

THE ERA PROJECT

The Equal Rights Amendment and Abortion

MAY 3, 2022 UPDATE: The Supreme Court has voted to strike down *Roe v. Wade* in a leaked draft opinion by Justice Samuel Alito in *Dobbs v. Jackson Women's Health Organization*, overturning 50 years of precedent protecting the fundamental right to abortion. If this draft indeed represents the majority opinion of the Supreme Court, it will be a monumental setback for women's rights and signals that many of the most basic protections in our society, starting with reproductive rights, are under threat.

According to the 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[.]” Further, the right to abortion does not fall under the protection of the 14th Amendment’s Due Process Clause.

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.

Here are the reasons why:

There are several ways to understand how restrictions on access to abortion (and other reproductive health care such as contraception) amount to sex discrimination.

Restrictions on access to abortion violate the ERA because:

- **Restrictions on abortion single out abortions for more onerous treatment than other medical procedures that carry similar or greater risks**, imposing “an unnecessary, irrational, and unjustifiable undue burden on women” and other pregnant people “seeking to exercise their right to”¹ make decisions about whether to end a pregnancy.
- **Restrictions on abortion perpetuate harmful and discriminatory gender stereotypes that limit equal participation in society.** For decades the Supreme Court embraced the view that “the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.... The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”² This view was eventually abandoned by the Supreme Court as an outdated stereotype denying the equal right to equal citizenship of all, regardless of gender. Justice Ruth Bader Ginsburg specifically linked restrictions on access to abortion to those outdated stereotypes in one of the Supreme Court’s most important abortion cases: that they reflect a gendered notion of citizenship in which women were “regarded as the center of

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home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution. Those views are no longer consistent with our understanding of the family, the individual, or the Constitution.”³

- **The ability to control one’s reproduction is essential to the possibility of equality in the workplace and in public life.** The right to abortion access is a necessary condition for—and thus instrumental to—women’s full citizenship and equality. As Justice Ginsburg put it: full and equal citizenship “is intimately connected to a person’s ability to control their reproductive lives.”⁴
- **Because laws restricting abortion subject women to state-compelled pregnancy, they shape the lives of every person who is capable of becoming pregnant.** Both the work of childbearing and the work of childrearing compromise parents’ opportunities in education and employment in gendered ways. Thus, for reasons physiological and social, such regulations affect women’s lives in ways they simply cannot and do not affect men’s lives.⁵
- Constitutional law scholar Reva Siegel put it most clearly: **restrictions on abortion offend the principle of sex equality “because of the status-based attitudes about women they reflect.** For centuries, this society has defined women as mothers and defined the work of motherhood as women’s work. These are the assumptions which make it ‘reasonable’ to force women to become mothers.”⁶
- **Restrictions on abortion coerce pregnant people to assume the role and do the work of parenthood without addressing the emotional, financial, and other costs of compelled parenthood.** Research shows that mothers are much more likely to experience significant career interruptions in order to attend to their families’ needs. “While women represent nearly half of the U.S. workforce, [they still devote more time than men](#) on average to housework and child care and fewer hours to paid work, although the gap has narrowed significantly over time. Among working parents of children younger than 18, mothers in 2013 spent an average of 14.2 hours per week on housework, compared with fathers’ 8.6 hours. And mothers spent 10.7 hours per week actively engaged in child care, compared with fathers’ 7.2 hours.”⁷ The disproportionate burden placed on mothers to care for children is one of the principal causes of structural sex-based inequality in the wage labor market and other sectors.
- **The consequences of reducing access to abortion and contraception, and thus increasing compelled parenthood, were compounded exponentially by the COVID-19 pandemic.** In a survey from May and June of 2021, one out of four women who became

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unemployed during the pandemic reported the job loss was due to a lack of childcare, twice the rate of men surveyed. A more recent survey shows the losses have not slowed down: between February and August of 2020, mothers of children 12 years old and younger lost 2.2 million jobs compared to 870,000 jobs lost among fathers.⁸

- **Restrictive abortion access disproportionately impacts low-income women, women of color, the LGBTQ community, immigrants, young women, 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.

[The ERA Project](#) at Columbia Law School submitted an *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. Pennsylvania added an ERA to their constitution in 1971. It states that: “Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.” Our brief can be downloaded [here](#).

¹ *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 585 (2021) (Sotomayor, J., dissenting) (citing *Gonzales v. Carhart*, 550 U.S. at 172 (Ginsburg, J., dissenting)).

² *Bradwell v. State*, 83 U.S. 130 (1872).

³ *Gonzales v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg dissenting).

⁴ *Id.*

⁵ Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *Stan.L.Rev.* 261, 354 n. 373 (1992).

⁶ *Id.* at p. 379.

⁷ Pew Research Center, *Women More Than Men Adjust Their Careers For Family Life*, <https://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/>.

⁸ Nicole Bateman and Martha Ross, *Why Has COVID-19 Been Especially Harmful For Working Women?*, Brookings, <https://www.brookings.edu/essay/why-has-covid-19-been-especially-harmful-for-working-women/>; Tim Henderson, *Mothers Are 3 Times More Likely Than Fathers to Have Lost Jobs in Pandemic*, Pew, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/28/mothers-are-3-times-more-likely-than-fathers-to-have-lost-jobs-in-pandemic>; Alicia Sasser Modestino, *Coronavirus Child-Care Crisis Will Set Women Back A Generation*, *Washington Post*, July 29, 2020, <https://www.washingtonpost.com/us-policy/2020/07/29/childcare-remote-learning-women-employment/>.