

Below are answers to some of the audience questions from the 'What's at Stake Post Roe?' live panel:

Does the Supreme Court decision deny a specific "right to abortion" or wholly negate the "right to privacy" on which Loving, Griswold, and Roe were decided?

- The decision is careful to limit its action to overturning Roe and Casey. The dissent (and Thomas's opinion) note that the Dobbs decision opens the door to overturning other decisions.
Carol Faulkner

Can you discuss this decision from within the context of the Ninth Amendment?

- The Ninth Amendment specifies that the enumeration of certain rights in the constitutional text is not meant to deny or disparage other unwritten rights that the people still possess. On its face, it appears to be a broad guarantee of unwritten fundamental rights, but across its history, the Court has always been reluctant to rely on it that way, likely out of fear of unconstrained judicial discretion. *Thomas Keck*

It has been suggested that this decision returns authority on this matter to the states. However, could you discuss federal preemption and the potential implications of the Supremacy Clause overriding those state laws either to be more or less restrictive?

- Lawyers and judges opposed to Roe v. Wade have long emphasized that on their reading, the Constitution is "silent" with respect to abortion and hence that legislative institutions should be free to regulate it however they want. "States' rights" is sometimes used as shorthand for this position, but it is more accurate to say that the overturning of Roe frees up legislative institutions, both state and federal, to regulate abortion without constitutional restraint. Most such laws are enacted at the state level, but Congress can and has regulated abortion as well (e.g., the Bush-era ban on so-called "partial-birth abortions"). If and when Congress enacts new abortion restrictions, the general rule is that those federal laws would supersede any state laws to the contrary, though litigation would be likely to result in particular cases. More fundamentally, it is also not fully accurate that abortion opponents want to return the issue to a posture of legislative discretion. Before Roe, pro-life advocates tried to establish that fetuses were legal persons under state and federal constitutions, and hence that legislative institutions are required to outlaw abortion in order to protect the unborn persons' constitutional right to life. Post-Dobbs, these efforts are ramping back up. *Thomas Keck*

I continue to read, and many of the justices that joined in the majority opinion themselves said in confirmation hearings, that the legal underpinnings/precedent was not there to reverse Roe. What, if any, legal recourse exists?

- There is no legal recourse for a justice issuing a decision that appears to contradict something they said in their confirmation hearings. Those prior statements almost always leave some wiggle room, and even if they did not, the justice could always say that after full consideration and reflection, they had been persuaded to change their mind. If members of Congress concluded that a judge had lied under oath during their confirmation hearing, they could impeach the judge on those grounds. But impeachment and removal require a majority vote in the House and two-thirds vote in the Senate, so such efforts are unlikely to be successful.

Thomas Keck

Why did Congress not pass a law to codify Roe in the 49 years since it was decided? Did they not anticipate the decision being overturned?

- There was likely some amount of complacency on the part of Democratic leadership. Prior to Dobbs, the Court had repeatedly declined calls to reverse Roe, and some thought it would continue in that vein. But also, since the conservative campaign against Roe reached full steam (during Reagan's second term), there have only been a handful of brief moments of Democratic control of Congress and the White House (Clinton's first 2 years, Obama's first 2 years, and now). There were calls to codify Roe during each of those moments, but other priorities intervened. *Thomas Keck*
- One possibility could be a lack of support to pass something truly analogous to Roe. To the extent Congress is aligned with public opinion, designing a policy to get majority support would involve many subtleties not addressed (or even allowed to be addressed) under Roe, because public opinion is very nuanced. For instance, while a majority have historically supported abortion availability in the 1st trimester, only a small minority (less than 30%) have been supportive after that. A policy restricting early pregnancy would be more consistent with many European countries' policies than with Roe, which was comparable to only a handful of countries around the world that allowed abortion after 20 weeks. It may be that whatever legislation could have been negotiated would have appeared to compromise rather than codify Roe. *Sarah Hamersma*

Is there any scenario where the court could reverse itself on a subsequent abortion rights related decision?

- There is no prospect that the current Court will reverse Dobbs. There are prior examples where the Court quickly backtracked on a controversial decision that provoked massive outcry, but these instances almost always involve some change in the Court's membership as well. *Thomas Keck*

What can we do - as graduate students/teachers/researchers/etc. - to help raise awareness about this issue? What is the likelihood that Congress might codify Roe into law?

- For decades, conservative opponents of Roe v. Wade have tended to emphasize this issue in their voting decisions more heavily than have liberal supporters. If supporters of reproductive

rights work to elect like-minded candidates up and down the ballot, then yes, Congress could codify Roe. The House has already passed such a bill, but the Senate is a bigger lift, given the overrepresentation of small conservative states and the filibuster rule that requires super-majority votes for most legislative action. *Thomas Keck*

What do you see as men's role when sexual activity results in an unwanted pregnancy? Also, are you concerned that the Supreme Court will disallow contraceptives, etc.?

- I think this decision affects all Americans, including men, by intruding on their rights to make decisions about their families. As I write, the House just passed an act to ensure access to contraception, so Democratic politicians certainly see the danger. *Carol Faulkner*
- There are certainly important implications for men, some of which are highlighted in this recent [NPR story](#). A [recent study](#) estimates that one in five men have impregnated someone who has had an abortion, but this is likely an undercount because many men do not know that their partner has had an abortion. Another [study](#) found that young men who were involved with a pregnancy and whose partners had an abortion were nearly four times more likely to graduate from college than those whose partners gave birth. As a result of the Dobbs decision, it appears that there has been [an increase in men seeking vasectomies](#). *Shannon Monnat*
- It's notable that when women have been asked about the contributing factors to their decision to abort, about [half of them indicate relationship problems and the desire not to be a single mother](#). It's quite clear that men can and do engage in sexual activity without the intention to commit to the long-term support of children they may father. The asymmetry of reproductive burden falls to women both during and following pregnancy, and [this is particularly true when they are less educated](#). Abortion access reduces the risk fathers will be called upon to parent after initiating a pregnancy, so post-Roe this risk will increase in some places. It will be interesting to see whether men become more willing to use their own over-the-counter contraception or press for better male contraception options, when [women are usually held responsible for contraception despite the side effects](#). *Sarah Hamersma*

Are there statistics on number of births and/or abortions within the U.S. prison system overall?

- Studies on this appear to be limited, but [this study](#) collected 12 months of pregnancy statistics (2016-2017) from a geographically diverse sample of 22 state prisons and the federal prison system. Among the pregnant women who were admitted to these prisons, there were 753 live births (92% of pregnancies), 46 miscarriages (6%), 11 abortions (1%), 4 stillbirths (0.5%), and 3 newborn deaths. *Shannon Monnat*

Regarding cross-border restrictions, whether international or interstate, what types of law can prohibit travel to terminate a pregnancy?

- While some of the new criminal abortion statutes try to target travel (and those who aid in travel), it is unclear how successful they will be, or whether they will be able to enforce those laws. In the early 1970s, when New York liberalized its abortion laws before Roe, there was increased travel into the state for abortions. Before Roe, women also went abroad - Sweden, Mexico - to get abortions. *Carol Faulkner*
- Before Roe, some states where abortion was illegal tried to ban advertising by providers in nearby states where it was legal. The Supreme Court prohibited such efforts shortly after Roe. In a concurring opinion in Dobbs, Justice Kavanaugh indicated that in his view, state efforts to prohibit crossing state lines to obtain an abortion violated the constitutional “right to travel” (which, like the right to privacy, is an unwritten right), but it appears that anti-abortion state legislatures are going to be more aggressive on this front than they were before Roe, and it is not certain how the resulting legal disputes will play out. *Thomas Keck*

Companies like Amazon have vowed to reimburse employees who travel to receive abortion treatment. Would this not introduce a new set of concerns about the privacy of employees and possible retribution from employers?

- Yes, and anti-abortion state legislatures and prosecutors are already trying to crack down on such corporate efforts. In states where abortion is now illegal, we are likely to see aggressive efforts to regulate and prosecute anyone who assists a pregnant person in accessing an abortion, including by providing funding to travel out of state. *Thomas Keck*

What are the potential implications of the roll-back of Roe on other constitutional rights like voting rights, etc.?

- The immediate impact will be on decisions that depend on the right to privacy established by Griswold and other cases. Voting rights are a matter of concern separate from the privacy cases because we know that in U.S. history voting rights have been granted (the Fifteenth Amendment, for example) and then taken away. *Carol Faulkner*

The Supreme Court appears to be taking on more cases aimed at restricting/removing rights. What could we do to fight those decisions?

- There are several prior periods in the Court’s history where the Court has been “captured” by a particular political coalition and uses its power to advance an ideological agenda that it is unable to win via the elected institutions. Every time this has happened, actual or threatened Court reform by Congress has been part of the process by which the activist Court has been brought back within the main lines of public opinion and political support. During the 19th century, Congress routinely changed the Court’s size, and there are other mechanisms by which Congress can curb the Court as well. These efforts have sometimes persisted across multiple decades, so while this year’s midterms are very important, it may also be a longer fight. *Thomas Keck*

Is the Supreme Court scheduled to hear any rights of the accused cases in the near future?

- The Court hears cases involving the rights of criminal defendants every year. You can see its docket for the coming term here: <https://www.scotusblog.com/case-files/terms/ot2022/>.
Thomas Keck

Could someone on panel talk about impact of forced child births on women's labor force participation as linked to lack of good maternal health care, lack of paid parental leaves, and lack of affordable high-quality childcare?

- To the extent the post-Roe landscape results in an increase in births (estimated at about 75,000 in next year), we would expect to see at least some reductions in women's labor force participation, since studies both with and without an abortion focus show that fertility reduces labor force participation on average. It's not clear this reduction will be detectable in the aggregate, given this is only about a 2% increase in births (which number around 3,700,000 per year); a change of 1% or 2% in birth rates is typical in recent years ([and was consistently in decline for many years until COVID](#)). But regardless, now is a good opportunity to advocate for those programs and policies that better recognize the social value of child rearing and support women giving birth, including but not limited to those who would have aborted under Roe.

While health insurance for pregnancy and a short post-partum period for women with incomes below 138% of the Federal Poverty Guidelines is available in every state via federal mandates (regardless of ACA expansion status), states can extend this higher into the income distribution and many do. However, nationally, over 40% of births are Medicaid-funded; among Black and American Indian and Alaska Native (AIAN) women, two-thirds are [Medicaid-funded](#). Given the poor maternal outcomes in these populations despite high levels of insurance, there is reason to think quality of care remains a concern beyond mere coverage, and pressure should continue to investigate and improve this care. Similarly, there is strong evidence of the value of paid parental leave; while in general, parenthood reduces labor supply, [paid parental leave increases attachment to the labor force for mothers after the period of the leave](#). Advocating for a federal leave program in particular could prevent women from being left behind because of their particular state, or employer's generosity, and recognizes a shared social responsibility for our future. The fact that having a child seems, for so many, truly infeasible suggests that we have a fundamental problem nationwide that - while perhaps muted by abortion access - goes much deeper than women's preferences about abortion, to a lack of social support for the essential work of childrearing. *Sarah Hamersma*

What do we know about the history of abortion as at-home health care in early America and/or among indigenous people, and was this history considered in the decision or cited in the dissent?

- The Dobbs decision and dissent both focus on the law. The decision also deliberately ignores women's history as well as women's constitutional rights. As a result, the history of women's long control over pregnancy, abortion, and birth was not part of the argument. The dissent also focuses more on abortion laws (and the Fourteenth Amendment) than on this intimate history.

Neither the decision nor the dissent takes into account social and cultural differences among women or their experiences over time. This history would certainly have deepened the argument in the dissent. *Carol Faulkner*