

Health Care in Motion

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Abortion is Essential Health Care

As [physicians](#), [patients](#), [global governing bodies](#), and [countries around the world](#) understand, abortion is an essential part of health care. And although there is no fundamental right to health care in the United States, for nearly 50 years the Supreme Court has recognized the constitutional right to abortion. It appears that this is about to change. The Supreme Court is poised to overturn legal precedent in a radical way, eliminating this important right, and allowing state legislatures to criminalize abortion. If this happens, the key question then becomes how policymakers, advocates, and communities will respond to preserve access and provide alternate pathways for people seeking abortion services.

The *Dobbs* Draft Opinion

On May 2, 2022, a [draft of the Supreme Court's opinion](#) in the case *Dobbs v. Jackson Women's Health Organization* was leaked to the press – the first such breach in the Court's history. At issue in *Dobbs* is a Mississippi law that prohibits nearly all abortion beyond the 15th week of pregnancy, several weeks before the point of viability. The draft opinion, written by Justice Samuel Alito, is built on the legal conclusion that the Constitution does not protect a right to abortion, overturning the long-held precedent enshrined in *Roe v. Wade* and *Planned Parenthood v. Casey*. This [writing has been on the wall](#) for some time now – with [the Supreme Court's recent approbation of Texas's S.B. 8](#) just the latest in a long line of affronts to the principle of *Roe*. Nevertheless, the strident tone of Alito's leaked opinion underscores that the conservative legal movement has long viewed the destruction of *Roe* as a cardinal priority, [appointing judges](#) with single-minded determination. That investment is now on the precipice of paying off, at the cost of destroying a fundamental right to essential health care.

The draft opinion does not mince words. Emphasizing that the “right to an abortion” is not present in the text of the Constitution itself, Justice Alito writes that “*Roe* was egregiously wrong from the start.” Of course, there are many individual rights that do not appear in the language of the Constitution that we nonetheless cherish as fundamental – the right to travel, the right to privacy, or the right to marry who we please, among others. In Alito's telling, the Court only recognizes such rights when they are “deeply rooted in this Nation's history and tradition” and “implicit in the concept of ordered liberty.” Sweeping to the side whether the last 50 years count as history, and ignoring the question of [whose American history and tradition](#) should be taken into account, Alito draws upon a host of ancient English legal sources for the notion that abortion rights do not belong in this category. Alito's sources are dubious, relying, for example, on Sir Matthew Hale, a 17th Century English jurist

[“who was considered misogynistic even by his era’s notably low standards.”](#) Hale is [famously responsible](#) for establishing the principles underlying the so-called spousal rape exemption – the legal notion that a husband may not be convicted of rape as against his wife. Before the makeup of the Court shifted, recognition of this type of historical injustice [moved the Court to deemphasize the “deeply rooted” standard](#), such as in the case recognizing the [right to same sex marriage](#). Justice Alito’s draft opinion firmly reverses course, anchoring his decimation of abortion protection in outmoded understandings of bodily integrity.

Absent protection as a constitutional right, abortion access would ostensibly be reduced to a policy question to be decided by states. Yet, Alito’s draft opinion still has one major hurdle to overcome. Whatever ancient history was, *Roe* has cloaked individual abortion rights in constitutional protection since 1973. “Stare decisis” is the legal principle that a court should adhere to its own precedent, absent extraordinary circumstances, for the sake of the integrity of the judicial process. To overcome this high standard, Justice Alito’s draft opinion resorts to categorizing *Roe* with the Court’s lowest moments – when it legalized racial segregation in 1896, or when laws protecting workers were struck down on dubious “freedom of contract” grounds in 1905. In this story, Justice Alito’s draft opinion enjoys the heroic company of *Brown v. Board of Education* and the cases that permitted states to enact a minimum wage. One is left only to conclude that the core principle of stare decisis [means nothing more](#) than promoting the ideological preferences of the current justices.

Until a final opinion is issued, *Roe* is still the law of the land. The Court is expected to issue a final opinion within the next two weeks. Left undisturbed, the holding from Alito’s draft opinion will permit states to criminalize abortion, or alternatively, guarantee access to it. The nation’s deep divisions will become further entrenched, with the health disparities already inherent in inequitable abortion access further exacerbated. Advocates, providers, and members of the community must be prepared to respond to this seismic shift.

Abolishing the Federal Constitutional Right to Abortion: Impact on Health

According to a recent [analysis](#) by the Center for Reproductive Rights, overturning *Roe* would mean that abortion is likely prohibited in 25 states and 3 territories. This number, and the consequences that would follow, is staggering. Results from the large, long-term [Turnaway Study](#) highlight the [increased health risks](#) of carrying an unwanted pregnancy to term versus being able to access an abortion:

- Women who were denied an abortion and gave birth experienced more life-threatening health events.
- Women denied an abortion experienced poorer mental health.
- Women denied an abortion were more likely to stay in contact with a violent partner.
- Women denied an abortion were more likely to experience unmet health-related social needs such as food insecurity years later.

Furthermore, denial of abortion care can be particularly harmful to transgender, non-binary, and gender diverse people. Pregnancy can [evoke extreme gender dysphoria](#), care for which is also [facing a constant battle](#) in states across the country.

Beyond the health impact of being denied an abortion, stripping abortion of its status as a legal health care service also jeopardizes the safety of abortion procedures.

While some people who want or need an abortion will be able to travel from a state in which care would be illegal to one in which it is legal, many others will not have the option. Even with *Roe* and *Casey* in place, affordable access to abortion is not a reality for many people across the country. Organizations including [In Our Own Voice: National Black Women’s Reproductive Justice Agenda](#) and the [National Birth Equity Collaborative](#) have amplified how abortion restrictions disproportionately harm Black women. [Indigenous Women Rising](#), the [National Indigenous Women’s Resource Center](#), and others have highlighted ways in which abortion restrictions negatively affect the health and wellbeing of indigenous and Alaska Native women. By way of one example, consider the discriminatory impact of the Hyde Amendment – a ban on using federal funding to pay for abortion that has been in place in 1976. Because the amendment directly affects people who have health coverage through or receive services through federal programs (e.g., Medicaid, the Indian Health Service), [more than half of people impacted by the Hyde Amendment are people of color](#).

Future Implications of *Dobbs*

Courts have long acknowledged a “right to privacy” in home and family life. This right to privacy has come to include, among other things, a right to marriage, including interracial and same-sex marriage, and a right to contraception. Because the logic of the Court’s draft opinion disfavors rights that are not specifically written in the Constitution, or not “deeply rooted” in U.S. history, these other privacy rights may also be at risk. As with the imminent end to the right to abortion, future judicial action overturning the right to contraception could have devastating health consequences.

Legal Strategies to Protect Patients and Providers

Many states have already passed legislation (known as [trigger laws](#)) that would make nearly all abortions illegal in the state after a decision overturning *Roe v. Wade*. This would create starker deserts of care and put greater burdens on people seeking essential services. Lawmakers and advocates are pursuing alternative legal strategies to protect those who nonetheless seek, receive, provide, or assist in the performance of an abortion. These strategies are advancing at all levels of government:

Federal Legislation

In the wake of the leaked opinion, the Senate sought movement on the [Women’s Health Protection Act](#) (WHPA), a bill that would enact a statutory (i.e., legislative) right to receive and provide abortion care. Under the WHPA, outright bans, as well as medically unnecessary restrictions or limitations, would be illegal. States would be prohibited from imposing delay tactics such as waiting periods, mandatory ultrasounds, and similar obstacles. However, in this latest attempt to enact the bill, legislators were unable to get the requisite 60 votes to support [cloture](#) (i.e., to end debate and move the bill to a vote).

Republican Senators Susan Collins (Maine) and Lisa Murkowski (Alaska), both of whom opposed advancing the WHPA, support a separate bill that they introduced in February 2022: the [Reproductive Choice Act](#). This bill would create a weaker, more limited right to abortion than the WHPA as it maintains the current status quo

under *Roe* and *Casey*. States would be prohibited from imposing an “undue burden” on abortion access. The Reproductive Choice Act has been referred to committee.

State Legislation

States, including [Connecticut](#), [New York](#), and [California](#), are enacting new laws to protect people who come to their state for abortion care. This would be particularly important for people from states where such care would be illegal. In addition to improving capacity to meet growing health care needs, these laws try to respond to evolving tactics in states such as [Texas](#) and [Idaho](#) that create overreaching causes of action against people who perform or assist in the performance of an abortion.

The table below offers a snapshot of legislative measures to enhance abortion protections and promote continued access to care.

<u>Category</u>	<u>Strategies</u>
Capacity building	<ul style="list-style-type: none"> • Expand abortion provider capacity to handle an influx of patients from states in which abortion is illegal • Provide grants to bolster security and promote the safety of patients and providers
Non-cooperation (e.g., non-extradition)	<ul style="list-style-type: none"> • Limit the ability of states that prohibit abortion to file law suits against providers and patients for legal abortions performed in the supportive state
Privacy	<ul style="list-style-type: none"> • Restrict prosecutorial access to data associated with abortion care and the interstate transfer of information about people who cross state lines for health care prohibited in their home state • Protect the home addresses of providers, patients, volunteers, and others from public discovery
Structural barriers to abortion	<ul style="list-style-type: none"> • Improve access to abortion care generally, including through robust state funding for services and expanded non-physician scopes of practice. (Read more in a previous installment of Health Care in Motion)
Medical misconduct	<ul style="list-style-type: none"> • Prohibit professional misconduct charges that punish health care providers for providing legal abortion care to patients from states where abortion is illegal • Ensure that health care providers are not barred from practice because of disciplinary action related to providing abortion care in states that have banned such services

Malpractice coverage	<ul style="list-style-type: none"> Prohibit medical malpractice insurers from taking adverse actions against a health care provider for performing a legal abortion
Freedom from interference	<ul style="list-style-type: none"> Create a cause of action against someone who unlawfully interferes with reproductive health care rights

Prosecutorial Discretion

In addition to enshrining protections in the letter of the law, advocates are looking to those responsible for enforcing laws to protect access to abortion care. This strategy relies on [prosecutorial discretion](#), or when a lawyer representing the government decides whether or not to pursue a case and charge a person for a crime.

In a recent [interview](#) with the Brennan Center for Justice, Miriam Krinsky from the nonprofit, Fair and Just Prosecution, described her team’s work [organizing state attorneys](#) against prosecuting abortion-related activity:

“Prosecutors will inevitably be the last line of defense when it comes to abortion bans, and elected prosecutors who work in states that criminalize pregnancy outcomes and abortions will have a choice to make in the wake of any Supreme Court decision eviscerating the protections established in *Roe v. Wade*. They will be required to decide whether to use their discretion and limited resources to police and prosecute healthcare decisions and thereby criminalize patients, medical care providers, and others who facilitate these deeply personal choices.”

State Courts

Advocates have also focused their attentions on state courts, where unlike their federal counterparts, state judges are often elected and regularly face re-election or re-appointment. An article in [Ms. Magazine](#) noted that states’ highest courts often lack diversity—in race, gender, and socioeconomic background. And despite the judges’ clear role in interpreting state laws, there hasn’t been an overwhelming movement for “progressive judges” as there has been for prosecutors. Yet the flow of money has continued to make its way into the states, with a record [\\$100 million spent on state supreme court races](#) in 2020.

Supporting Reproductive Justice, Patients, and Providers in the Months Ahead

Even if the Supreme Court officially overturns *Roe v. Wade*, abortion care will continue to be essential health care. Abortion care has necessarily been a part of sexual health, mental health, birth equity, and infant and child health, and will continue to be an essential part going forward. The landscape will be more difficult to navigate, but community and advocates will, as they always have, find ways to respond.

We expect that health care stakeholders specifically will have questions and that, at times, there will only be imperfect answers. But there are resources that have helped bridge gaps in this care and that have helped

people access abortion services safely and in culturally informed and appropriate ways. As we reflect on how the Supreme Court’s forthcoming decision may impact our role in supporting and advancing reproductive justice, consider familiarizing yourself with tools such as the [Digital Defense Fund’s resources on digital security for abortion and privacy protection](#), the ever-important work of [abortion funds](#), and an analysis of [what abortion might look like in your state](#) if *Roe* is overturned.

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