



Legal Analysis of the Leaked Dobbs v Jackson Womens' Health Draft And the Attacks on Privacy and Human Sexuality

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As of today, abortion is STILL legal.

One month prior to an expected final opinion, on May 2nd, 2022, Politico leaked a 98 page, first draft of the majority opinion of the Supreme Court of the United States in the Dobbs v Jackson Womens' Health (Dobbs) case, which if made final, would overturn the existing protections granted by the Constitution under Roe and Casey, and return the decision making back to the states and federal government. While the Court has confirmed its accuracy, they have not yet confirmed whether this draft is reflective of the current thoughts of the Justices. There remains some uncertainty in the final outcome, which is likely to be released in June 2022.

This memorandum analyzes the leaked draft, the impact on abortion care throughout the country, as well as the potential impact of the Court's reasoning on other existing rights, especially related to human sexuality and sexual behavior. The memo also provides an analysis of the likely next steps at both the federal and state level if the current opinion is made final, as well as the critical importance of medically accurate, inclusive, and comprehensive sex education.

The Right to Privacy

Griswold v. Connecticut was a case challenging a law that made birth control illegal. In 1965, Griswold became a landmark case decided by the U.S. Supreme Court, establishing the constitutional protection for the right of privacy, and it received widespread approval. In this case, the 7-to-2 majority ruled that marital relations between a husband and wife were a basic "right of privacy older than the Bill of Rights." The Constitution protected this right even if it did not mention it specifically. It was an implied right, one that was part of the "penumbra," or shadow, of several amendments. The First Amendment, for example, contained a freedom to associate privately; the Third and Fourth Amendments protected the sanctity of private homes; the Fifth Amendment's guarantee against self-incrimination allowed an accused person to keep information private.

The majority also found the right of privacy guaranteed in part by the Ninth Amendment,

which reserved to the people any rights not named in the Bill of Rights. Rights are expansive, not restrictive, and whenever fundamental rights are at stake, Justice Arthur Goldberg noted in a concurring opinion, the state must have a compelling purpose for abridging these liberties. Invading the "sacred precincts of marital bedrooms" was not a legitimate reason, Goldberg wrote. It was this basis of the inalienable right to privacy that the decision in Roe used in its legal basis.

Roe and Casey

In 1973, the U.S. Supreme Court ruled on the landmark decision of Roe v. Wade (Roe), in which the Court ruled that the Constitution of the United States protects a pregnant woman's liberty to choose to have an abortion without excessive government restriction. In doing so, the Court struck down many U.S. federal and state abortion laws and established in a 7-2 decision that the Due Process Clause of the Fourteenth

Amendment to the United States Constitution provides a 'right to privacy that protects a woman's right to choose whether to have an abortion,¹ but that this right is not absolute and must be balanced against the government's interests in protecting women's health and prenatal life. The Court established a three-trimester test wherein during the first trimester (0 to 13 Weeks), the government had zero right to prohibit abortions at all. During the second trimester (14 to 26 Weeks), a government could require reasonable health regulations. During the third trimester (27 to 40 Weeks), abortions could be prohibited entirely as long as the laws contained exceptions for cases where an abortion was necessary to save the life or health of the mother. The Court deemed these rights 'fundamental', requiring courts to evaluate any challenged abortion laws under the highest level of judicial scrutiny, 'strict scrutiny'.

In 1992, the Court affirmed the core holding of Roe in Casey vs Planned Parenthood (Casey), but abandoned the three-trimester model, in favor of an evaluation of pre-viability vs post-viability (which was lowered to 24 weeks). The Court also reduced the level of judicial scrutiny required to 'undue burden', ruling that any restrictions on an abortion may not place an undue burden on the woman seeking care, as abortion continued to be classified as a fundamental right granted to women through the Constitution.

Dobbs

At issue in the Dobbs case is a restrictive Mississippi law that prohibits abortions after 15 weeks unless there is a medical emergency or fetal abnormality. Unlike many other abortion bans, there is no protection or exception for women who have been raped, and/or victims of incest. The state petitioned the Supreme Court, asking it to overrule both Roe and Casey, allowing them to legislatively prohibit abortions, pre-viability, and with few exceptions. Despite two lower courts' ruling against the state, in this draft opinion,

the Supreme Court reverses the lower court rulings and issues an entirely new opinion that overturns both Roe and Casey. The Supreme Court argued that elected representatives must decide on behalf of the people they represent, including the rights and limits of abortion care.

The Court rejects arguments that stare decisis (prior precedent of the Court) applies here as the majority believes that the reasoning in both Roe and Casey were fundamentally flawed. The Court then references numerous examples of when the Court has overturned prior rulings, including the landmark historic civil rights cases of Plessy v Ferguson and Board v Brown, which ruled that 'separate is inherently unequal' and restricted a school system's ability to segregate students on the basis of race.

The conservative majority in this draft opinion rejected arguments that the Equal Protection clause applies because in their view, abortion is 'not a sex based classification' and 'the regulation of medical procedures that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretext designed to effect an invidious discrimination against members of one sex or another.'"

Essentially, because abortion is a medical procedure that only pregnant people get - not one that both cisgender sexes experience - regulating it is not subject to a higher level scrutiny for unfair discrimination - operating under the assumption that government regulation of only pregnancy-related medical care is not gender-based discrimination itself. By doing so, the Court removed the requirement for heightened scrutiny of the state law's constitutionality under the Equal Protection Clause of the Constitution, and instead applied a 'rational basis' test, which allows for the state law to be deemed constitutional so long as the state had a rational basis. In this case-- "protecting the life of the unborn fetus"-- to regulate or ban the practice is considered "rational."

In overturning *Roe*, the draft opinion argues that *Roe* was fundamentally flawed for several reasons. The Court argues that abortion is not referenced anywhere in the Constitution, and the majority then argues that the Due Process Clause only guarantees rights that are 'deeply rooted in the Nation's history and tradition' and 'implicit in the concept of ordered liberty.'

Essentially, unless the right existed and could be traced back to the [Magna Carta](#) ² **a royal charter of rights adopted by King John of England in 1215** - it is not guaranteed as an unenumerated right under the 9th and 14th Amendments to the Constitution.

Enumerated vs Unenumerated Rights

An enumerated right is one that is written explicitly into the Constitution. These include, but are not limited to some of the most common "rights including the freedom of speech, freedom of religion, and the right to a fair trial. Unenumerated rights, by contrast, are not explicitly written, but have been interpreted through the Supreme Court's "knowledge of law." These rights are primarily granted through the Ninth Amendment, which states that Americans have other, unwritten rights that are not explicitly written in the Constitution, and the Fourteenth Amendment right to Due Process.

The Court has previously ruled that unenumerated rights include the right to travel, the presumption of innocence in criminal cases, and the right to travel within the country; as well as the right to keep personal matters private, the right to contraception, the right to engage in private sexual activity, the right to same-sex marriage, and the right to interracial marriage. In essence, the right to autonomy over one's own human sexuality and sexual behavior. A full list of unenumerated rights does not exist as they have not all been tested and developed through case history and yet are so intrinsic to the human experience as to be understood as transcending the Constitution.

Dobbs' Impact on Abortion

If the *Dobbs* holding becomes final, as many as thirteen states have trigger laws that would immediately ban access to abortion. In these states, abortion would be illegal under most circumstances, after 6 to 8 weeks of pregnancy. Data from the Guttmacher Institute indicates that these laws could impact over 36 million women across the country, significantly hindering their ability to access the care that they need.³

Currently, an estimated 54,000 to 63,000 abortions occur in the US per year at 15+ weeks of pregnancy. In the first four months of 2022, the total number of sexual and reproductive health and rights provisions had been introduced in state legislatures across the country is 1,989 bills.

Thirty three restrictions were enacted in nine states,⁴ while 11 protective abortion measures were enacted in seven states.⁵ Given the trajectory of this legislative trend, it is safe to assume that absent major political turnover at the state or federal level, should *Dobbs* overrule *Roe*, tens of millions of women will be harmed.

In addition, the pressure that this will place on providers in states that allow abortion cannot be understated. Legal scholars are beginning to question whether states that prohibit abortions, and that criminalize or civilly punish those who assist women in need of care, can or will enact statutes that extend the same penalties to those outside of their state. In addition, there are so few providers currently throughout the country that the closing of clinics in 13 states will have a meaningful impact on patient wait times, as well as an incredibly arduous journey for those who need to travel far for care, with a disproportionate impact on those with low incomes.

2. In the late 18th century, the United States Constitution became the supreme law of the land, recalling the manner in which Magna Carta had come to be regarded as fundamental law. The Constitution's Fifth Amendment guarantees that "no person shall be deprived of life, liberty, or property, without due process of law", a phrase that was derived from Magna Carta. In addition, the Constitution included a similar writ in the Suspension Clause, Article 1, Section 9: The Ninth Amendment states that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The writers of the U.S. Constitution wished to ensure that the rights they already held, such as those that they believed were provided by Magna Carta, would be preserved unless explicitly curtailed.

3. <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe>

4. Elizabeth Nash et al., "2022 State Legislative Sessions: Abortion Bans and Restrictions on Medication Abortion Dominate," Guttmacher Institute, May 6, 2022,

<https://www.guttmacher.org/article/2022/03/2022-state-legislative-sessions-abortion-bans-and-restrictions-medication-abortion>. 5. Ibid.

Next Steps at the Federal Level

The House has already passed the [Women's Health Protection Act](#) (WHPA), which codifies the protections of *Roe v Wade*. The Senate took the bill up for a procedural vote on February 28, 2022, but failed to secure the full Democratic caucus support and failed the 60 votes needed to filibuster-proof the bill. Senate Majority Leader. Schumer has announced that the Senate will take the bill up again on May 11th, and have made changes to secure the full Caucus' support. The edits are substantively minor, yet significant to the work that reproductive health, rights, and justice advocates have supported. The edits include the removal of the non-binding findings section which include reference to restrictions on abortion as perpetuating 'white supremacy' and called it a 'tool of gender oppression.' Separately, Senators Collins (R-ME) and Murkowski (R-AK) have voted against WHPA, but introduced a narrower bill that seeks to partially codify *Roe*

[The Reproductive Choice Act](#) (RCA) seeks to codify the protections offered in *Roe* and *Casey*, while protecting healthcare providers' conscience protections for those that have religious objections to performing abortions. The RCA also seeks to protect federal and state laws that require excess materials to be given to a patient, prohibit sex-based abortions, or require parental or guardian notification for minors seeking an abortion.

It is likely that WHPA will again fail to reach the 60 votes needed to overcome the procedural vote. However, it is possible that Democratic Leader Schumer (D-NY) could follow recent precedent on prior major votes, and remove the requirement of 60 votes entirely. Another possibility is that the Democratic Leader could strike a deal with Senators Collins, Murkowski, and others who support the Reproductive Choice Act to attempt to reach a compromise on the policy. This is an unfortunately unlikely scenario during an election year, as both parties will seek to gain the upper ground in messaging their support for women in light of *Dobbs*.

Dobbs' Potential for Lasting Harm

The majority in the *Dobbs* leaked opinion attempts to draw a distinction between abortion rights and the right to privacy/liberty as it pertains to intimate sexual relations, contraception, and marriage. However, numerous legal scholars have argued that just as the *Dobbs* court undermines the core legal reasoning in prior cases to justify their conclusion, making it all too easy for future courts and cases to utilize the *Dobbs* reasoning to justify overturning existing laws on the right to contraception, private sexual activity, same-sex marriage, and interracial marriage.

Given the potential for the Court overruling *Roe* and *Casey*, Congress reaching a standstill, and states creating a myriad of restrictions that criminalize and/or civilly punish individuals who seek abortions, it is all the more important that state and federal legislative action be taken now to support access to inclusive, comprehensive, and medically accurate sex education.

It is important to note the significant undermining of American democratic institutions that led to this draft opinion. The current make-up of the U.S. Supreme Court is tainted by the political corruption of three seats being filled by a President so at odds with a democratic tradition, that he incited his supporters into a treasonous attack on Congress to challenge the legitimacy of the 2020 elections, and a Congress which illegitimately manipulated the Justice confirmation process to fill two seats at odds with the will of American voters as well as forcing a congressional vote to confirm a Justice who was credibly accused by multiple women of sexual misconduct and assault. It cannot be ignored that this most consequential undermining of the American right to privacy over our personal sexual and reproductive selves is rooted in an underlying willingness to sacrifice our democratic institutions for this unconstitutional power grab.