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Columbia Law School's Center for Gender and Sexuality Law on Leaked Dobbs Opinion

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CENTER FOR GENDER & SEXUALITY LAW

Columbia Law School's Center for Gender and Sexuality Law on Leaked Dobbs Opinion

May 03, 2022


Subject: Columbia Law School's Center for Gender and Sexuality Law on Leaked *Dobbs* Opinion

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New York, New York – The [leaked](#)  Supreme Court opinion in *Dobbs v. Jackson Women's Health Organization*, signals a major break with at least three generations of constitutional law. Should this opinion be officially issued by the Court, it will eliminate not only constitutional protections for abortion, but well-settled legal principles on which basic personal rights have rested for over 60 years. “While the draft notes that the decision does not reach other issues such as contraception, same-sex marriage, and laws criminalizing same-sex sex, Justice Alito’s draft opinion kicks the constitutional legs out from under the decisions recognizing those rights, and it’s hard to see upon what constitutional principles they will rest if this opinion becomes law,” said Katherine

Franke, James L. Dohr Professor of Law and Director of the Center for Gender and Sexuality Law.

[The Center for Gender and Sexuality Law](#) is the home to three projects focused on cutting-edge law and policy relating to gender-based equality, religious liberty, and racial justice. The work of these projects can support journalists and others seeking to understand the meaning of the leaked Dobbs opinion:

Statement from the Equal Rights Amendment (ERA) Project

[The ERA Project](#) has issued a concise [Q & A on the relationship of the ERA and abortion rights](#). The Equal Rights Amendment (“ERA”), which would add an explicit guarantee of sex equality to the United States Constitution, would protect the right to abortion and the full range of reproductive healthcare and is more critically needed now than ever before. According to the leaked draft opinion, *Roe* was “egregiously wrong from the start” and “must be overruled” because “the Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision[.]” The right to abortion does not fall under the protection of the 14th Amendment’s Due Process Clause.

As the late Justice Ruth Bader Ginsburg put it: full and equal citizenship “is intimately connected to a person’s ability to control their reproductive lives.” The right to abortion access is a necessary condition for—and thus instrumental to—women’s full citizenship and equality.

Restrictions on abortion is a fundamental equality issue because:

1. abortion is singled out for more onerous treatment than other medical procedures that carry similar or greater risks;
2. restrictions further perpetuate harmful and discriminatory gender stereotypes that limit equal participation in society;
3. abortion restrictions place a disproportionate burden on mothers as primary caregivers for children, causing structural inequality in the wage labor market and other sectors;
4. they coerce pregnant people to assume the role and do the work of parenthood without addressing the emotional, financial, and other costs of compelled parenthood;
5. lack of access to abortion disproportionately impacts low-income women, women of color, the LGBTQ community, immigrants, young women, women with disabilities and women living in rural areas who face overlapping barriers to health care, educational and economic opportunities, access to housing, job security, financial safety nets, and social and political equality.

To read The ERA Project’s talking points on the ERA and abortion, [click here](#).

To read the Project’s *amicus* brief in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services* explaining how Pennsylvania’s ban on funding for abortion violates the Commonwealth’s Equal Rights Amendment, [click here](#).

Statement from the Law, Rights, and Religion Project

The Court’s draft opinion in *Dobbs* decries that *Roe v. Wade* failed at “bringing about a national settlement of the abortion issue,” and abortion opponents have claimed that overturning *Roe* will reduce religious conflict on the matter. Nothing could be further from the truth.

Most abortion patients are religious, people of faith from many religious traditions support abortion access, and there is a long and rich tradition of faith-based activism for reproductive rights. [The Law, Rights, and Religion](#)

Project [↗](#) has [previously explained](#) [↗](#) how “several religious denominations hold that the right to reproductive health care is an essential aspect of religious freedom.” For example, “[i]n a resolution adopted in 1984, the Central Conference of American Rabbis, an association of Reform rabbis, stated that ‘freedom of choice in the issue of abortion is directly related to the First Amendment’s guarantee of religious freedom.’...the [Evangelical Lutheran Church in America] has stated that “[f]or some, the question of pregnancy and abortion is not a matter for governmental interference, but a matter of religious liberty and freedom of conscience protected by the First Amendment.”

In our 2019 report *Whose Faith Matters? The Right to Religious Liberty Beyond the Christian Right* [↗](#), we discussed the many people of faith who have brought religious liberty litigation asserting a religious right to access, provide, or assist with abortion care. These include several suits involving members of the Clergy Consultation Service on Abortion (CCS), a national network of faith leaders that provided counseling and referrals for abortion services prior to Roe.

The religious reproductive freedom movement has seen a [new flourishing](#) [↗](#) over the past year in response to relentless attacks on abortion rights. If this decision stands, we will see an outpouring of religious advocacy and activism in support of the right to access and provide abortion care—perhaps testing the limits of the Supreme Court’s recent expansion of the right to religious exercise.

Statement from the Racial Justice Project

The draft Supreme Court opinion completely overturning *Roe v. Wade* and *Planned Parenthood v. Casey* would be devastating for all people seeking abortion care, but particularly for women and people of color, especially for those who are Black or Black queer and trans people, and those with no or low incomes. First, pregnant people, particularly Black women, are already navigating the rise in maternal mortality and the inability to access an abortion.

“Access to the full range of reproductive health care is the quintessential intersectional issue, insofar as Black women and Black queer and trans folks are already the most impacted by restrictions on abortion and access to pre-natal care,” says Candace Bond-Therriault, the Center’s Director of Racial Justice Policy and Strategy. “Constitutional law has never centered the lives and interests of Black folks, and this draft opinion is yet another example of how we are illegible to the majority of this Court.”

The Center for Gender and Sexuality Law at Columbia Law School develops research projects and initiatives focused on issues of gender, sexuality, reproductive rights, bodily autonomy, and gender identity and expression in law, policy, and professional practice. The Center’s mission is to formulate new approaches to complex issues facing gender and sexual justice movements.
