of abortion” to the states “allows women on both sides of the abortion issue” to influence state law, highlighting that women constituted 55.5% of Mississippi voters in the 2020 election. Of course, this would come from the same court that has stripped the Voting Rights Act of its power and green lit nearly every voting restriction since.

### **The Leaked Draft Hints at Support for Treating Fetuses as Legal Persons—With Nationwide Implications**

In multiple places, the leaked draft uses language suggesting that fetuses should have legal rights as full persons and emphasizes that states have an interest in protecting “fetal life.” This language invites anti-abortion extremists to press arguments with the Court, Congress, and state and local legislatures that fetuses should be treated as legal persons, separate from the pregnant person, with often competing legal interests. If the Supreme Court were to recognize fetuses as “persons” under the Constitution, then it would become unconstitutional for any state to permit abortion. This would mean that abortion would be banned nationwide, even in states that have passed protections for abortion access.

Recognizing “fetal personhood” could have even more far-reaching effects. Already, if abortion is criminalized, pregnancy and pregnancy outcomes will be under greater scrutiny. Pregnant people needing medical treatment for existing health conditions or for complications with their pregnancies may be denied the care they need if there is any risk the care could affect the fetus. And people suffering miscarriage or ectopic pregnancy may not only be denied care to manage the condition, they could also face risk of criminal prosecution and be forced to prove that their pregnancy loss was not their fault. This subordination of the health and lives of pregnant people will become commonplace if fetuses are treated as legal persons under the law. Further, if embryos have status as legal persons, many—including LGBTQ people—may be denied the ability to start a family through assisted reproductive technologies like IVF.

### **Other Fundamental Rights Are at Risk Under the Draft’s Cramped Reading of the Constitution**

The leaked draft lays out a roadmap for the Supreme Court’s conservative majority to eviscerate other important rights—including the right to contraception and same-sex marriage. Although the draft opinion states that it “concerns the constitutional right to abortion and no other right” and that “nothing in this opinion should be understood to cast doubt on precedent that do not concern abortion,” these refrains provide little comfort under the draft’s analytical framework.

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<sup>2</sup> The point about safe haven laws is a clear appeal to Justice Amy Coney Barrett, who asked at oral argument why these laws do not suffice to solve the problem of forced parenthood.

- The leaked draft reasons that there is no constitutional right to abortion because “the Constitution makes no reference to abortion,” and then limits any rights not specifically mentioned in the Constitution to those “deeply rooted in this Nation’s history and tradition.” But the Constitution also does not make reference to contraception or LGBTQ rights, which means this decision places *Griswold v. Connecticut* (right to contraception for married people), *Eisenstadt v. Baird* (same for single people), *Obergefell v. Hodges* (same-sex marriage), *Lawrence v. Texas* (private, consensual sexual relations), and many other decisions in the Court’s cross-hairs.
- The leaked draft goes so far as to suggest that the Constitution does not protect a “broader right to autonomy and to define one’s concept of existence.” This too places many fundamental rights relating to marriage, procreation, and childrearing in danger.

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*Dobbs v. Jackson Women’s Health Organization* is the culmination of a decades-long coordinated attack on the right to abortion and people’s ability to access it. If this leaked draft decision is finalized and *Roe* is overturned, the Court will be repudiating its own precedent, taking away a long-standing constitutional right that people have relied upon for half a century, and leaving what was once a fundamental right to the dictates of politicians. This would be a legal, constitutional, and public health crisis. Nearly half of states are expected to ban abortion. People in states where abortion is illegal who become pregnant and need an abortion will be forced to travel hundreds—even thousands—of miles to access care, but many will not have the means to afford travel, to obtain child care, or to take time off work or school. This will particularly jeopardize the health and lives of Black, Indigenous, and other people of color, who disproportionately work in low-paid jobs without paid leave or flexible work schedules and face unprecedented risk of death from pregnancy and childbirth in this country, as well as young people who become pregnant, LGBTQ people, people living in rural areas, people in abusive relationships, and people with disabilities. An anti-abortion Congress and President could also ban abortion nationwide—as some federal lawmakers are already proposing.

As bad as this leaked draft is, it could still change. But without formally declaring *Roe* and *Casey* overturned or keeping all the outrageous language and reasoning of this leaked draft, the Court can still destroy the right to abortion. Any decision that upholds Mississippi’s abortion ban would gut the right to abortion and decimate access—even more than it already is. There is no victory in this case unless the Court explicitly reaffirms *Roe* and *Casey* and strikes down the Mississippi ban as blatantly unconstitutional.

The ability to choose whether and when to become a parent is central to gender justice and personal autonomy. Whether the final opinion mirrors this leaked draft or is a watered-down version of it, now is the time to join together to fight for a world where our bodies, lives, and futures are our own—and not controlled by the Court, anti-abortion extremists, or politicians who try to shame us.