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JULY 2022 | ANALYSIS

# ***Dobbs v. Jackson Women's Health Organization: The Court Takes Away a Guaranteed Nationwide Right to Abortion***

On June 24, 2022, the United States Supreme Court issued its closely divided and legally unjustifiable opinion in *Dobbs v. Jackson Women's Health Organization*.<sup>1</sup> In the opinion, five extremist Justices overturned *Roe v. Wade*<sup>2</sup> and *Planned Parenthood v. Casey*<sup>3</sup> and declared that there is no federal constitutional right to abortion, a decision that affects millions of people nationwide. Three of those justices were nominated by President Trump, who promised<sup>4</sup> to only appoint justices who would overturn *Roe*. As the powerful dissent points out, this decision was reached “for one reason and one reason only: because the composition of this Court has changed.”<sup>5</sup>

This decision is nothing short of devastating. The opinion callously overturns nearly 50 years of precedent using 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. And most appallingly, the anti-abortion justices wholly disregard the devastating impact that dismantling abortion access will have on the health and lives of women and all people who can become pregnant. This impact is already being felt: In the days since the decision was released, multiple states have enacted total bans on abortion, while anti-abortion extremist state legislators have proposed laws to criminalize those who provide abortions, those who seek them, and anyone who helps another person obtain one. The decision has wreaked legal chaos, even as the full extent of the harm has yet to be realized.

## **Analysis of the Decision**

### **FOR THE FIRST TIME, THE SUPREME COURT HAS TAKEN AWAY A FUNDAMENTAL CONSTITUTIONAL RIGHT**

Showing cavalier disregard for longstanding precedent and fundamental legal rights, the Supreme Court overturned the constitutional right to abortion by overruling *Roe* and *Casey* in a decision authored by Justice Samuel Alito and joined by Justices Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.<sup>6</sup> As the dissent, co-authored by Justices Steven Breyer, Elena Kagan, and Sonia Sotomayor,

points out, while the full the consequences of the Court's devastating decision are yet unknown, "one result of [the Court's] decision is certain: the curtailment of women's rights, and of their status as free and equal citizens."<sup>7</sup>

For close to 50 years—until *Dobbs*—the Supreme Court repeatedly reaffirmed that the legal right to abortion is firmly grounded in the Constitution as an aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. The majority opinion jettisons this half century of caselaw based on an unprecedented narrowing of the right to liberty. The majority seizes on the fact that the word "abortion" does not feature in the text of the Constitution.<sup>8</sup> It then asserts that a right to abortion may be recognized only if that right was "deeply rooted in the Nation's history and traditions" when the Fourteenth Amendment was ratified in the mid-19th century.<sup>9</sup> The majority opinion then uses a cherry-picked discussion of history to conclude that there is no constitutional right to abortion.<sup>10</sup> However, as the dissent rightly notes, the Supreme Court has repeatedly "rejected the majority's pinched view of how to read our Constitution."<sup>11</sup>

The majority opinion casts aside the important principle of *stare decisis*—or respect for precedent. As the dissent warns, the majority's newfound and "cavalier" approach to precedent is "a loaded weapon, ready to hand for improper uses."<sup>12</sup> Indeed, "[w]eakening *stare decisis* creates profound legal instability," the dissent points out, and "threatens to upend bedrock legal doctrines, far beyond any single decision."<sup>13</sup>

The majority attempts to hide the gravity of its decision by disingenuously asserting that it has not taken sides about abortion. Both the majority and Justice Kavanaugh in his concurrence insist that the Court has merely returned the issue to the states. Not so. As the dissent powerfully names: "When the Court decimates a right women have held for 50 years, the Court is. . . taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so."<sup>14</sup>

### **THE COURT CREATES A NEW STANDARD THAT WILL LIKELY PERMIT VIRTUALLY ANY ABORTION RESTRICTION**

The decision sets forth a new standard for the constitutionality of abortion laws that essentially defers to the whims of whatever politicians are in power in a state at any given moment. The decision states that laws regulating

abortion are entitled to a "strong presumption of validity" and that state legislatures have legitimate interests in "respect for and preservation of prenatal life at all stages of development."<sup>15</sup> Under this standard, which the dissent rightly calls "the lowest level of scrutiny known to law,"<sup>16</sup> almost every abortion restriction or ban will likely be upheld by federal courts. In this case, the Court upheld Mississippi's abortion ban—even though it applies before viability and only allows an exception in the most extreme and narrow of circumstances. Applying this new test, the majority rubber stamps the law simply because Mississippi stated that it has an "interest in 'protecting the life of the unborn.'"<sup>17</sup> The decision thus gives a green light to states to enact all manner of restrictions.

### **THE COURT 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 receive only a few paragraphs of discussion in a nearly 80-page majority opinion. The Court fails entirely to grapple with how the right to abortion is critical to the equality, personal autonomy, and bodily integrity of women and all people who can become pregnant. Indeed, as the dissent points out, "[t]he most striking feature of the majority is the absence of any serious discussion of how its ruling will affect women."<sup>18</sup>

When the majority opinion does discuss people who can get pregnant, it dismissively suggests that they will not be harmed by forced pregnancy because, it 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 without facing criminal prosecution.<sup>19</sup> But this argument is blatantly wrong for a number of reasons.

First, the Court 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.<sup>20</sup>

Second, the Court also blithely overlooks the glaring gaps in the protections it cites to. Pregnant and parenting students<sup>21</sup> and workers<sup>22</sup> continue to face discrimination,<sup>22</sup> job insecurity,<sup>23</sup> loss of earnings,<sup>24</sup> and diminished professional and educational opportunities. Childbirth and parenting continue to impose significant costs.<sup>25</sup> And many of the

states with the most restrictive abortion laws fail to support pregnant people, children, and families. In fact, as the dissent notes, citing the National Women’s Law Center’s amicus brief,<sup>26</sup> in Mississippi there is no guaranteed paid family leave, no general ban on pregnancy discrimination in the workplace, and the state has the worst infant mortality rate in the country.<sup>27</sup> The Court ignores all of this.

Finally, as the dissent points out, the majority does not acknowledge the profound harm of taking away a right that is fundamental to people’s dignity, liberty, and equality. The dissent explains that “women must have control over their reproductive decisions” to be able to “take their place as full and equal citizens.”<sup>28</sup> The majority blatantly ignores the ways in which people who can become pregnant have relied on the right to abortion to make important decisions, including whether to pursue education or careers, and how to approach intimate and family relationships, minimizing these interests as too “intangible” for the Court to even consider.<sup>29</sup> The dissent powerfully protests that “closing our eyes to the suffering today’s decision will impose will not make that suffering disappear.”<sup>30</sup>

Rather, in response to all this, the Court cynically suggests that “[w]omen are not without electoral or political power” and “return[ing] 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.<sup>31</sup> Of course, this is cold comfort coming from the same justices that have stripped the Voting Rights Act of its power<sup>32</sup> and green lit nearly every voting restriction since.<sup>33</sup>

## Implications of the Decision

### STATES ARE BANNING ABORTION

In overturning *Roe*, the Court has emboldened extremists to swiftly propose or implement bans on abortion. Within two weeks of the decision, 11 states had abortion bans in effect, and in an additional three states, clinics stopped providing abortion due to legal uncertainty. In other words, within just 14 days, 14 states were without abortion care, meaning 24.5 million women could no longer get this essential health care in their state.<sup>34</sup> All told, nearly half of states are expected to ban abortion,<sup>35</sup> and an anti-abortion Congress and President could also ban abortion nationwide.<sup>36</sup>

These bans force people to travel far distances across multiple states. People will incur significant costs and

logistical barriers for care that should be readily affordable and accessible. And people have to worry about whether their actions will be monitored and criminalized. For some people, the costs will be too much, and they will be forced to carry pregnancies against their will, with long-lasting impacts on their lives and futures. Thus, the dissent explains, the majority’s decision will allow anti-abortion politicians to “transform” pregnancy from “what, when freely undertaken, is a wonder into what, when forced, may be a nightmare.”<sup>37</sup> And it is the communities that already bear the brunt of systemic inequities, disparities, and discrimination who will be harmed the most.

### THE LEGAL CHAOS IS FAR-REACHING AND GROWING

In addition to the chaos created as states race to ban abortion, extremist politicians are ratcheting up their attacks in other ways. They are seeking to punish people for traveling out of state for abortion care.<sup>38</sup> They are targeting those who help people seek abortion care, including employers who have pledged to pay for employees’ travel costs. People are worried about increased surveillance and invasion of privacy, as the threat of criminalization grows.<sup>40</sup> They are seeking answers about their risks and potential liability but in such an unprecedented situation, there are no easy answers.

And the decision has created chaos around access to other reproductive health care. Reports have already surfaced of people suffering miscarriage who have faced denials of care because of abortion bans.<sup>41</sup> Pregnancy and pregnancy outcomes will be under greater scrutiny, which could dissuade people from getting the prenatal and other care they need. Access to birth control has also been affected, given the purposeful, misleading conflation of abortion and birth control.<sup>42</sup> And pregnant people may be denied access to life-saving cancer treatments or mental health medication.<sup>43</sup>

### OTHER FUNDAMENTAL RIGHTS ARE AT RISK

The majority opinion lays out a roadmap for eviscerating other important rights—including the right to contraception and same-sex marriage. *Roe v. Wade* did far more than establish the right to abortion; it solidified and expanded on the right to privacy and liberty, which is the basis for rights related to contraception and procreation, marriage, family relations, child rearing, and intimacy.<sup>44</sup> As the dissent makes clear, “[t]he Court’s precedents about bodily autonomy, sexual and familial relations, and procreation are

all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives.”<sup>45</sup>

Although the majority opinion protests that it is only about abortion and does not cast doubt on other precedent,<sup>46</sup> its analytical framework does the exact opposite. The dissent likens the majority’s protestations not to worry to “someone telling you that the Jenga tower simply will not collapse.”<sup>47</sup> It is impossible to “neatly extract” the right to abortion from the “constitutional edifice without affecting any associated rights.”<sup>48</sup>

In a separate concurrence, Justice Thomas makes things crystal clear—he calls for the Court to reconsider all of the Court’s precedents establishing fundamental rights under the Fourteenth Amendment’s right to liberty, including *Griswold v. Connecticut* (right to contraception), *Lawrence v. Texas* (right to same sex intimate relations), and *Obergefell v. Hodges* (marriage equality). He says that every one of these decisions are “demonstrably erroneous” and that the newly constituted Court has not only the power but a “duty” to overturn any prior decision that it deems to have been wrongly decided.<sup>49</sup>

## THE COURT’S DECISION HINTS AT OTHER TROUBLING LEGAL POSSIBILITIES

The majority’s opinion contains language that suggests other troubling legal developments are ahead.

### The Court Wants to Return Us to a Time when Women—and Many Others—Were Not Equal in the Eyes of the Law.

The majority decision relies upon common law court decisions, 19th century statutes, and historical legal treatises<sup>50</sup>—all written by men memorializing the law at a time when women generally had no independent legal status. As the dissent explains, the men who ratified the Constitution “did not understand women as full members of the community embraced by the phrase ‘We the People.’”<sup>51</sup> In this way, the majority relies on a sexist history of men denying rights to women in order to “consign[ ] women” and all who can become pregnant “to second class citizenship.”<sup>52</sup> The Court also goes out of its way to reject an argument for abortion that is based on the legal principle of equal protection of the laws.<sup>53</sup> This issue was not briefed by the parties or addressed by the lower courts, so the fact that the Court addresses it portends future harmful decisions from this Court about gender equality and sex discrimination.

## The Court’s Decision Alludes to a Future where Abortion Could be Illegal Everywhere.

In multiple places, the majority opinion uses language and reasoning suggesting that fetuses should have legal rights as full persons.<sup>54</sup> The decision highlights, repeats, and quotes sources equating abortion with murder on approximately 20 different occasions.<sup>55</sup> This presents extremists with an invitation 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. If the Supreme Court were to recognize fetuses as “persons” under the U.S. Constitution, then abortion would be banned nationwide, even in states that have passed protections for abortion access.

## Conclusion

*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. It has created a legal, constitutional, and public health crisis. As the dissent points out, “[s]ome women, especially women of means, will find ways around the State’s assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today’s majority holds, provide no shield, despite its guarantees of liberty and equality for all.”<sup>56</sup>

Irrespective of what this lawless Court says, the ability to decide whether and when to become a parent is a fundamental right that is central to gender justice and personal autonomy.

## FOOTNOTES

- 1 *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_\_ (2022) (hereafter "Dobbs Majority"). For more background on this important case, see our analysis: *Dobbs v. Jackson Women's Health Organization: What's at Stake for Abortion Rights and Access*, NATIONAL WOMEN'S LAW CENTER (Feb. 1, 2022), <https://nwl.org/resource/dobbs-v-jackson-womens-health-whats-at-stake-for-abortion-rights-and-access/>.
- 2 410 U.S. 113 (1973); see also *Roe v. Wade and the Right to Abortion*, NATIONAL WOMEN'S LAW CENTER (Jan. 24, 2022), <https://nwl.org/resource/roe-v-wade-and-the-right-to-abortion/>.
- 3 505 U.S. 833 (1992).
- 4 See Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016), <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>.
- 5 *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_\_ (2022) (Breyer, Sotomayor, and Kagan, J., dissenting), Slip Op. at 6 (hereafter "Dobbs Dissent").
- 6 *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_\_ (2022), Slip op. at 1 (hereafter "Dobbs Majority"). The *Dobbs* decision was split 5-1-3: five justices in the majority, one justice in concurrence, and three in the dissent. Chief Justice John Roberts wrote a concurring opinion in which he agreed with the judgment of the majority upholding the Mississippi law at issue banning abortion at 15 weeks—weeks prior to fetal viability—but would not have explicitly overturned *Roe* and *Casey* in this case. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_\_ (2022) (Roberts, J., concurring in the judgment), Slip Op. at 1. Notably, even without explicitly overturning *Roe* and *Casey*, Chief Justice Roberts' opinion upholding the 15-week ban still would have overturned *Roe* and *Casey*'s core principle that states cannot ban abortion prior to viability.
- 7 *Dobbs* Dissent at 4.
- 8 *Dobbs* Majority at 9.
- 9 *Dobbs* Majority at 25.
- 10 *Dobbs* Majority at 16–25.
- 11 *Dobbs* Dissent at 16.
- 12 *Dobbs* Dissent at 56.
- 13 *Dobbs* Dissent at 57.
- 14 *Dobbs* Dissent at 20–21.
- 15 *Dobbs* Majority at 77–78.
- 16 *Dobbs* Dissent at 2.
- 17 *Dobbs* Majority at 78.
- 18 *Dobbs* Dissent at 47–48 (cleaned up).
- 19 *Dobbs* Majority at 33–34.
- 20 See, e.g., *Working Together to Reduce Black Maternal Mortality*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 6, 2022), <https://www.cdc.gov/healthequity/features/maternal-mortality/index.html>.
- 21 See *Stopping School Pushout for Girls Who Are Pregnant or Parenting*, NATIONAL WOMEN'S LAW CENTER (Apr. 18, 2017), <https://nwl.org/resource/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting/>.
- 22 See *Fighting for Pregnant Workers in the States*, NATIONAL WOMEN'S LAW CENTER (Oct. 30, 2018), <https://nwl.org/resource/fighting-for-fairness-for-pregnant-workers-in-the-states/>.
- 23 See *The Pregnant Workers Fairness Act: Making Room for Pregnancy on the Job*, NATIONAL WOMEN'S LAW CENTER (Aug. 2021), <https://nwl.org/wp-content/uploads/2021/02/PWFA-Making-Room-for-Pregnancy-v4.2-2021.pdf>.
- 24 See *Motherhood Wage Gap for Mothers Overall*, NATIONAL WOMEN'S LAW CENTER (Apr. 29, 2021), <https://nwl.org/resource/motherhood-wage-gap-for-mothers-overall/>.
- 25 See *A Lifetime's Worth of Benefits: The Effects of Affordable, High-quality Child Care on Family Income, the Gender Earnings Gap, and Women's Retirement Security*, NATIONAL WOMEN'S LAW CENTER & CENTER ON POVERTY AND SOCIAL POLICY (Mar. 2021), [https://nwl.org/wp-content/uploads/2021/04/A-Lifetimes-Worth-of-Benefits\\_FD.pdf](https://nwl.org/wp-content/uploads/2021/04/A-Lifetimes-Worth-of-Benefits_FD.pdf).
- 26 Brief for National Women's Law Center et al., as *Amici Curiae*, <https://nwl.org/resource/nwlc-files-amicus-brief-on-behalf-of-72-organizations-in-supreme-court-case-deciding-the-future-of-the-right-to-abortion-2/>.
- 27 *Dobbs* Dissent at 41.
- 28 *Dobbs* Dissent at 47 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 897 (1992)).
- 29 *Dobbs* Majority at 64–65.
- 30 *Dobbs* Dissent at 53.
- 31 *Dobbs* Majority at 65–66.
- 32 See, e.g., *Shelby County v. Holder*, 570 U.S. 529 (2013) (striking down Sections 4(b) and 5 of the VRA *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021) (establishing a new— weaker—standard for enforcement under Section 2 of the VRA).
- 33 See, e.g., *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Mem.) (shadow docket decision staying a preliminary injunction that had blocked Alabama's redistricting plan under Section 2 for diluting the votes of the State's Black population).
- 34 See Katherine Gallagher Robbins and Shaina Goodman, *Issue Brief: State Abortion Bans Could Harm Nearly 15 Million Women of Color*, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES (July 2022), <https://www.nationalpartnership.org/our-work/resources/economic-justice/state-abortion-bans-harm-woc.pdf>.
- 35 See Sarah Varney, *What's Next if 'Roe v. Wade' Falls? More Than Half of States Expected to Ban or Restrict Abortion*, KAISER HEALTH NEWS (May 3, 2022), <https://khn.org/news/article/whats-next-if-roe-v-wade-falls-more-than-half-of-states-expected-to-ban-or-restrict-abortion/>.
- 36 See Caroline Kitchener, *The Next Frontier for the Antiabortion Movement: A Nationwide Ban*, THE WASHINGTON POST (May 2, 2022), <https://www.washingtonpost.com/nation/2022/05/02/abortion-ban-roe-supreme-court-mississippi/>.
- 37 *Dobbs* Dissent at 4.
- 38 See Caroline Kitchener and Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients From Crossing State Lines*, THE WASHINGTON POST (June 29, 2022), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/>.
- 39 See Justin Wise, *Sidley Targeted as Republicans Warn Firms on Abortion Pledges*, BLOOMBERG LAW (July 8, 2022), <https://news.bloomberglaw.com/business-and-practice/sidley-targeted-as-republicans-warn-firms-on-abortion-pledges>.
- 40 See Barbara Ortutay, *Why Some Fear that Big Tech Data Could Become a Tool for Abortion Surveillance*, PBS NEWSHOUR (June 28, 2022), <https://www.pbs.org/newshour/economy/why-some-fear-that-big-tech-data-could-become-a-tool-for-abortion-surveillance>.
- 41 See Charlotte Huff, *In Texas, Abortion Laws Inhibit Care for Miscarriages*, NPR (May 10, 2022), <https://www.npr.org/sections/health-shots/2022/05/10/1097734167/in-texas-abortion-laws-inhibit-care-for-miscarriages>.
- 42 See *Don't Be Fooled: Birth Control Is Already at Risk*, NATIONAL WOMEN'S LAW CENTER (June 2022), [https://nwl.org/wp-content/uploads/2022/06/FactSheet\\_Attacks-on-birth-control-6.17.22.pdf](https://nwl.org/wp-content/uploads/2022/06/FactSheet_Attacks-on-birth-control-6.17.22.pdf).
- 43 See Robert Langreth and Ike Sweetlitz, *Abortion Bans Will Impact Doctors' Treatment of Cancer, Miscarriage*, BLOOMBERG (June 24, 2022), <https://www.bloomberg.com/news/articles/2022-06-24/overturning-roe-can-impact-therapy-for-cancer-miscarriage>.
- 44 See *Nothing Is Safe: Threats to Other Fundamental Rights in the Wake of Roe v. Wade Being Overturned*, NATIONAL WOMEN'S LAW CENTER (July 1, 2022), <https://nwl.org/resource/even-more-than-abortion-the-constitutional-importance-of-roe-v-wade/#>.
- 45 *Dobbs* Dissent at 20.
- 46 *Dobbs* Majority at 66.
- 47 *Dobbs* Dissent at 25.
- 48 *Dobbs* Dissent at 25.
- 49 *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_\_ (2022) (Thomas, J., concurring), Slip Op. at 3.
- 50 *Dobbs* Majority at 16–25.
- 51 *Dobbs* Dissent at 14–15.
- 52 *Dobbs* Dissent at 15.
- 53 *Dobbs* Majority at 10–11.
- 54 *Dobbs* Majority at 1–2, 5–8, 21–23, 31–32, 34, 37–39, 44, 46, 49–50, 66, 71, 78.
- 55 *Dobbs* Majority at 17–26, 29.
- 56 *Dobbs* Dissent at 4.