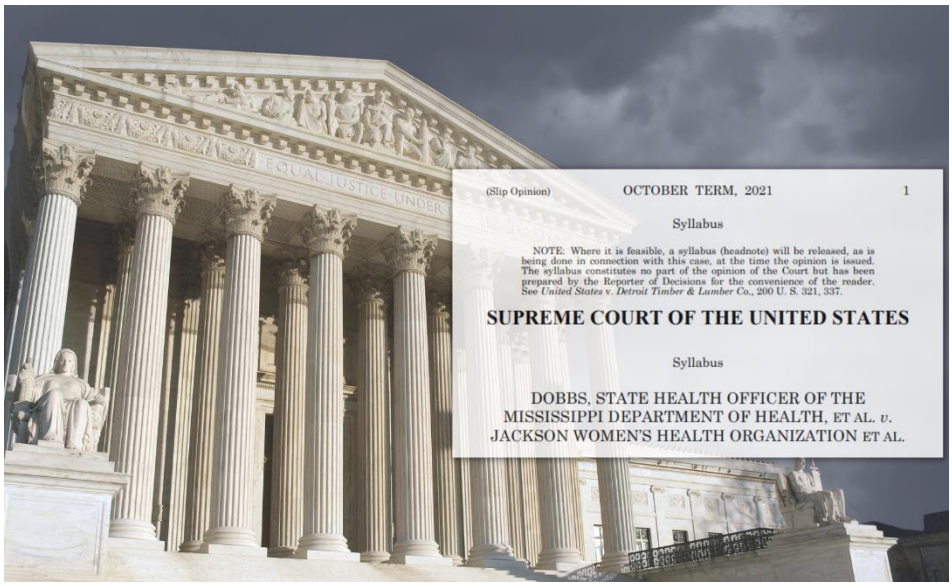
CENTER *for* REPRODUCTIVE RIGHTS

Legal Analysis:

What *Dobbs* Got Wrong

The U.S. Supreme Court's ruling eliminating the constitutional right to abortion was radical and wrong



On June 24, 2022, the U.S. Supreme Court reversed nearly 50 years of precedent and, for the first time, eliminated a right grounded in personal liberty: the right to abortion. Its ruling in *Dobbs v. Jackson Women's Health Organization* overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* and held that the Fourteenth Amendment's guarantee of liberty does not encompass an individual's right to abortion.

As this analysis explains, *Dobbs* is wrong, poorly reasoned, and not the final word on the Constitution's protection for the right to abortion, which is a critical part of the broader right to reproductive autonomy.

Dobbs uprooted deeply embedded liberty rights doctrine, and instead embraced a dangerous method of constitutional interpretation.[1] *Dobbs* has set our country back decades and is out of step with human rights and global movement towards liberalization of abortion laws and policies. It took away from millions the constitutional right to decide whether to be pregnant or give birth to a child, while refusing to recognize the immediate and ongoing harm that it would cause for individuals and families. The concurring opinions are similarly regressive.

While the *Dobbs* ruling represents a radical denial of fundamental liberties, the joint dissent offers a sharply contrasting approach that would preserve and buttress critical rights: it forecasts the profound damage *Dobbs* would inflict and begins to chart a path forward for rebuilding a more robust right to reproductive autonomy.

March 2023

I. The Majority Opinion: Dismantling the Constitutional Right to Abortion

Justice Samuel Alito authored the majority opinion, joined by Justices Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. The majority overrules *Roe* as wrongly decided and holds that the Fourteenth Amendment's guarantee of liberty does not encompass an individual's right to abortion.[2] Citing a case about regulation of optometry, it concludes that rational basis review—the most deferential standard of judicial review—is an appropriate level of scrutiny for abortion bans and restrictions and lists a variety of state interests that would satisfy that standard.[3]

The majority reaches its sweeping result without any discussion or consideration of the harmful impact it will have on the health, lives, and future of pregnant people and their families. Indeed, the majority opinion references "legislative bodies" six times—which is six times more than it mentions the bodies of women or pregnant people.[4]

AN UNPRINCIPLED AND DANGEROUS APPROACH TO CONSTITUTIONAL INTERPRETATION

Justice Alito, writing for the majority, begins by observing that the Constitution "makes no reference to abortion."[5] The majority then purports to apply the analysis used in *Washington v. Glucksberg*, 521 U.S. 702 (1997), to determine whether the Fourteenth Amendment's textual guarantee of liberty encompasses the right to abortion. In *Glucksberg*, the Court considered whether the asserted right was deeply rooted in our nation's history and tradition and fundamental to our concept of ordered liberty. But the *Dobbs* Court's reliance on *Glucksberg*'s historical inquiry is flawed; the Court did not follow *Glucksberg*'s approach to defining liberty rights in cases prior to or after that case.[6] As the *Dobbs* joint dissent notes, "[t]he *Glucksberg* test . . . 'may have been appropriate' in considering physician-assisted suicide, but 'is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.'"[7]

Rather, in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Court reiterated its prevailing approach for determining substantive liberty rights under the Fourteenth Amendment.[8] There, the Court considered whether the constitutional right to marry encompasses protection for a right to marry someone of the same sex. The Court did not ask, narrowly, whether the right to marry someone of the same sex is deeply rooted in this country's history and tradition. Instead, it asked about marriage "in its comprehensive sense" and whether there was a sufficient present-day justification for excluding same-sex couples from the fundamental right to marriage.[9]

Interpretation of the Constitution's guarantees of fundamental rights, the *Obergefell* Court observed, "has not been reduced to any formula" and "requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."[10] Relying on and reinforcing precedent recognizing an expansive vision of constitutional liberty, the *Obergefell* Court held that the Fourteenth Amendment guarantees individuals the right to marry a person of the same sex.[11] The *Obergefell* majority explicitly declined to apply the narrow test from *Glucksberg* in favor of an approach premised on a broader understanding of liberty.[12]

That broader approach makes sense especially in cases about sex and family. Otherwise, the Court's interpretation of the Constitution would simply reinforce the historical subordination of marginalized people—including women, LGBTQ people, Black people, and other people of color—whose full and equal rights were not "deeply rooted" in our nation's history and tradition at the time of the Fourteenth Amendment's ratification.

Given this body of precedent, *Dobbs*'s revised history and tradition test is radical and unsupported in at least two respects.[13] First, it fails to explain its return to *Glucksberg*'s test over the Court's more settled and holistic approach to defining liberty rights under more recent and governing precedent.

Second, *Dobbs*'s approach is strikingly narrower than the inquiry *Glucksberg* lays out. Without explanation or support, *Dobbs* says that to be deeply rooted in our history and tradition, a fundamental right must

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have been positively endorsed or recognized in 1868, when the Fourteenth Amendment was ratified.[14] But even *Glucksberg* did not fossilize constitutional guarantees in this way.[15]

With its new approach in hand, the *Dobbs* majority proceeds to rely on evidence that mainstream historians and scholars dispute, and takes a stilted view of the law in 1868 to conclude that at that time, three-quarters of states made it a crime to perform an abortion at any stage of pregnancy.[16] The majority's rote number-crunching ignores evidence that abortion laws on the books were rarely enforced, and when they were, prosecution focused overwhelmingly on rare instances where women died, with some courts holding that the criminal laws did not in fact ban all abortions regardless of circumstance.[17] It also casts aside the sexist and anti-immigrant motivations underlying enactment of 19th century criminal abortion laws.[18] And it does not mention the connection between those efforts and physician-backed campaigns, rooted in racism and competition, to push out midwives—overwhelmingly Black women who had been the primary caregivers for pregnant people.[19]

The Court also looks further back, distorting sources to hold that abortion at all stages may have been criminalized at common law, failing to note its reliance on cases of battery or poisoning without the pregnant person's consent.[20] Among its sources is an English jurist who defended marital rape and had women executed for witchcraft.[21] Based on this flawed historical approach, and because there was no positive right to abortion established in 1868, the majority concludes the Fourteenth Amendment's liberty guarantee cannot encompass a right to abortion.[22]

In addition to cherry-picking historical sources, the majority's myopic and ossified constitutional vision forecloses any possibility of extending rights to those to whom they were previously denied.[23] First, it fails to acknowledge that the ratifiers of the Fourteenth Amendment were white, male landowners, who did not view women or people of color as full and equal citizens, and did not permit them a voice in the political process.[24] As the dissent aptly notes: "When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship."[25]

Second, the majority undermines the purpose of the Fourteenth Amendment, which together with its sibling Reconstruction-era amendments, was meant to address the lasting brutality of slavery and the Framers' denial of Black people's humanity. States had endorsed sexual violence and rape, coerced pregnancy and childbearing, and forced the separation of families to deny enslaved people fundamental aspects of liberty, bodily integrity, and dignity.[26] As Professor Peggy Cooper Davis has long pointed out, to begin to repair that damage, the Fourteenth Amendment guaranteed a right of liberty against state control—which includes rights of individuals, not states, to decide whether and when to become pregnant and give birth to a child, and to create and raise a family.[27] With that context, it is quite clear that, for a state to take control of a person's body and demand they go through pregnancy and childbirth, and all the associated physical risks and life-altering consequences, is a deprivation of that fundamental liberty right.[28]

Third, the majority dismisses the argument that the Fourteenth Amendment's equality guarantee protects the right to abortion, stating in dicta that banning abortion is not sex discrimination.[29] No party had made this argument and the majority undertakes no analysis to support this statement. It simply invokes a long-abandoned and denounced pregnancy discrimination case, while ignoring decades of precedent establishing modern sex equality doctrine.[30] This inclination to look back to a time when pregnant people were denied constitutional protections is consistent with the majority's regressive and dangerous liberty analysis.

Finally, the majority's rationale does not stop at excising the right to abortion from the Fourteenth Amendment liberty guarantee. Followed to its logical conclusion, it threatens much of the Court's liberty jurisprudence—a result that would further undermine the promise of the Fourteenth Amendment. The words contraception, sex, and marriage appear nowhere in the Constitution.[31] And rights against coerced sterilization, to contraception, to same-sex intimacy, or to marry a person of the same sex or a different race were not affirmatively protected across the nation in 1868.[32] Indeed, at that time, a majority of states criminalized consensual sex with someone of the same sex[33] and prohibited interracial marriage.[34] *Dobbs* suggests these are non-issues: abortion is different, it says, because abortion involves the state's interest in potential life.[35] But this is not a reliable limiting principle: consideration of the nature of the

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state's interest fits nowhere in *Dobbs*'s approach to the history and tradition inquiry.[36] And, at least one justice in the majority—Justice Thomas—makes clear this interest is no limit.[37] As the dissent summarizes: "Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other."[38]

FAILING TO RESPECT STARE DECISIS AND MASKING THE HARM THE DECISION WILL INFLICT

The majority briefly turns to stare decisis, a principle of stability and judicial restraint. Stare decisis sets a high bar for the Court to overrule its own decisions, counseling that judicial protection for individual rights must hold firm absent the most dramatic and unexpected changes in law or fact, including because people rely on the Court's decisions.[39] Nothing had changed since *Roe* or in the 30 years since *Casey* reaffirmed *Roe* to warrant the "upheaval in law and society" the majority set off by overruling those decisions.[40] Rather, as the dissent points out, "the Court reverses course . . . for one reason and one reason only: because the composition of this Court has changed."[41] "Substitut[ing] a rule by judges for the rule of law," as the Court does, "threatens to upend bedrock legal doctrines" beyond this case, "creates profound legal instability," and "calls into question [the] Court's commitment to legal principle."[42] It "takes aim . . . at the rule of law."[43]

One of the most alarming aspects of the majority's stare decisis discussion is its failure to account for the profound harm its decision would cause to people who rely on the right to abortion. The Court holds that it cannot assess the "novel and intangible" reliance interests that are "empirical," such as "the effect of the abortion right on society and in particular on the lives of women."[44] That casts aside not only the profound and devastating consequences of the decision on real people, but also one of the judiciary's primary roles: to consider evidence and make a judgment.

Bringing a child into the world, raising and nurturing children, and building families and communities are, for many, among the most joyful and meaningful experiences in life. At the same time, these life-changing events bring challenges and risks, as evidence well documents. Every pregnancy entails risk to a pregnant person's health or life, and pregnancy

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Black, **Indigenous**, and **low-income communities** are disproportionately impacted by the U.S. maternal health crisis and by abortion bans

and childbirth involve significant and comparably greater risks than abortion.[45] Even an uncomplicated pregnancy significantly stresses the body, causes physiological and anatomical changes, and affects every organ system. Childbirth itself is 14 times more likely to result in death than abortion in the United States[46] (and is several times more dangerous in some states[47]). Every pregnancy-related complication is more common among women giving birth than among those having abortions.[48] And approximately one-third of pregnancies end in a cesarean section (C-section)—major abdominal surgery that carries serious risks.[49] Indeed, the United States has one of the highest maternal mortality rates among wealthy democracies.[50] This human rights crisis in U.S. maternal health disproportionately impacts Black, Indigenous, and low-income communities, who consistently face the greatest risks during pregnancy, childbirth, and postpartum due to discrimination and inadequate access to quality health services.[51]

Beyond the increased risk to their health and lives from forced pregnancy and childbirth, people who are denied a wanted abortion, many of whom are already parents, are more likely to experience economic insecurity and poverty.[52] The financial impacts of being denied an abortion are as large as or larger than being evicted, losing health insurance, being hospitalized, or being exposed to hurricane flooding.[53]

These are among the many reasons access to abortion is critical to women's equal participation in society. In fact, legal abortion has made possible many of the educational and professional gains women have realized over the last five decades.[54] For example, for young people with an unplanned pregnancy, legal abortion increased the probability of finishing college by nearly 20% and entering a profession by nearly 40%.[55]

All of these facts were documented extensively in the respondents' briefing to the Court, the dozens of amicus briefs in support of respondents, or both. The majority ignored them all.

Equally disturbing is the majority's specious claim that *Dobbs* aligns with other decisions overruling precedent. Picking up an anti-abortion argument, the majority compares its overruling of *Roe* to the unanimous decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

to overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896).[56] Yet, as the NAACP Legal Defense and Education Fund—which litigated *Brown*—commented about this comparison: "[T]here is and should be no comparison between *Roe* and *Plessy*. While *Roe* recognized that the liberty protected by the federal Constitution includes the right of women to access abortion care, *Plessy* endorsed and upheld a racial apartheid system that denied the equality, dignity, and humanity of Black people in the United States."[57] The *Dobbs* dissent echoes this point, stating *Brown*'s protection of rights with "a strong basis in the Constitution's most fundamental commitments" stands in stark contrast to *Dobbs*'s revocation of rights on which individuals have relied for decades.[58]

Dobbs is shot through with other efforts to conceal the harm its decision will cause. For one, the majority claims destroying constitutional protection for abortion rights simply "return[s] the issue of abortion to [] legislative bodies" and allows "women on both sides of the abortion issue to seek to affect the legislative process."[59] It emphasizes that "women are not without electoral or political power;" and points out that, in fact, women vote at slightly higher percentages in Mississippi than men do.[60] Defending the revocation of a constitutional right because women can vote sits uncomfortably alongside the majority's interpretive method, which freezes Fourteenth Amendment rights at a time when women could *not*. And, of course, the essence of a constitutional right is that it is not up for majority vote.

Moreover, the appeal to the ballot box rings hollow coming from a Court that has allowed states to dismantle protections for voting rights, and undermined efforts to combat undemocratic gerrymandering in the states.[61] As Sherrilyn Ifill, then President of the NAACP Legal Defense Fund, pointed out, both the Court's voting rights and abortion decisions disproportionately harm Black women and other people of color and that harm is particularly acute in the South, where restrictions on reproductive rights and voting rights have gone hand in hand for decades.[62] Political and electoral power, and the power to shape one's own life, are "essential to autonomy and equality," as the Brennan Center for Justice, a democracy law and policy institute, notes.[63] Disenfranchisement and the denial of reproductive control at the hands of the state are twin efforts to deny each individual the power to chart their life's course.

In the same vein, the majority posits that the decision returns to the states the power to regulate—or ban—abortion and will keep the courts out of abortion issues.[64] This, too, rings hollow. What happens to abortion access in one state inevitably impacts other states. People with the means to do so have always been able to cross state lines for abortion care when it is out of reach at home. As nearly half the states move to ban abortion, even more people will be forced to leave their communities—putting their health and lives at greater risk to seek out safe care where it remains legal.[65]

But anti-abortion advocates are not satisfied with allowing each state to decide the legality of abortion within its own borders. Among other tactics, they are already promoting model legislation that would inhibit people from leaving states that have banned abortion to obtain services elsewhere.[66] And they are pursuing legislation and litigation that aims to end access to abortion care across the country.[67] Some federal legislators are considering a nationwide ban. The courts—and the Court—will be called upon to decide these issues, and more.[68]

II. The Concurring Opinions: Direct and Veiled Threats to Liberty Rights

Justice Thomas, Justice Kavanaugh, and Chief Justice John Roberts each offer additional views in separate concurring opinions. These are equally flawed or disingenuous.

Both Justice Thomas and Justice Kavanaugh fully support the majority's narrow history-and-tradition-based rationale for reversal. Justice Thomas would use *Dobbs* as a launching pad to go even further. He writes that, in future cases, the Court "should reconsider all of [the] Court's substantive due process precedents," and undo constitutional protection for the rights to contraception, to same-sex sexual intimacy, and to marry someone of the same sex "because the Due Process Clause does not secure *any* substantive rights."[69]

By contrast, Justice Kavanaugh claims, without much elaboration, that *Dobbs* does not affect liberty precedents "involving issues such as contraception and marriage."[70] And, as to abortion, Justice Kavanaugh

notes, also in a cursory way, that based on the constitutional right to travel, a state could not bar a resident from traveling to another state to obtain an abortion.[71]

Additionally, Justice Kavanaugh insists, the decision to overrule *Roe* is "neutral"—that it is neutral to grant to states the power to make decisions about pregnancy and childbirth for each individual.[72] As the dissent appropriately responds: "When the Court decimates a right women have held for 50 years, the Court is not being 'scrupulously neutral,' [i]t is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so."[73]

Chief Justice Roberts concurs in the judgment to uphold Mississippi's 15-week ban only; he would stop short of overruling *Roe* completely and allowing states to ban abortion entirely—at least in this case.[74] He would overrule *Roe* and *Casey's* central holding that states cannot ban abortion before viability, while retaining what he defines as *Roe*'s protections for a "reasonable opportunity" to access abortion.[75] The Chief Justice provides no explanation as to the constitutional basis or parameters for such a standard, or how it would work in practice.

Like the *Dobbs* majority, Chief Justice Roberts supports his abandonment of the viability line by attempting to paint the United States' constitutional protections for abortion as overly permissive and out of step with the rest of the world.[76] He notes that "[i]t is indeed telling that other countries almost uniformly eschew a viability line"[77] and references for support an often-repeated and always-misleading statistic about the number of countries that permit abortion later in pregnancy.[78]

In doing so, both Chief Justice Roberts and the majority unquestioningly adopt the rhetoric of abortion opponents, which misrepresents the legal status of abortion across the world to mischaracterize the U.S. as being far more permissive than other countries. In fact, across Europe and in most other developed countries, abortion is allowed on broad grounds around or until viability. Where countries impose earlier gestational limits for abortion on request, there are often broad exceptions, such as to preserve the person's physical or mental health, that extend at the least through viability.[79] As European legal scholars appearing as amicus in *Dobbs* explain, abortion is permitted through at least 22 weeks of

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pregnancy in 37 of the 46 member states in the Council of Europe, and through between 18–21 weeks in another three countries, either on request, on broad socioeconomic grounds, or based on the health of the pregnant person (using criteria that do not limit that to risk to the person's life).[80]

The dissent provides a more accurate and nuanced assessment of world abortion laws and contrasts regression in the United States with the global trend "toward increased provision of legal and safe abortion care."[81] Indeed, in the past 25 years, close to 60 countries have liberalized their laws and policies on abortion.[82] Currently, 72 countries allow abortions on request and 59% of women of reproductive age live in countries that allow abortions broadly.[83] The United States is moving against this tide. It is now one of only four countries that have removed legal grounds for abortion since 1994. The other three countries are El Salvador, Nicaragua, and Poland. As the dissent notes, with the loss of U.S. constitutional protections for abortion, and in light of global liberalization of abortion laws, "it is American States that will become international outliers after today."[84]

III. The Joint Dissent: Reinforcing the Fourteenth Amendment Right to Reproductive Autonomy

In a joint opinion, Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan dissent, "[w]ith sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection."[85] The joint dissent sets out why the majority's decision to erase 50 years of precedent safeguarding individual freedom and women's equal status is unprincipled, indefensible, and constitutionally incorrect; breaches core rule-of-law principles designed to promote stability; jeopardizes other rights, from contraception to same-sex intimacy and marriage; and undermines the Court's legitimacy.

In sharp contrast to the majority and each of the concurring opinions, the dissenters also lay bare the harms of the Court's decision, warning that "[c]losing our eyes to the suffering today's decision will impose will not

make that suffering disappear."[86] Put simply, "[the Court] says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs."[87] That transforms "what, when freely undertaken, is a wonder into what, when forced, may be a nightmare."[88] Some, especially those of means, "will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate."[89] Thus, "[t]he effects will be felt most severely, as they always have been, on the bodies of the poor. The history of state abortion restrictions is a history of heavy costs exacted from the most vulnerable women."[90]

Whether or not those unable to access abortion "choose to parent, they will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose."[91] And, "[b]eyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right [to abortion] grants."[92] As the dissent recognizes, robbing a person of this right will "alter her views of herself and her understanding of her place in society as someone with the recognized dignity and autonomy to make these choices."[93] Without this right, "the loss of power, control, and dignity will be immense."[94]

The dissent catalogues the devastating questions that, as they foresaw, are arising with urgency in the wake of *Dobbs*:

> "Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur, before the Fourteenth Amendment's protection of life kicks in? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment's protection of liberty and equality?"[95]

These questions begin to reveal the profound damage *Dobbs* is causing for each real person behind them. In sum, "[w]ithdrawing a woman's right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today's Court has wrenched this choice from women and given it to the States."[96]

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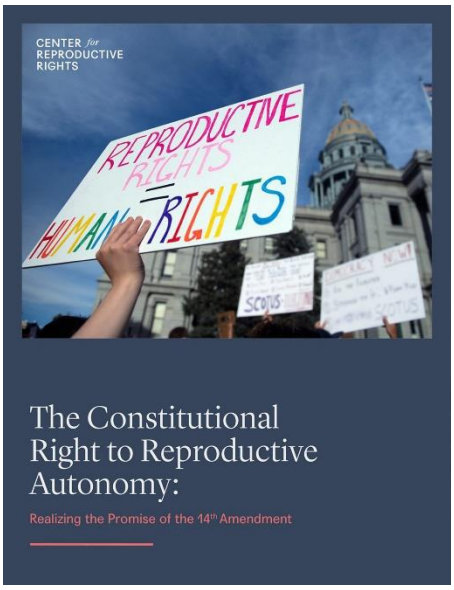
Mindful of this reality, the joint dissent lays out a constitutional understanding that can guide future opinions to rebuild and guard the right to abortion. Constitutional interpretation, the dissenters explain, requires acknowledging that "those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights."[97] But because "[t]he Framers (both in 1788 and 1868) understood that the world changes . . . they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions."[98] Under this approach, "[r]especting a woman as an autonomous being, and granting her full equality, mean[s] giving her substantial choice over this most personal and most consequential of all life decisions."[99]

IV. The *Dobbs* Decision is a Global Outlier

The *Dobbs* decision and U.S. regression on abortion rights has been widely condemned as a violation of human rights. Responding to the Supreme Court's decision in *Dobbs*, then United Nations High Commissioner for Human Rights Michelle Bachelet reiterated human rights protections for abortion and the impact that the decision will have on the fundamental rights of millions within the United States, particularly people living on low incomes and people belonging to racial and ethnic minorities.[100] United Nations independent human rights experts, including the UN Working Group on discrimination against women and girls, the UN Special Rapporteur on health, and the UN Special Rapporteur on violence against women, similarly denounced *Dobbs*.[101] At the conclusion of a human rights review of the United States in August 2022, the UN Committee on the Elimination of Racial Discrimination (CERD) noted deep concerns with the decision and recommended that the United States address the disparate impact that it would have on racial and ethnic minorities, Indigenous women, and those living on low incomes.[102]



This Center report explores the constitutional rights and guarantees in U.S. law that undergird the right to reproductive autonomy.

The condemnation is well-grounded in human rights. Over the past 25 years, international human rights experts and mechanisms have confirmed that abortion is a fundamental human right, critical to ensuring health, justice, and equality. United Nations treaty monitoring bodies, which monitor compliance with international human rights treaties, have found that restrictive abortion laws violate a range of human rights, including rights to life, privacy, health, equality and non-discrimination, and freedom from cruel, inhumane, and degrading treatment.[103] In March 2022, the World Health Organization, the leading global public health expert body, published an updated Abortion Care Guideline which recognizes abortion as an essential health service that is necessary to the realization of human rights.[104] National courts in countries around the world are recognizing robust protections for reproductive autonomy, grounded in national constitutional provisions and in human rights, contributing to a global trend in liberalization of abortion laws.[105]

CONCLUSION

Contrary to the overwhelming global trend, *Dobbs* is a significant retrogression of rights in the United States. But *Dobbs* is not the final word on the Constitution's protection for the right to abortion, or for a broader and deeper right to reproductive autonomy. The Fourteenth Amendment *does* protect those rights through its multiple and interdependent guarantees of life, liberty, and equal protection.[106] Building on the joint dissent, and consistent with the approach of other courts, jurists, and scholars, a correct interpretation of those constitutional provisions requires robust protection for the human right to reproductive autonomy.

That interpretation recognizes that the Constitution charts a path forward. A path that is more, not less, protective of individual rights, and more, not less, inclusive of people who have been excluded from exercising those rights in the past. And it includes protecting the fundamental rights of every individual—including pregnant people—to control their own bodies, lives, and futures.

Endnotes

1. This analysis is based on an excerpt of a forthcoming law review article co-authored by Center attorneys. *See* Hillary Schneller, Diana Kasdan, Risa Kaufman & Alex Wilson, Dobbs v. Jackson Women's Health Organization: *Reckoning With its Impact and Charting a Path Forward*, 25 U. PA. J. CONST. L. (forthcoming Apr. 2023).
2. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).
3. *Id*. at 2284 (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955)).
4. *See id*. at 2256, 2268, 2277, 2284.
5. *Id*. at 2242.
6. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Carey v. Population Servs., Int'l, 431 U.S. 678 (1977); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).
7. *Dobbs*, 142 S. Ct. at 2326 n.4. (Breyer, Sotomayor, and Kagan JJ., dissenting) (quoting *Obergefell*, 576 U. S. at 671).
8. *Id*.
9. *Obergefell*, 576 U.S. at 671.
10. *Id*. at 663–64 (internal citation and quotation marks omitted).
11. *Id*. at 664–65.
12. *Id*. at 671.
13. For additional discussion, *see* Reva B. Siegel, *Memory Games:* Dobbs's *Originalism as Anti-Democratic Living Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023).
14. *Dobbs*, 142 S. Ct. at 2254 ("Not only are respondents and their amici unable to show *that a constitutional right to abortion was established when the Fourteenth Amendment was adopted*, but they have found no support for the existence of an abortion right that predates the latter part of the 20th century. . . ." (emphasis added)); *id*. at 2257 ("Instead of seriously pressing the argument that *the abortion right itself has deep roots*, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right." (emphasis added)).
15. Washington v. Glucksberg, 521 U.S. 702, 710–19 (1997) (discussing history and tradition but nowhere referring to the burden of showing a deeply rooted positive *right* to physician aid in dying).
16. *Dobbs*, 142 S. Ct. at 2254; *see generally* Brief of American Historical Association and Organization of American Historians as Amicus Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4341742.

17. *See* Brief of American Historical Association and Organization of American Historians as Amicus Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4341742, at *18–20.

18. *See* Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae In Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (No. 19-1392), 2021 WL 4340072, *13–16 (discussing campaign in late 1800s to criminalize abortion on grounds that "nature's laws" required women to be wives and mothers and emphasizing campaign's goal to increase birthrate of Protestant women, as compared to "foreign" and Catholic women, based on anti-immigrant, anti-Catholic views).

19. *See* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME 90-112 (1998) (discussing how 19th and early 20th century campaigns against abortion and against midwives (referred to as "the midwife problem") "became intertwined into one"); Keisha Goode & Barbara Katz Rothman, *African-American Midwifery, a History and a Lament*, 76 AMER. J. ECON. & SOCIOL. 65 (2017) (discussing efforts to marginalize midwives, who were predominantly Black women, during the same time period).

20. *Cf. Dobbs*, 142 S. Ct. at 2250–53.

21. G. Geis, *Lord Hale, Witches, and Rape*, 5 BRIT. J. OF LAW & SOC'Y 26 (1978).

22. On the other hand, looking to "history and tradition" may not overdetermine the constitutional inquiry; it may be "standardless," allowing judges to "look out over a crowd and pick friends," *i.e.*, to canvass the historical record and rely on select facts to support a preferred outcome. *See* Siegel, *supra* note 13 (manuscript at 49).

23. *See* Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 37–38 (Nov. 10, 2022) (discussing how "a decision to privilege any historical moment prior to the era in which social movements challenged traditional gender norms is a decision to read the Constitution as silent on abortion rights").

24. *Dobbs*, 142 S. Ct. at 2324–25 (Breyer, Sotomayor, and Kagan JJ., dissenting).

25. *Id.* at 2325.

26. *See* Brief of the Howard University School of Law Human and Civil Rights Clinic as Amicus Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4340231, *4–8; Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org. (No. 19-1392), 2021 WL 4427025, at *12.

27. PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 90–117 (1998) (explaining how the "constitutional right to be a parent . . . has ample, but heretofore unacknowledged support in the history of antislavery and Reconstruction"); *see also* Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.- C.L. L. REV. 299 (1993) (drawing on the history underlying the

Fourteenth Amendment to demonstrate the ways in which its supporters understood the rights to family, including procreation, contraception and abortion, as fundamental aspects of liberty); *See* Peggy Cooper Davis, *Overturning Abortion Rights Ignores Freedoms Awarded After Slavery's End, Says Peggy Cooper Davis*, THE ECONOMIST (Jun. 13, 2022).

28. *See generally* Brief for Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4197213 [hereinafter Respondents' Br.].
29. *Dobbs*, 142 S. Ct. at 2245–46.
30. *Compare id*. (citing Geduldig v. Aiello, 417 U.S. 484 (1974) *with* Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae In Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (No. 19-1392), 2021 WL 4340072, *7–11 (discussing post-*Geduldig* sex equality cases, including Nev. Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003) and United States v. Virginia, 518 U.S. 515 (1996)).
31. *See Dobbs*, 142 S. Ct. at 2332 (Breyer, Sotomayor, and Kagan JJ., dissenting).
32. *Id*.
33. *See* Bowers v. Hardwick, 478 U.S. 186, 192–93 (1986) (majority of states had criminal sodomy laws), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). *Lawrence* observes further that those 1800s-era criminal sodomy laws were not directed at same-sex sexual activity but "sought to prohibit nonprocreative sexual activity more generally." 539 U.S. at 559.
34. *See* Brief and Appendix on Behalf of Appellee, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931, at *6.
35. *Dobbs*, 142 S. Ct. at 2277 (majority opinion).
36. *Id*. at 2331–32 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
37. *Id.* at 2301 (Thomas, J. concurring).
38. *Id*. at 2319 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
39. *See Casey*, 505 U.S. at 866; *accord id.* at 864.
40. *Dobbs*, 142 S. Ct. at 2319 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
41. *Id*. at 2319–20.
42. *Id*. at 2335, 2348.
43. *Id*. at 2348.
44. *Id*. at 2277 (majority opinion).
45. *See, e.g.*, Brief of Birth Equity Organizations and Scholars as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4311857 [hereinafter Birth Equity Br.]; Brief of American College of Obstetricians and Gynecologists as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org.,142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4312120 [hereinafter ACOG Br.].

46. *See* ACOG Br. at *10.
47. Birth Equity Br. at *9.
48. Elizabeth G. Raymond & David Grimes, *The Comparative Safety of Legal Induced Abortion*, 119 OBSTET. & GYNECOL. 215, 216, 217 (2012).
49. *See* Birth Equity Br. at *7.
50. GENDER EQUITY POLICY INSTITUTE, THE STATE OF REPRODUCTIVE HEALTH IN THE UNITED STATES: THE END OF ROE AND THE PERILOUS ROAD AHEAD FOR WOMEN IN THE *DOBBS* ERA 6 (Jan. 19, 2023).
51. *See, e.g.*, Jamila K. Taylor, *Structural Racism and Maternal Health Among Black Women*, 48 J. L., MED. & ETHICS 506 (2020); Saraswathi Vedam, et al., *The Giving Voice to Mothers Study: Inequity and Mistreatment During Pregnancy and Childbirth in the United States*, 16 REPROD. HEALTH 77 (2019); Judith A. Lothian, *The Continued Mistreatment of Women During Pregnancy and Childbirth*, 28 J. PERINATAL EDUC. 183 (2019).
52. *See* Respondents' Br. at *38–40 (citing sources).
53. Brief of Economists as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4341729 at *25 [hereinafter Economists' Br.].
54. *See generally id*.
55. *Id.* at *3, *10, *13.
56. *Dobbs*, 142 S. Ct. at 2262 (majority opinion).
57. LEGAL DEF. FUND, *LDF Issues Statement on Misleading References to Brown v. Board of Education by Supreme Court Justices* (Dec. 2, 2021).
58. *Dobbs*, 142 S. Ct. at 2342 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
59. *Id*. at 2277 (majority opinion).
60. *Id*.
61. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019); Gill v. Whitford, 138 S. Ct. 1916 (2018); Shelby Cnty. v. Holder, 570 U. S. 529 (2013).
62. Sherrilyn Ifill, *Stealing the Crown Jewels*, N.Y. REVIEW OF BOOKS (May 12, 2022); *see also e.g.*, Jennifer Weiss-Wolf et al., *Supreme Court's Abortion Ruling Shows What Happens When Democracy is Thwarted*, BRENNAN CTR. FOR JUSTICE (June 24, 2022).
63. *See, e.g.*, Weiss-Wolf, *supra* note 62.
64. *See Dobbs*, 142 S. Ct. at 2259 (majority opinion).
65. *See, e.g.*, Economists' Br.
66. *See, e.g.*, NAT'L RIGHT TO LIFE, NRLC POST-*ROE* MODEL ABORTION LAW VERSION 2, (July 4, 2022).
67. *See, e.g.*, Compl. Alliance for Hippocratic Oath v. U.S. Food & Drug Admin., (N.D. Tex. Nov. 18, 2022) (No. 2:22-cv-00223), ECF No. 1

(requesting, at a minimum, F.D.A. remove approval for mifepristone and, more broadly, seeking nationwide ban on medication abortion); Caroline Kitchener, *The Next Frontier for the Antiabortion Movement: A Nationwide Ban*, WASH. POST (May 2, 2022).

68. For discussion of additional questions the courts will confront, *see, e.g.*, David S. Cohen, Greer Donley, and Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023).
69. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (emphasis in original).
70. *Id*. at 2309 (Kavanaugh, J., concurring).
71. *Id*.
72. *Id*. at 2305, 2310.
73. *Id*. at 2328 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
74. *Id*. at 2310–11, 2314 (Roberts, C.J., concurring in the judgment).
75. *Id*. at 2310.
76. *Dobbs*, 142 S. Ct. at 2243 n.15 & 2270 (majority opinion); *id*. at 2312 (Roberts, C.J., concurring in the judgment).
77. *Dobbs*, 142 S. Ct. at 2312 (Roberts, C.J., concurring in the judgment) (internal quotation marks and citation omitted).
78. *Id.*; *cf.* CTR. FOR REPROD. RTS., U.S. ABORTION LAWS IN GLOBAL CONTEXT (Sept. 2022).
79. CTR. FOR REPROD. RTS., *The World's Abortion Laws* (last visited March 8, 2023).
80. *See* Brief of European Law Professors as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4340178.
81. *Dobbs*, 142 S. Ct. at 2340 (Breyer, Sotomayor, Kagan, JJ., dissenting).
82. *See* Risa Kaufman et al., *Global Impacts of* Dobbs v. Jackson Women's Health Organization *and Abortion Regression in the United States*, 30 SEXUAL AND REPROD. HEALTH MATTERS 1 (2022) (providing overview of abortion liberalization in regions around the globe).
83. *See id.*
84. *Dobbs*, 142 S. Ct. at 2341 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
85. *Id*. at 2350.
86. *Id*. at 2346.
87. *Id*. at 2317.
88. *Id*. at 2318.
89. *Id.* at 2318–2319.
90. *Id.* at 2345 n.27.

91. *Id.* at 2339.
92. *Id*. at 2346.
93. *Id*. (internal quotes omitted).
94. *Id*.
95. *Id*. at 2336.
96. *Id*. at 2346
97. *Id*. at 2325.
98. *Id*.
99. *Id*. at 2317.
100. Michelle Bachelet, *Bachelet on US ruling on Dobbs v. Jackson Women's Health Organization* (June 24, 2022).
101. Working Group on Discrimination Against Women and Girls, Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health & Special Rapporteur on Violence Against Women, Its Causes and Consequences, Joint Web Statement by UN Human Rights Experts on Supreme Court Decision to Strike Down Roe v. Wade (June 24, 2022).
102. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, CONCLUDING OBSERVATIONS TO THE UNITED STATES ¶¶ 35-36 (Sept. 2022).
103. *See generally* CTR. FOR REPROD. RTS., BREAKING GROUND 2020: TREATY MONITORING BODIES ON REPRODUCTIVE RIGHTS; *see also* Brief of United Nations Mandate Holders as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4427032, at *7–31. Affirming that human rights are foundational to the provision of and access to quality abortion care, the World Health Organization's 2022 Abortion Care Guideline is undergirded by international human rights. *See* WORLD HEALTH ORG., ABORTION CARE GUIDELINE WEB ANNEX A. KEY INTERNATIONAL HUMAN RIGHTS STANDARDS ON ABORTION (2022).
104. WORLD HEALTH ORG., ABORTION CARE GUIDELINE, 13–14 (2022); *see also* CTR. FOR REPROD. RTS., WHO'S NEW ABORTION GUIDELINE: HIGHLIGHTS OF ITS LAW AND POLICY RECOMMENDATIONS (Mar. 2022).
105. *See, e.g.*, CTR. FOR REPROD. RTS., THE CONSTITUTIONAL RIGHT TO REPRODUCTIVE AUTONOMY: REALIZING THE PROMISE OF THE 14TH AMENDMENT, 44–45 (Jul. 2022) (discussing cases from high courts in India, Kenya, Mexico, and Nepal).
106. *See generally id.*