

## Abortion may cause a federalism crisis

By David A. Carrillo and Allison G. Macbeth | May 10, 2022

If it reflects the court's final decision, the leaked draft U.S. Supreme Court opinion in *Dobbs v. Jackson Women's Health Organization* has both important short-term consequences and dire long-term implications for federalism. In the short term states can rely on their existing statutory and state constitutional provisions to fill the void left if *Dobbs* abrogates federal constitutional protection for abortion. But the reasoning in *Dobbs* can also be applied to void other federal liberty protections such as contraception and interracial and same-sex marriage. The draft disclaims such an intent — yet its reasoning undercuts those rights because they rely on the same autonomy privacy analysis that *Dobbs* rejects. Worse, Congress can fill that void with legislation that could ban those rights nationwide, which under the Commerce Clause and the Supremacy Clause could invalidate even state constitutional protections for those rights. So in the short term blue states might circle the wagons around their state constitutions, but in the long term even that defense might crumble.

In its immediate aftermath *Dobbs* could reinforce state sovereignty and federalism principles. After all, states are intended to be the primary guardians of individual liberty for their citizens, and the federal government is one of limited powers. If federal constitutional protections for abortion rights vanish, a Californian might say, "So what? My state constitution already protects abortion rights." And California's constitution can be both a sword and a shield here: protecting existing rights and expanding them — as California's legislature recently announced it intends to do. California's constitution could, for example, be amended to include an express right to reproductive liberty, which would fill the void left by *Dobbs* and could protect Californians against attempts by other states to criminalize cross-border abortion activity.

Thus, blue state constitutions would be free to provide all the reproductive liberty one could want — more than existed under federal law. The draft *Dobbs* opinion says that the decision will return the issue of abortion to legislative bodies, which opens the door to state legislatures and electorates to pass laws and amend their state constitutions to maximally protect abortion rights in those states. Red state citizens have fewer options: work to change their state politics, or vote with their feet by moving to blue states. That results in a two-zone America (no-abortion and abortion-safe states), even as it promotes federalism by enhancing state constitutional power. Our federalist system is designed to allow states to decide for themselves how to safeguard the health and welfare of their citizens, and *Dobbs* at least validates that principle.

But *Dobbs* has other potential future implications that may make those consolations illusory, and the blue state solution of focusing on their state constitutions may be short-lived. At first, even if *Dobbs* imperils other federal rights, California constitutional law still protects them. California's constitution has an express right to privacy, and the state's courts have interpreted that provision to protect a right to abortion. More broadly, California constitutional law protects interracial marriage and a right to contraception. So even if future federal decisions apply *Dobbs* to overturn those federal rights because *Dobbs* removed their privacy underpinnings, at least we still have our state constitutional rights — right?

Maybe not. Future federal decisions could apply the *Dobbs* reasoning to overturn the federal decisions that currently ban miscegenation laws, protect contraception access, and permit same-sex marriage. As the Biden administration’s brief in *Dobbs* noted, limiting the 14th Amendment’s liberty protection to only things that are “deeply rooted in history” will rule out same-sex intimacy and marriage, interracial marriage, and contraception, because none of those practices is mentioned in the federal constitution — indeed, most of them were widely prohibited in the states when the 14th Amendment was adopted.

Removing federal constitutional protection from those issues would open the door to whatever legislation Congress has power to enact. For example, the U.S. Supreme Court upheld the federal Partial-Birth Abortion Ban Act in *Gonzales v. Carhart*, noting that Congress has power under the Commerce Clause to regulate the medical profession. Congress also has Commerce Clause power to regulate prescription medication (*United States v. Sullivan*; *McDermott v. Wisconsin*) and to make drugs illegal (*Gonzalez v. Raich*; *Taylor v. U.S.*). Congress could enact nationwide bans on abortion, medication abortion, contraception, and interracial and same-sex marriage.

Anticipating that scenario, some states have already proposed legislation that could have broad implications on reproductive rights. In Louisiana, for example, a new bill establishes personhood from fertilization and would criminalize harms against unborn persons as battery or homicide. If it becomes law, after *Dobbs* that statute will criminalize abortion — and intrauterine birth control devices, emergency contraception, and fertility treatments like in vitro fertilization.

*Dobbs* can also resurrect long-dormant state laws on abortion. Once *Roe v. Wade* became law, many states left their existing state abortion laws in place. But *Dobbs* will immediately resurrect laws like Michigan’s 1931 statute that makes abortion a felony. One such zombie law is California’s constitutional provision that bans same-sex marriage, a provision upheld in *Strauss v. Horton*. The U.S. Supreme Court decision in *Obergefell v. Hodges* made *Strauss* moot — but *Obergefell* relied on the same federal privacy right that *Dobbs* spurns. If future federal decisions pursue that line of reasoning, *Obergefell* could be invalidated, which potentially revives the core *Strauss* holding that California’s state constitutional ban on same-sex marriage is valid. The upshot: same-sex marriage would again be banned in California, and by the state’s own constitution.

The conflict over existing life versus potential life may ignite a federalism crisis: states could gain significant power over self-determination, or lose much of their existing sovereignty. As Justice Thomas argued in his *Gonzalez v. Raich* dissent, if Congress can use the Commerce Clause to regulate doctors providing in-state prescriptions to their patients, “then it can regulate virtually anything — and the Federal Government is no longer one of limited and enumerated powers.” *Dobbs* may, as Justice Thomas warned, initiate a pattern of federal courts applying *Dobbs* to void more federal constitutional protections, Congress acting, and more state constitutional provisions becoming dead letters. History may be repeating itself: a small group of states resists federal power by relying on states’ rights, and learns that federalism is a fickle friend.

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