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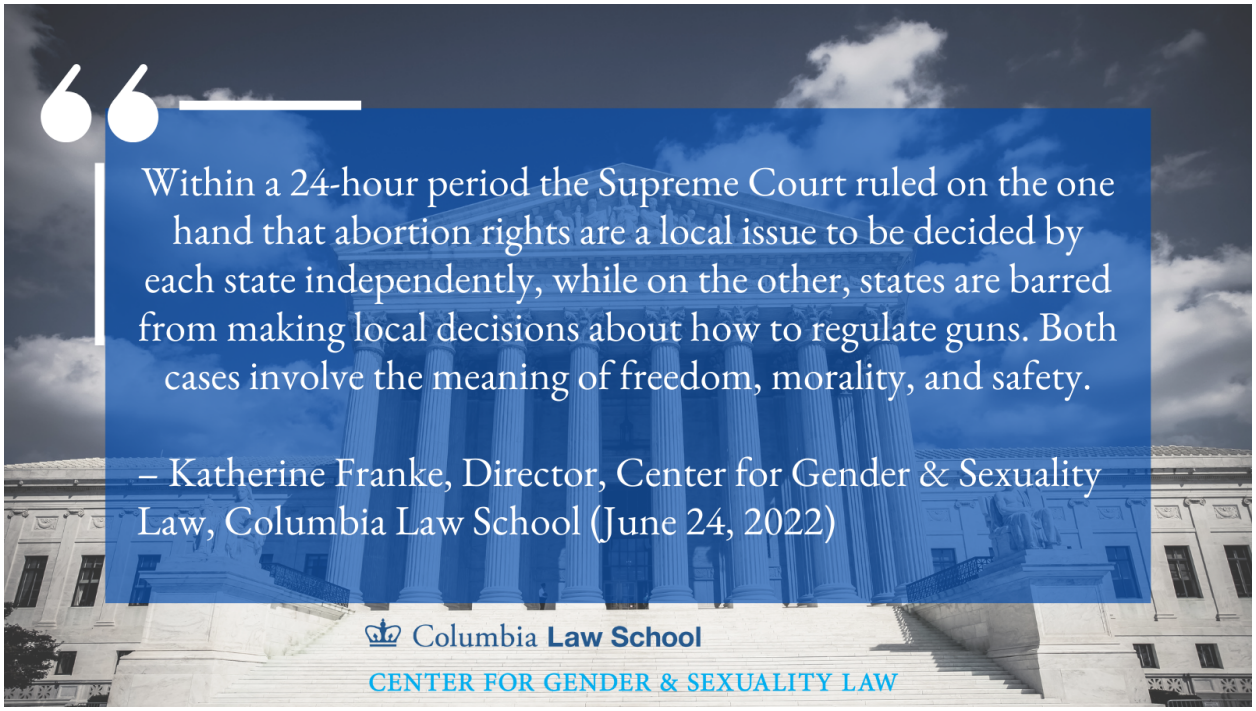
CENTER FOR GENDER & SEXUALITY LAW

Statement from Columbia Law School's Center for Gender and Sexuality Law on the Supreme Court Decision Overruling the Constitutional Right to Abortion



The Supreme Court opinion in *Dobbs v. Jackson Women's Health Organization* signals a major break with at least three generations of constitutional law. This opinion eliminates not only constitutional protections for abortion, but well-settled legal principles on which fundamental rights have rested for over 60 years. "Within a 24-hour period the Supreme Court ruled on the one hand that abortion rights are a local issue to be decided by each state independently, while on the other, states are barred from making local decisions about how to regulate guns," said Katherine Franke, James L. Dohr Professor of Law and Director of the Center for Gender and Sexuality Law. "Both cases involve the meaning of freedom, morality, and safety."

On June 24th, the Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, officially overruling nearly 50 years of Supreme Court precedent that ensured that no one could be compelled by the government to give birth. With this opinion, the Supreme Court applies an interpretation of the 14th Amendment that only recognizes "deeply rooted" rights dating

back centuries, and relies on legal "authorities" starting in the 1300s who endorsed the enslavement of Black people and the second-class legal and political status of women.

This opinion is a devastating setback for the long-term struggle for sex equality, bodily autonomy, civil rights, and basic dignity for all. While we do not expect progress to be linear, we do expect our highest court to serve as gatekeeper to the foundational values in which our nation is rooted—equality, liberty, dignity, justice—rather than using their power to dismantle well established constitutional norms, causing the pain and suffering of millions in its wake.

The consequences of this tragic decision could go well beyond *Roe v. Wade*. As Justice Thomas, a Justice who can be counted on to say the quiet part out loud, states in his concurrence, "in future cases, [the Court] should reconsider all of [its] substantive due process precedents, including Griswold, Lawrence, and Obergefell"—cases that stand for the rights to contraception, consensual same-sex intimacy, and same-sex marriage. "While the opinion notes that the decision does not reach these other issues specifically, Justice Alito's 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 when these rights are next challenged." said Professor Franke.

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 *Dobbs* opinion:

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ERA PROJECT

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 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 are 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 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.

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LAW, RIGHTS, AND RELIGION PROJECT

Statement from the Law, Rights, and Religion Project

The Court's 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. As LRRP has noted before, 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. With this decision, 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 Supreme Court opinion completely overturning *Roe v. Wade* and *Planned Parenthood v. Casey* is devastating for all people seeking abortion care, but particularly for women and people of color, especially for those who are Black or Brown queer and trans people, and those with no or low incomes.

Justice Alito opines that abortion is "not deeply rooted in this Nation's history and tradition" and therefore cannot be guaranteed by the Due Process Clause of the 14th Amendment. Alito states that "[u]ntil the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion." He further supports his reasoning by looking to the common law—which was a time when slavery remained legal and Black folks were considered property, not persons, in much of the country—to show that anti-aborton laws are a "historical and deeply rooted tradition." To prove that abortion was criminalized in Virginia, the Appendix uplifts a 1863 state law that distinguished between free and enslaved people: "Any *free* person who shall administer to, or cause to be taken, by a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such

abortion or miscarriage, shall be confined in the penitentiary not less than one, nor more than five years. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child." But, even this 1863 Virginia statute had an exception for the life of the mother or child, which Alito wholly ignores.

Looking at history through this lens is more than problematic for people of color, women, and the LGBTQ+ community. Our Nation's historical analysis is riddled with laws and state constitutional provisions that explicitly require and allow for anti-Black and anti-Brown discrimination, and it wasn't until the modern Civil Rights Era in the 1960s that Federal and State laws overtly prohibited such discrimination. What's most frightening is the reality that many of the rights secured by people of color, and LGBTQ+ folks, including the right to abortion, in the last 50 years could no longer be considered "deeply rooted," which puts many of our civil and constitutional rights up for debate.

"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-Theriault, the Center's Director of Racial Justice Policy and Strategy. "Constitutional law has never centered the lives and interests of Black folks, and this opinion is yet another example of how we are illegible to the majority of this Court.

Today, my heart and spirit are heavy. By unequivocally overturning *Roe v. Wade* and *Planned Parenthood v. Casey*, the Supreme Court of the United States has once again failed us, especially women of color, and all those who have the capacity to become pregnant. But, I find solace in looking to the framework of reproductive justice, which recognizes the right to abortion as a human right that goes beyond borders and constitutional limitations. We must center the reproductive justice movement, its leaders and its framework as we continue to chart a path forward in a world without a federal constitutional right to abortion, but this is the work that Black and Brown women and femmes do every single day. And, the fight continues and we won't stop fighting until all people are able to determine to not have a child, to have a child, and to parent the children that we have in safe and healthy environments."

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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.