

ABORTION POLITICS 2022 – ONE MORE CASUALTY OF THE CULTURE WAR

The impact of the *Dobbs* [decision](#), which reversed, in one fell swoop, close to 50 years of settled judicial precedent (in the case of *Roe*, and 30 years in the case of *Casey*) should not be underestimated. In fact, it is hard to imagine facets of our collective lives that will not be impacted by a decision encapsulated in two unambiguous sentences¹ few would have imagined would ever find their way into a Supreme Court opinion. Foremost among the consequences is the inescapable conclusion that the status of women in the United States has now been severely undermined. As Justices Breyer, Sotomayor and Kagan noted in their dissent, “one result of today’s decision is certain: the curtailment of women’s rights, and of their status as free and equal citizens.”

At its core, the decision will force childbirth on women against their will, regardless of the consequences. The decision not only hurts those directly impacted, but also many communities, particularly communities of color and poor women, burdened among other things by broken healthcare systems. Incidentally, though beyond the scope of this note, the decision also has the potential to have a ripple effect across the globe by emboldening other countries to roll back abortion rights. Similarly, beyond the scope of this note, are the threats to other seemingly settled rights – contraception (*Griswold*), same-sex marriage (*Obergefell*) and private, consensual sexual acts (*Lawrence*) – that *Dobbs* could presage, as well as the potential impact of an endorsement of the “independent state legislature” theory (*Moore v. Harper*, which the Court has agreed it will hear in the fall).

In her comprehensive description of what led up to *Dobbs*, Amelia Thomson-DeVeaux, [writing](#) for FiveThirtyEight, notes that while nearly one woman in four (citing [Guttmacher Institute](#) researchers Rachel Jones and Jenna Jerman) will have an abortion in her lifetime, those women are not evenly dispersed across all walks of life (and geography), and there has been little effort to make the connection between access to legal abortion and the myriad ways in which the lives of women have been transformed since *Roe*. Polling experts note that voters have a tendency to discount tremendously negative events until they happen, if they do. Even when the draft *Dobbs* opinion leaked, there was a sense of disbelief. To date, as Thomson-DeVeaux notes, the loss of abortion rights has been an abstract, even exhausting, topic of conversation. It was a “political phantasm” – not something that would ultimately come to pass.

That changed overnight; *Dobbs* is likely to be as transformational for the next generation as *Roe* was almost a half century ago. Thomson-DeVeaux rightly notes that perhaps for the first time in their lives, many Americans will have to decide how they actually feel about legal abortion and how much they care that abortion rights were given, and then taken away. This reckoning will be taking place within the crucible of a deeply polarized America.

Dobbs not only furthers the polarization of society but further undermines democracy. What other conclusion can one draw from a decision that runs counter to the views of clear majorities of Americans? As noted in a recent Brennan Center [article](#), [t]here is a straight line from America’s broken systems of democracy to the Supreme Court’s catastrophic

¹ Those two sentences: “We therefore hold that the Constitution does not confer a right of abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.”

majority ruling in [*Dobbs*]. That's because both abortion access and systems of civic participation and representation are essential for autonomy and equality."

Ultimately, it is about politics, and the reputation of the Supreme Court has been undermined. The *Dobbs* dissent invoked Justice Thurgood Marshall's opening sentence in his dissent in *Payne v. Tennessee*: "Power, not reason, is the new currency of this Court's rulemaking." The *Dobbs* dissent continued, "Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court." Incidentally, the *Dobbs* dissent also notes, quoting *Casey*, that "the Court could not pretend" that overruling *Roe* had any "justification beyond a present doctrinal disposition to come out differently from the Court of 1973." For overruling *Roe*, *Casey* concluded, the Court would pay a "terrible price." The *Dobbs* dissent in turn concludes, "In overruling *Roe* and *Casey*, this Court betrays its guiding principles."

Where do we stand?

Dobbs triggered a number of direct and, in some cases, immediate legal consequences (see [NYT Tracker](#))

- ***Abortion is now banned in*** Alabama, Arkansas, Missouri, Oklahoma, South Dakota, Texas, Wisconsin and West Virginia
- ***Abortion bans have been blocked in*** Arizona, Kentucky, Louisiana and Utah
- ***Trigger laws will impose bans shortly in*** Idaho, Mississippi, North Dakota, Tennessee and Wyoming
- ***Abortion is restricted in*** Ohio, South Carolina, Florida and Georgia
- ***Abortion is legal for now but uncertain in*** Indiana, Iowa, Kansas, Michigan, Montana, Nebraska, North Carolina, Pennsylvania and Virginia
- ***Abortion is likely to remain protected (though based on varying standards) in*** Alaska, Colorado, Illinois, Maine, Nevada, New Hampshire, Rhode Island, California, Connecticut, the District of Columbia, Delaware, Hawaii, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Vermont and Washington, although since DC is not a state, it could be vulnerable if Republicans win back control of Congress

According to an [article](#) in FiveThirtyEight, the results in the midterms could decide whether abortion is banned or protected in seven states – Kansas, Pennsylvania, Arizona, Wisconsin, North Carolina, Michigan and Georgia. Democrats control the government in Maine, but a GOP sweep is not out of the question there, possibly presenting Republicans with an opportunity to reverse Maine's law permitting abortions until around 24 weeks. In Nevada, if Republicans gain power in Nevada, abortion access would likely not change because a 1990 referendum established the right to an abortion within 24 weeks, and it would take another referendum to alter this.

And, if in 2024, Republicans win back the White House and have majorities in the House and Senate, notwithstanding the Supreme Court's conclusion that abortion rights should be a matter of state law, could we nonetheless see a national ban on abortion?

Certain Implications

Studies show that abortion restrictions do not decrease abortion rates. A [report](#) published by NPR (updated June 27, 2022), quoting [data](#) from the Guttmacher Institute and WHO, found that where abortion is broadly legal, there are between 36 and 47 abortions performed annually per 1,000 women aged 15-49, and where abortion is illegal, there are between 31 and 51 abortions annually per 1,000 women, on average. These statistics are consistent with previous studies.

[Amelia Thomson-DeVeaux](#) cites research that access to legal abortion has lowered child poverty, kept women from getting married as teenagers, raised wages of women, increased participation of women in the workforce, made it more likely that women would finish college and reduced levels of maternal mortality.

Not surprisingly, research has shown that women denied abortions were more likely to end up living in poverty, had worse credit scores and, even years later, were more likely to be unable to afford basics, such as food, housing and transportation. They were more likely to be unemployed, more likely to have higher levels of personal debt and more likely to go through personal bankruptcy or eviction. They were more likely to be in worse physical health. Abortion is seen as a choice often made to take care of a family; most seeking abortions already were mothers. (See [Turnaway Study](#).)

Dobbs exacerbates the consequences of gender violence. Forcing women who have been raped to carry a child to term adds further trauma to the assault. According to a [National Intimate Partner and Sexual Violence Survey \(2010\)](#) issued by the CDC, 18.3% of women in the United States have been raped at some point in their lives. Approximately 8.6% of women in the United States reported having an intimate partner who tried to get them pregnant when they did not want to. Approximately 2 million women have become pregnant as a result of rape by an intimate partner.

Thomson-DeVeaux rightly asks whether we are about to see a multitude of definitions of “person” and “parenthood” across different states? Countless aspects of healthcare are intertwined with abortion care, having untold consequences for medical practice. She notes that abortion bans could also have untold consequences for a range of other rights, including birth control and fertility treatment.

In effect, *Dobbs* not only furthers the criminalization of abortion, but it also furthers the criminalization of pregnancy (defined by the American College of Obstetricians and Gynecologists as “the punishing or penalizing of individuals for actions that are interpreted as harmful to... pregnancies, including enforcement of laws that punish actions during pregnancy that would not otherwise be criminal or punishable”). Healthcare providers must now discern whether and how to treat women with life-endangering healthcare situations. The decision expands the scope of those who can be criminally prosecuted, including women being prosecuted for having miscarriages. Healthcare providers could be prosecuted for assisting with care after a miscarriage, which uses medication similar to abortion pills. Similarly, providing care for women following an ectopic pregnancy ([estimated](#) as 1 in 50 pregnancies) could be criminalized.

Who is Likely to be Impacted, and Where?

According to a study published in the [New York Times](#), between the states with trigger laws and those likely to ban abortion, a quarter of women in the United States of reproductive age could have to travel more than 200 miles to obtain a legal abortion – 9 million in trigger states, increasing to 17 million if you add the 11 states that are likely to ban abortion and increasing to 24 million in the six states that may ban abortion. (Pre-Dobbs, approximately 1% of women of reproductive age lived more than 200 miles from an abortion clinic.)

And at a time when the child care system and by many measures the overall healthcare system are broken, there is scant discussion of additional resources for the added burdens on the system that *Dobbs* will produce. In fact, there is a broader set of issues, namely the impact on healthcare, that is yet to gain widespread attention. According to research conducted by [Brookings](#), of the 13 states that have immediate trigger laws, nine rank number 30 or lower in overall state health data and more than ten of these states rank in the bottom half for public health and healthcare quality. No-cost or lower cost reproductive services more commonly accessed by lower income women and women of color likely will migrate as a result of *Dobbs* to states that offer abortion services, and will be out of reach for women who cannot travel. The study concludes that states eager to restrict or ban abortions will experience deeper health inequalities, which longer term will impact not only their labor forces but also their expenditures on healthcare.

Abortion bans will impact not only the states that impose them but also adjacent states, some of whose healthcare systems already are spread thin, and could be overwhelmed. Three states where abortion is legal – Colorado, Illinois and Kansas – are surrounded by states that ban abortions. Brookings cites New Mexico, a leader in providing abortion services, whose healthcare system is already under pressure and could be overwhelmed by out-of-state residents seeking reproductive health services. That in turn could also limit the ability of in-state residents to get the care they need.

I suspect few have given much thought to potential conflicts among states as those states with bans seek to restrict travel to states where abortion is legal, or whose citizens will now seeks to enforce provisions of state law against residents of other states.

Popular Support Undermined by the Electoral College

Over the past 30 years, there have been eight presidential elections and eight Supreme Court vacancies; Republicans won the popular vote in only one of those eight elections, but chose five of the justices. Three of those justices were nominated by Donald Trump, who lost the popular vote by close to 3 million votes – Trump’s 62,985,106 votes in 2016 translated into 27.3% of eligible voters – and two by George W. Bush, who while he won the popular vote for his second term, had lost the popular vote in 2000. Now, six justices of the Supreme Court (including three nominated by Trump, two nominated by George W Bush and one nominated by George HW Bush) have rolled back protections extremely popular with the American public.²

² Incidentally, the majority (7-2) opinion in *Roe* was written by Harry Blackburn, who was joined by four Republican-appointed justices (William Brennan, Lewis Powell, Potter Stewart and Chief Justice Warren Burger) and two Democratic-appointed justices (William O. Douglass and

According to a Pew Research [survey](#) (taken before the *Dobbs* decision was issued), 61% of adults believe abortion should be legal in all cases (no exceptions)/(some exceptions). Only 8% believe abortion should be illegal in all cases (no exceptions). Where pregnancy threatens the woman's life or health, 73% believe abortion should be legal, in the case of rape 69% believe abortion should be legal and where the child is likely to have severe disabilities or health problems, 53% believe abortion should be legal. Gallup has [similar statistics](#): their latest update on U.S. abortion attitudes finds 58% of Americans opposed to overturning *Roe*, while 32% are in favor. Since 1989, between 52% and 66% of U.S. adults have wanted to maintain *Roe*. Current polling supports roughly matches the average over that three-decade period.

An NPR/PBS NewsHour/Marist [poll](#) taken after the *Dobbs* decision was issued found that majorities disagree with the decision, think it was politically motivated, are concerned the court will now reconsider rulings that protect other rights, and are more likely to vote for a candidate this fall who would restore the right to an abortion. The poll found that 56% opposed, and 40% supported, the decision. Those opposed to *Dobbs* included 88% of Democrats, 20% of Republicans and 53% of Independents. By gender: 59% of women and 54% of men opposed the decisions. By education, 69% of college educated and 47% of non-college educated respondents opposed the decision. Two-thirds of respondents said they or someone they knew had had an abortion, including three-quarters of Independents, 70% of Democrats and 55% of Republicans.

Incidentally, according to Jacob Grumbach, [writing](#) in POLITICO, the level of support for abortion rights today is higher than the support for same-sex marriage was in 2015 at the time the Supreme Court struck down bans on same-sex marriage in *Obergefell v. Hodges*.

Back to the States

The challenge is that the Supreme Court has sent abortion rights back to the states. That raises a variety of issues.

The sad irony is that the Supreme Court has pushed decisions on limiting or criminalizing abortion to the states while at the same time failing to limit partisan gerrymandering (holding in *Rucho et al. v. Common Cause et al.* that the Court has no role in limiting state-sanctioned partisan gerrymandering) and undermining voting rights (in particular hollowing out voting rights in *Shelby County v. Holder* and *Brnovich v. DNC*). At the same time, the Supreme Court, only one day before *Dobbs*, in *Bruen*, overrode New York State's 108-year old ban on concealed carry (a ban that clearly reflected the democratic will of the voters of New York). Justice Thomas was untroubled by the double standard, writing in *Bruen*, that while deferring to the democratic process is "understandable – and, elsewhere appropriate, it is not deference that the Constitution demands here."

As David Pepper noted in his book, *Laboratories of Autocracy* (see my previous briefing note, available [here](#)), democratic institutions at the state level have been hollowed out by gerrymandering. Gerrymandering makes it far more difficult for majorities of voters to elect

Thurgood Marshall). One Democratic-appointed justice (Byron White) and one Republican-appointed justice (William Rehnquist) dissented.

a majority of seats in many state legislatures, but it also insulates legislators from having to moderate positions on culture war issues such as abortion rights. On the contrary, gerrymandering rewards partisan extremism by guaranteeing seats to the most extreme during the only election that matters for most state legislatures – their primaries.

Not only has the *Dobbs* decision overnight furthered the polarization between red states and blue states in terms of where abortion is available, but it has heightened the divide between states where the infrastructure of democracy still allows a majority of voters to determine the outcome of elections and policy votes, and those that do not. As [Grumbach](#) notes, while in some red states like Louisiana and Utah, state policies on abortion bans could align with a majority of voters in that state, the same is unlikely to be true in Arizona, Georgia, Michigan and Wisconsin.

At the same time the Supreme Court is sending abortion politics back to the states, legislatures in many of the states where abortion is or is about to be banned are hard at work restricting voting by minority communities, by dismantling processes that in 2020 in fact increased access to voting. And the Supreme Court is not standing in the way. In *Merrill v. Milligan*, the Supreme Court [failed](#) to block Alabama from using redistricting maps aimed at depowering black voters, which a federal court had already deemed illegal, in violation of the Voting Rights Act.

Concluding Thoughts

There are actions that can be taken on an individual basis and there are actions that businesses should consider.

Individuals

- ***Donate to abortion funds*** that are helping people access care by providing financial assistance to patients in need. *See, for example*, the funds listed on the [website](#) of the National Network of Abortion Funds
- ***Donate to independent abortion clinics*** through [Keep our Clinics](#)
- ***Donate to abortion advocacy groups*** such as the [Center for Reproductive Rights](#), [In our own Voice](#), [NARAL](#) and [Planned Parenthood Action Fund](#). See also the links to other reproductive freedom sites prepared by the ACLU (available [here](#))
- Donate to the [ACLU](#)
- ***Urge your local, state and federal lawmakers*** to act to protect abortion rights and access in law
- *Dobbs* is a stark reminder of the importance of state legislatures and governors – for a host of reasons. It is also a stark reminder that decades-long efforts by conservatives paid off. Therefore, it is critical to fund training, recruitment and support of candidates for state office that will be agents of change. As Amanda Litman, co-founder of Run for Something, notes, there is a culture among Democrats of chasing the “bright, shiny objects” – national candidates, while Republicans “treat political giving as a business investment – you get your judges and your tax cuts.”
- ***Donate to groups focused on down-ballot races:***
 - The Democratic Legislative Campaign Committee ([DLCC](#))

- [Run for Something](#)
- [EMILY's List](#)
- **Broaden the discussion** among friends and family to help people connect the dots between the decision and the consequences. *See, for example*, the [guide](#) prepared by the ACLU. Key messages from Amnesty International:
 - Terminating pregnancies is a decision made by millions – every year a quarter of pregnancies end in abortion
 - Criminalizing abortion does not stop abortion, it simply makes abortion less safe
 - Criminalising or restricting abortion prevents healthcare providers from doing their jobs properly and providing the best care options for their patients

Another key message: men benefit tremendously from reproductive freedoms and cannot sit idly on the side lines; men must join the fight
- Vote, and urge everyone you know to vote, in the midterms

Business Community

As I have noted before (see my previous briefing note, [here](#)), the business community has a critical role to play in support of democracy, and the *Dobbs* decision has just exacerbated the problem. Admittedly, the abortion decision comes at a time when there is increased political risk arising from governmental retribution. What happens if the government passes legislation to prohibit employers from deducting abortion-related travel expenses for employees (see legislation [introduced](#) by Senator Rubio)?

Businesses in states that ban abortion will need to consider their ability to recruit workers. A [survey](#) commissioned in 2021 by Tara Health Foundation, following the passage by Texas of SB 8, found that 66% of respondents (including 74% of women, 73% of Gen Zs and 69% of Millennials) would be discouraged from taking a job in Texas, and 63% (including 73% of women, 68% of Gen Zs and 66% of Millennials) would be discouraged from applying in other states with laws similar to SB 8. Almost half the respondents would consider moving out of state, and 55% feel their employers should speak out publicly about restrictive abortion practices or give corporate donations to non-profits that provide or protect access to abortion care if politicians in their state banned or restricted access to abortion.

Whether or not businesses are prepared to ease the burden through internal expense reimbursement,³ there is one other critical action the business community should consider. How much money⁴ is flowing through PACs to anti-abortion politicians, through trade

³ While an increasing number of businesses are offering expense reimbursements, this is far from ideal, for a host of reasons, including very real privacy concerns for the employee, and potential liability for the employer for aiding and abetting).

⁴ By way of reminder (from Open Secrets):

PACs (what the FEC calls “nonconnected committees”) raise and spend contributions for the express purpose of electing or defeating candidates. Most PACs represent business, labor or ideological interests. An organization’s PAC will collect money from the group’s employees/members and make contributions in the PAC’s name to candidates and political parties. Individuals contributing to a PAC may also contribute directly to candidates and political parties, even those also supported by the PAC. PACs can give \$5,000 to a candidate per election (primary, general or special) and up to \$15,000 annually to a national political

organizations to the National Republican Senatorial Campaign, the Republican State Leadership Committee and Republican Governors Association or to anti-abortion non-profit advocates from companies that express an intention to support abortion rights?

In the 2020 cycle, nine anti-abortion PACs contributed \$654,086 to Republican candidates ([Open Secrets](#)) and three spent over \$1 million on anti-abortion lobbying ([Open Secrets](#)). Judd Legum and Rebecca Crosby ([writing](#) in Popular Information) estimate that, since 2016, 13 corporations have donated \$15 million to the NRSC, RSLC and RGA (this figures excludes PAC contributions donated directly to anti-abortion politicians and corporate support for anti-abortion non-profit advocates).

Doing the right thing in support of reproductive rights should also mean refocusing lobbying dollars to reverse the tide of anti-abortion legislation surging through a number of state legislatures. A related effort would be to make donations to abortion funds – while expense reimbursements by a company will help that company’s employees, the vast proportion of women in America who seek abortions do not work for major corporate enterprises.

Admittedly, the entire landscape around corporate political spending is fraught, but as is the case with climate and a host of other ESG issues, for potential reputational and liability reasons, businesses need to align their actions with their public declarations on abortion rights, and that should extend to political giving.

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Washington, D.C.
July 4, 2022

party. PACs may receive up to \$5,000 each from individuals, other PACs and party committees per year. Politicians may form Leadership PACs to raise money for other candidates’ campaigns.

Independent expenditure-only political committees, or Super PACs, may accept unlimited contributions from unions, corporations, associations and individuals. Super PACs may spend unlimited amounts to influence the outcome of federal elections through independent expenditures. Unlike PACs, Super PACs may not contribute directly to a candidate or campaign, and may not coordinate with a candidate in making their expenditures. Contributions to, and expenditures of, a Super PAC are publicly disclosed.

527 groups (also referred to as “soft money” groups) can raise an unlimited amount of funds from individuals, corporations or labor unions. Contributions must be disclosed. These groups operate for the purpose of influencing elections to federal, state or local public office, but do not advocate directly for a candidate’s election or defeat or coordinate with any candidate at the federal level, though may do so at the state level. The most common are affiliated specifically with an interest group, union or association of elected officials. Examples of 527s include the RGA, DGA and Emily’s List.

501(c) groups can engage in varying degrees of political activity: 501(c)(3) groups operate for religious, charitable, scientific or educational purposes. These groups are not supposed to engage in any political activities, though some voter registration activities are permitted. 501(c)(4) groups are commonly called “social welfare” organizations that may engage in political activities, as long as these activities do not become their primary purpose. Similar restrictions apply to Section 501(c)(5) labor and agricultural groups, and to Section 501(c)(6) business leagues, chambers of commerce, real estate boards and boards of trade. The politically active groups – generally 501(c)(4)s and 501(c)(6)s – are referred to as “dark money” as they generally do not need to disclose the source of their funds. While donations to candidates are not permitted, donations may be made to Super PACs.

Corporations and labor unions cannot make contributions to political party committees (DNC or RNC) or candidates. Corporations can set up separate segregated funds.