

Deconstructing *Dobbs*: The Meaning and Implications of Overturning *Roe v. Wade*

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Impact of *Dobbs* on Reproductive Health and Abortion Access

- As of July 1, Abortion immediately banned in 5 states, either through “trigger laws,” or through revival of pre-Roe laws that were never repealed: AL, AK, MO, OK, SD
- Bans under temporary court injunction in KY, LA, UT
- 13 states have “trigger laws”
- Several states now have conflicting laws, with confusion over which should govern – the pre-Roe statute, the trigger law, or a subsequently enacted restriction, e.g. TX 6 week ban, MS 6 week or the 15 week law upheld in *Dobbs*
- Predicted that 22-26 states will ban or severely restrict abortion (e.g., 6 Weeks), with limited exceptions only for life-threatening situations
- For up to date tracking of state laws, see: <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>

Impact on Reproductive Health, con't

- Abortion Access preserved by statute or state constitutional interpretation in 19 states + DC: on the coasts, NE, NW, and Illinois : the red/blue American divide
- NY has codified right to abortion up to viability
- Estimated that 58% of women of childbearing age (13-44) will live in states that ban or severely restrict abortion; 38% in states that will permit abortion access
- Impact of restrictions greatest on low income and undocumented women, incarcerated women, young women, women with underlying health problems that increase risks of travel
- “Life threatening emergency” exceptions in state laws are vague, doctors already report uncertainty about legality of treating miscarriages, ectopic pregnancies, and other serious health problems posed by pregnancy
- Maternal mortality rates in US – which are already highest in industrialized world, and particularly high in abortion-restrictive states – are likely to increase

Impact of *Dobbs* in New York State

- Dobbs does NOT affect NY law. Federal legislation would be required to overturn NY's protection of abortion access: federal legislation is a new priority for abortion opponents
- NY abortion clinics likely to see greatly increased # of state patients that may strain capacity; WNY will be particularly impacted when Ohio ban goes into effect, and if Republican wins PA gubernatorial election in November 2022
- NY abortion providers already facing increased protest activity – fears of a return to the violence of the 1990's
- NY providers and residents may be targets of the looming “interjurisdictional abortion wars”

The “Interjurisdictional Abortion Wars” Are Coming, and the Constitutional Waters Are Murky

- Several states are likely to:
- prohibit their residents from traveling out of state for an abortion
- Prohibit providing information about legal out of state abortion to residents
- Target out of state people for “aiding and abetting” abortion through funding, travel assistance, and information



Constitutional Rights Implicated by the “Interjurisdictional Wars”:

- Right to Travel – an unenumerated right, just like privacy. But it has “ancient roots” – Magna Carta, Articles Confederation. But cf. Fugitive Slave Act?? Kavanaugh Dobbs concurrence says right to travel prohibits states from making it illegal to go out of state for an abortion
- First Amendment free speech: Donations can be a form of protected speech and freedom to associate, and donations to help a woman get a legal abortion in another state would not be “aiding and abetting” a crime
- First Amendment free speech right to give information about “topic of public concern” Bigelow v. Virginia, 421 U.S. 809 (1975), struck down a VA law against advertising about legal abortion services in NY prior to Roe
- But are any constitutional precedents now safe?

Lawyering in the World of “Stare Indecisis”

- Current Court majority has been overruling precedents at an unprecedented pace
- Dobbs majority holds that stare decisis is at its weakest for constitutional questions
- Any constitutional precedent that a majority thinks is “egregiously wrong” is vulnerable to being overruled
- Dobbs majority holds that “reliance” on precedents is not sufficient basis to refrain from overruling if the reliance is not “concrete as it is for economic and property rights;” implying that other types of rights are too intangible and not capable of empirical measurement. Dissent contends that constitutional rights such as free speech fit this “intangibility” notion
- Will lawyers need historians to help make constitutional arguments?

Impact of *Dobbs* on Other Unenumerated Privacy-Based Constitutional Rights

- Majority and says that the decision does not call into question rights developed in cases that Roe relied on, or in cases that relied on Roe: contraception, coerced sterilization, laws prohibiting certain forms of sexual intimacy, same sex marriage
- Thomas concurrence and dissent say that's not true – the reasoning of *Dobbs* directly threatens these other rights of intimate association and decisionmaking
- Applying *Dobb's* analysis grounded in 18th and 19th century history, none of these rights are deeply rooted, and were legally prohibited often for longer than abortion

Impact on Other Unenumerated Rights, cont.

- In some states, pre-Lawrence sodomy laws and pre-Obergefell marriage laws remain on the books; Texas AG Paxton has announced he is ready to enforce sodomy laws to generate a test case to challenge Lawrence
- Some states that declare abortion a crime from moment of fertilization are likely to ban certain forms of contraception – eg IUDs and “morning after pill” as alleged abortifacients; Students for Life of America leader has declared her group wants to ban the pill and IUD several other forms of contraception; Supreme Court has already upheld employer “religious liberty” objections to providing health insurance coverage for many forms of contraception
- Some contend that the Court would not uphold contraception bans, sodomy laws, or overturn same sex marriage because of even greater risk of political upheaval than overturning Roe. But what does that argument imply about the public perception of the legitimacy and political nature of the Court?
- Same sex and interracial marriage decisions also have Equal Protection Clause basis; they do not rely solely on unenumerated fundamental rights analysis. But, if Court is going to extend its originalist use of history to determine the scope of other rights, including Equal Protection, then that clause may not provide any protection, since interracial and same sex marriage were widely illegal at time of ratification of 14th Amendment