

TAKE BACK
THE COURT

Supreme Court Set to Eviscerate Abortion Rights

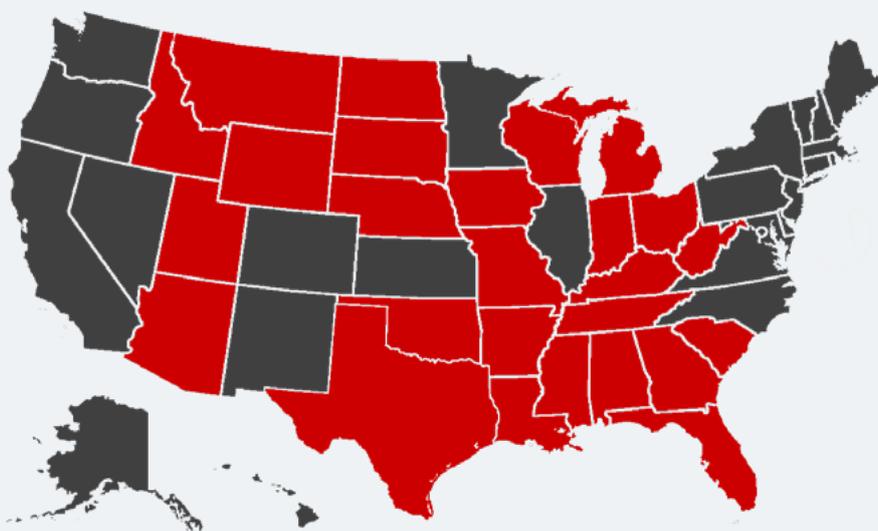
June 2022

Supreme Court Set to Eviscerate Abortion Rights

By granting cert in *Dobbs v. Jackson Women's Health Organization*, the conservative justices have given themselves the opportunity to end abortion rights as we know them. The leaked draft opinion written by Justice Alito makes clear that the Court is planning — and likely executing — an extreme decision that attacks the bodily autonomy of women, trans, and nonbinary people.¹ *Dobbs* is the culmination of anti-abortion politicians' decades-long fight to end safe and legal abortion, a crusade that has always been about power — about who has the power to choose to make decisions and who has decisions forced on them. Ending abortion access will disproportionately harm Black, Indigenous, and people of color, people with disabilities, people in rural areas, young people, immigrants, and those having trouble making ends meet. And as the leaked draft opinion indicates, abortion may be the first of many rights to fall as the Court dismantles privacy protections, including contraception access, interracial marriage, marriage equality, and private sexual relationships.

26 States Are Certain or Likely to Ban Abortion Without *Roe*

22 states have laws in place that would make them certain to ban abortion if *Roe* were overturned. An additional four states have political composition, history and other indicators—such as recent actions to limit access to abortion—that show they are likely to ban abortion without federal protections in place.



Data Source: Guttmacher Institute

A Perilous Term for Reproductive Rights

In 2018, Mississippi's sole abortion clinic challenged an unconstitutional state law that banned abortions after 15 weeks. The lower federal courts sided with the clinic and struck down the statute. Even the radically conservative Fifth Circuit held in December 2019 that "in an unbroken line dating to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion . . ." ² That's because the abortion ban was clearly, unquestionably unconstitutional under half a century of Supreme Court precedent. But in a brazenly political move, after Justice Ginsburg's death and conservatives stole another seat on the Court just days before an election by rushing Justice Barrett's confirmation, the justices announced in May 2021 that they would hear the case.

With Justice Barrett ensconced on the Court, anti-abortion extremists understood that their efforts to capture the Court in order to end abortion rights had come to fruition, and escalated their ask in *Dobbs*. Previously, the state of Mississippi speciously argued that the 15-week ban could somehow be consistent with *Roe* (it couldn't), but once Justice Barrett replaced Justice Ginsburg and the Court indicated that it was open to radical change, the state changed its argument to ask that the Court overturn *Roe* entirely.

The right-wing justices were so eager to implement their radical agenda, they did

not even wait for the *Dobbs* case to proceed before eviscerating abortion rights. In September — with *Roe* still ostensibly in place — the conservative justices used the shadow docket to bless Texas's draconian six-week abortion ban, effectively nullifying *Roe* for millions of people. ³ Over the course of the fall, the justices parried several lawsuits brought by abortion providers and by the U.S. Department of Justice challenging the blatantly unconstitutional law and kept the Texas ban intact. ⁴

The right-wing justices have made their agenda clear and are rushing to enact it as fast as they can. During oral argument in *Dobbs*, Justice Sotomayor asked whether the Court could "survive the stench" of overturning 50 years of reproductive rights precedent — a plainly political move by the Court's right-wing justices. ⁵ In his draft opinion, Justice Alito answered with a resounding "no" — and that in fact, the conservative justices revel in the stench of the institution's imploding legitimacy.

This Court will stop at nothing to eviscerate reproductive rights. We need to be clear about exactly what this decision means: Unelected, right-wing justices will be forcing people to carry pregnancies against their will. In the process, they will dismantle the privacy rights that formed the basis of *Roe* and the landmark cases that struck down bans on contraception, interracial marriage, marriage equality, and private sexual acts.

Anti-Abortion Politicians are Already Attacking Abortion Rights in Anticipation of the Court's Decision in *Dobbs*

Alito's draft opinion gives states the ability to regulate "prenatal life at all stages of development" and would allow any state to implement an abortion ban at any stage of pregnancy.⁶ This means that a long-held fundamental right to abortion would instead become a privilege based on where you live — a troubling reality already faced by many pregnant people living where *Roe* has faced attacks by state lawmakers:

- At least [26 states](#) are certain or likely to ban abortion if the Court overturns *Roe* and *Planned Parenthood v. Casey*, which provide for the fundamental right to abortion.
- Around [58 percent](#) of American women of reproductive age live in states hostile to abortion rights, according to Guttmacher Institute, or about 40 million women.⁷
- People living in the South and Midwest are likely to face the steepest obstacles to accessing an out-of-state abortion; the average travel distance for Louisianans, for instance, would increase 18-fold to more than a 660 mile one-way trip.⁸

In anticipation of a radical decision in *Dobbs*, several state legislatures, including Texas, Oklahoma, Louisiana, Missouri, Arkansas, and others, are in the

process of criminalizing abortion, and some bills even extend to abortions provided out-of-state.⁹ In addition, many bills and laws, such as SB 8 in Texas, convert citizens into bounty hunters, offering up to \$10,000 to report a known or suspected abortion.¹⁰ In one Texas congressional district, a central issue in the Republican primary was whether those who have abortions should receive the death penalty.¹¹ **The stakes could not be higher.** Criminal and civil proceedings, investigations into miscarriages, and potentially tracking the fertility of residents all have high emotional, mental, economic, and social tolls; felony convictions can also strip people of their right to vote.



These draconian state laws also implicate other areas of reproductive rights, including contraception and fertility treatments. Drafted bills in several states may ban reliable forms of contraception. In the Louisiana

legislature, extremists argued that using an IUD, which is among the most effective and long-acting forms of contraception, should constitute a homicide under the proposed law.¹² The use of IUDs, Plan B, and other emergency contraception could all be considered homicide under proposed new laws.¹³ And fertility treatments, such as in vitro fertilization (IVF), may soon be criminalized for those wishing to start families; many of these laws and bills give fertilized eggs legal personhood, making it illegal for facilities to discard or freeze fertilized embryos that are not implanted.¹⁴

The *Dobbs* decision will enable states to ban and criminalize abortion without exception, and embolden them to seek bans on certain forms of contraception and fertility care. The draft decision constitutes a gross violation of individual rights and personal liberty. And conservatives have indicated that they will go even farther: Senate Minority Leader Mitch McConnell has made it abundantly clear that passing a **national abortion ban** will be a priority if *Roe* and *Casey* are overturned and Republicans regain control of Congress.¹⁵ **Make no mistake: all of our rights are on the line if the Supreme Court overturns *Roe*.**

An Adverse Ruling in *Dobbs* will Open Up the Floodgates to Bans on Other Rights Grounded in Privacy

Alito's leaked draft opinion transcends abortion rights: it attacks broader privacy

rights with longstanding precedent in U.S. law. According to Alito, "a right to privacy... is also not mentioned [in the Constitution]."¹⁶ But an implied right to privacy underlying the Bill of Rights has long been recognized, and the Supreme Court has for decades relied on such a right to strike down bans on contraception (*Griswold v. Connecticut*, 1965), interracial marriage (*Loving v. Virginia*, 1967), private sexual acts (*Lawrence v. Texas*, 2003), and marriage equality (*Obergefell v. Hodges*, 2015).

By stating in the draft opinion in *Dobbs* that a right to privacy is not constitutionally protected, Alito and the radical conservative Court are opening the floodgates to legislative bans and litigation that will attack these core rights. **Bans on interracial marriage, marriage equality, private sex acts, and contraception are far from fringe ideas among conservative politicians and justices.** Senator Mike Braun said in March of 2022 that the Supreme Court should have never legalized interracial marriage nationwide and instead left those bans up to states.¹⁷

Alito's leaked draft opinion transcends abortion rights: it attacks broader privacy rights with longstanding precedent in U.S. law.

Senator Marsha Blackburn described *Griswold v. Connecticut*, which recognized a right to contraception and struck down bans on people accessing birth control, as a “[c]onstitutionally unsound ruling.”¹⁸ Justices Thomas and Alito have already called for the Court to overturn *Obergefell* and LGBTQ rights.¹⁹ **By stating in the *Dobbs* draft that there is no constitutional right to privacy, the conservative majority on the Court has demonstrated that it poses a clear and credible threat to these and other rights.**

We Must Expand the Court to Protect Reproductive Rights and Bodily Autonomy

In the days following Justice Alito’s frightening draft opinion, momentum behind Court expansion has only grown. In May, a coalition of 11 state-based groups working to protect abortion access in red states, blue states, and purple states [announced support for Supreme Court expansion](#). These are the people on the ground closest to the fight, and they know first-hand that “the fight to protect abortion rights must include the fight to expand the Supreme Court.”

The radical conservative justices on the Court have made it abundantly clear that they are deeply hostile to abortion rights and reproductive freedom. The Court is eager to upend half a century of precedent and is shameless about its anti-abortion agenda; it already allowed Texas to ban abortion nine months ago. Even if Congress is able to codify

abortion rights into law, a Court this hostile to abortion rights and gender equity will not let such a law stand. As the Court barrels forward with its radical agenda and repeals the last century of progress, we lose our fundamental rights to our bodies, our reproductive decisions, our privacy, and the right to live in a democracy that respects women, trans, and nonbinary people as full and equal citizens. **The only way to protect our rights and restore balance and integrity to the Court is to immediately take action to add four new seats.**

Endnotes

- 1 Draft opinion of Justice Samuel Alito, *Dobbs v. Jackson Women's Health Org.*, Docket No. 19-1392, (circulated Feb. 10, 2022) (published by Politico May 2, 2022).
- 2 *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019).
- 3 *Whole Woman's Health v. Jackson*, 594 U.S. ___ (2021) (denying petition for injunctive relief).
- 4 See *Whole Woman's Health v. Jackson*, 595 U.S. ___ (2021); *United States v. Texas*, 595 U.S. ___ (2021).
- 5 Transcript of Oral Arg. at 15, *Dobbs v. Jackson Women's Health Org.*, Docket No. 19-1392 (Dec. 1, 2021).
- 6 Draft Opinion of *Dobbs* at 66.
- 7 The linked study measured the impact of abortion restrictions on women. Trans and nonbinary people will also be impacted by the evisceration of abortion and reproductive rights.
- 8 ["If Roe v. Wade Falls: Travel Distance for People Seeking Abortion,"](#) Guttmacher Institute (accessed Jun. 1, 2022).
- 9 See State Legislation Tracker, *Guttmacher Institute* (accessed June 1, 2022); see also S.B.1202, 101st Gen. Assemb., 2nd Regular Session (Mo. 2022).
- 10 Maggie Astor, ["Here's What the Texas Abortion Law Says,"](#) *The New York Times* (Sept. 9, 2021).
- 11 Andrew Stanton, ["Death Penalty for Abortions Becomes Pivotal Issue in GOP Runoff in Texas,"](#) *Newsweek* (Mar. 27, 2022).
- 12 ["That's not an abortifacient': Watch these two male legislators argue about IUDs,"](#) CNN Politics (May 13, 2022); see also H.B.813, 71st Gen. Assemb., Regular Session (La. 2022). Note: The bill has since been withdrawn.
- 13 Alicia Victoria Lozano, ["Some birth control could banned if Roe v. Wade is overturned, legal experts warn,"](#) NBC News (May 12, 2022).
- 14 Stephanie Kirchgaessner, ["IVF treatment faces 'clear and present danger' from US anti-abortion effort,"](#) *The Guardian* (May 12, 2022).
- 15 Kelsey Vlamis, ["Sen. Mitch McConnell said a national abortion ban would be 'possible' if Roe v. Wade is overturned,"](#) *Business Insider* (May 7, 2022).
- 16 Draft Opinion of *Dobbs* at 9.
- 17 Jordan Weissmann, ["Senator Says Legalizing Interracial Marriage Was a Mistake, Backtracks Unconvincingly,"](#) *Slate* (Mar. 22, 2022).
- 18 Steve Benen, ["Blackburn denounces Supreme Court contraception ruling from 1965,"](#) MSNBC (Mar. 21, 2022).
- 19 Nina Totenberg, ["Justices Thomas, Alito Blast Supreme Court Decision on Same-Sex Marriage Rights,"](#) NPR (Oct. 5, 2021).