The Leaked Supreme Court Ruling Opinion: Implications for Abortion Access

On May 2, 2022, Politico published a leaked draft of the US Supreme Court’s opinion in Dobbs v Jackson Women’s Health Organization, upholding a Mississippi law banning abortions after 15 weeks’ gestation except in medical emergencies or severe fetal abnormality. The draft opinion would overturn the landmark Roe v Wade case (1973) that established a constitutional right to abortion before fetal viability. Roe has been settled precedent for a half-century. If the Court’s official ruling does overturn Roe, abortion decisions will devolve to the states to protect, ban, or regulate access, with vast geographic variability.

A Breach of Trust

The leak of the brief was historic, the first since the Court first assembled in 1790, and has significant ramifications for the Court’s integrity and legitimacy. Chief Justice John Roberts called the leak a “singular and egregious breach” of trust. Justice Sonia Sotomayor said during oral arguments, the Court could not survive the “stench” in public perception that “the Constitution and its reading are just political acts.” Just last year, the Supreme Court let stand a Texas law banning abortions after 6 weeks of pregnancy. Texas crafted the law to evade constitutional review, opening the door to states’ violations for the Court’s integrity and legitimacy. Chief Justice John Roberts called the leak a “singular and egregious breach” of trust. Justice Sonia Sotomayor said during oral arguments, the Court could not survive the ramifications for the Court’s integrity and legitimacy. Chief Justice John Roberts called the leak a “singular and egregious breach” of trust. Justice Sonia Sotomayor said during oral arguments, the Court could not survive the “stench” in public perception that “the Constitution and its reading are just political acts.” Just last year, the Supreme Court let stand a Texas law banning abortions after 6 weeks of pregnancy. Texas crafted the law to evade constitutional review, opening the door to states’ obligations to uphold previous rulings—does not apply to Roe: “our most important constitutional decisions have overruled prior precedent.” Yet the precedents Justice Alito claimed that stare decisis—courts’ obligation to uphold previous rulings—does not apply to Roe: “our most important constitutional decisions have overruled prior precedent.” Yet the precedents Justice Alito claimed that stare decisis—courts’ obligation to uphold previous rulings—does not apply to Roe: “our most important constitutional decisions have overruled prior precedent.” Yet the precedents Justice Alito claimed that stare decisis—courts’ obligation to uphold previous rulings—does not apply to Roe: “our most important constitutional decisions have overruled prior precedent.” Yet the precedents Justice Alito claimed that stare decisis.”

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Abortion Essential to “ Ordered Liberty”

Justice Samuel Alito’s draft opinion states that abortion rights are not “deeply rooted” in the nation’s history and not essential to “ordered liberty.” He argued that abortion is unique because it involves a “potential life.” Importantly, Justice Alito claimed that stare decisis—courts’ obligation to uphold previous rulings—does not apply to Roe: “our most important constitutional decisions have overruled prior precedent.” Yet the precedents Justice Alito was referring to all entailed granting citizens’ rights, including racial integration, intermarriage, and marriage. Overturning Roe would remove a constitutional right relied upon for 50 years.

State Divisions in a Post-Roe America

If Roe were overturned, 26 states are certain or likely to ban abortions. Nine states have in place bans enacted before Roe; 13 states have “trigger” laws that would ban abortions immediately; and 13 have bans after 6 or 8 weeks of pregnancy. Some of these states have more than 1 law in place that would ban abortion. Some states offer no exception for rape, incest, or nonfatal health risks. Other states could impose harsh restrictions making it difficult to access abortions (the eTable in the Supplement provides a summary of state abortion restrictions and protections). In 2021, 19 states passed more than 100 restrictive laws; thus far in 2022, 10 states have passed 37 restrictive laws.

Liberal states are enhancing abortion rights—4 states throughout pregnancy and 12 states prior to fetal viability. Fourteen states prohibit threats, intimidation, harassment, vandalism, or obstruction at abortion facilities. Seven states require health plans to cover abortion or provide state funds. Five states have expanded physician eligibility to provide abortions. Two states have laws protecting pregnant individuals and those who assist them from legal actions. Abortion rights in a post-Roe legal landscape could depend entirely on the state where a person resides.

Foreclosing Pathways to Safe and Legal Abortions

If the draft opinion holds, 58% of individuals of childbearing potential (an estimated 40 million) would lose the right to abortion in their state. These people will have to travel to states that permit abortions or receive abortion medication through telehealth appointments, the internet, or other sources. Millions of people would have to travel hundreds of miles to receive abortion care, with the average distance increasing from 25 miles to an estimated 125 miles. The percentage of people living more than 200 miles away from an abortion clinic would increase from 1% to an estimated 29%. Various hardships would prevent many individuals from traveling long distances to receive abortion services, such as short windows between pregnancy recognition and gestational limits, taking time off from work, finding childcare, and covering travel costs. If Roe were overturned, increased travel distances alone would be projected to prevent 93,500 to 143,500 individuals each year from accessing abortion care.

Medication abortions (enabled via prescription of mifepristone and misoprostol) currently account for more than half of all abortions. The US Food and
Drug Administration (FDA) currently permits abortion medication prescriptions via telehealth through 10 weeks’ gestation. While telehealth appointments would facilitate intrastate access to some abortions in states with increasingly shorter gestational limits, interstate access to abortion in general, including medication abortion, raises novel legal questions. Most telehealth abortion services operate only in states where abortion is legal. Nineteen states prohibit telehealth prescriptions for abortion medication. Missouri is considering a bill prohibiting out-of-state abortion assistance, authorizing lawsuits against anyone aiding or abetting an abortion. Abortion medication could be ordered online from sources outside the US, but the FDA generally prohibits the importation of approved drugs for personal use.

Enforcing Abortion Restrictions
Historically, state officials have enforced abortion restrictions. However, Texas, Idaho, and Oklahoma recently authorized citizen enforcement. Texas and Oklahoma laws apply to anyone who “aid[s] or abets” an abortion, including health care workers, family members, or ride-share drivers. Oklahoma’s law applies to anyone paying for, or reimbursing, abortions “through insurance or otherwise.” This could make charitable donations for abortion services unlawful. Traditionally, abortion laws are not enforced against pregnant individuals, but some prosecutors have charged people who self-induce abortion with crimes of manslaughter and fetal homicide.

The Patient-Physician Relationship
Abortion bans subject physicians to a range of penalties. Texas can impose a maximum penalty of life imprisonment, and 11 other states would impose penalties of up to 10 to 15 years. Threats of prosecution undermine clinicians’ ability to provide safe, evidence-based care and to counsel patients honestly, impeding the patient-physician relationship. Given harsh penalties, physicians may cease treating pregnancy loss, with no clear line between treating miscarriages and abortions. A shrinking workforce for both abortion services and pregnancy loss services could have far-reaching consequences for maternal and infant health outcomes.

Equity as a Defining Value
Abortion bans would disproportionately affect underserved and marginalized individuals, including those living in poverty or in rural areas, those from ethnic and racial minority groups, young individuals, undocumented people, and those who experience intimate partner violence. Approximately 75% of people who have abortions have incomes that are at or near the federal poverty line. Individuals who have abortions also disproportionately work in jobs with low wages and little flexibility, posing significant barriers to traveling long distances to access care. Medicaid recipients, which includes 19% of all individuals of childbearing age, must pay out of pocket because federal funding of abortion is prohibited under the Hyde Amendment.

Most patients who seek abortion services are from ethnic and racial minority groups: an estimated 81% in Mississippi, 79% in Georgia, and 75% in Texas. Individuals from these racial and ethnic minority groups are more likely to lack health insurance. Bans on abortion would likely increase pregnancy-related deaths, and Black individuals are 3 times more likely than White individuals to die of pregnancy-related causes. Young adults and adolescents, who are less likely to have a steady source of income, account for 72% of patients who seek abortion services. Survivors of intimate partner violence, which affects nearly 1 in 3 women, experience disproportionately high rates of forced pregnancy. They also encounter barriers to abortion services due to abusive partners.

Should the Court’s official ruling follow the reasoning in the leaked opinion, marginalized communities could lose fundamental rights. Rights to interracial marriage, same-sex marriage, contraception, and consensual sexual relations also rely on the right to privacy. Eliminating or reducing constitutionally protected privacy rights will erode personal autonomy and dignity, while also jeopardizing the health and emotional well-being of some of society’s most vulnerable.

REFERENCES