

Demonstrators gather in front of the U.S. Supreme Court as the justices hear arguments in *Dobbs v. Jackson Women's Health* Dec. 1, 2021. Chip Somodovilla via Getty Images.



## California's Constitutional Right to Abortion Before and After *Dobbs*

DAVID A. CARRILLO, ALLISON G. MACBETH & BRANDON V. STRACENER

CALIFORNIANS CURRENTLY HAVE dual federal and state constitutional abortion rights. But if the leaked draft majority opinion in *Dobbs v. Jackson Women's Health Organization* reflects the final decision, the U.S. Supreme Court appears poised to overturn *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* — and eliminate federal constitutional rights to abortion.<sup>1</sup> If *Dobbs* renders abortion rights a matter of state law, the robust California constitutional protection for abortion rights will remain — for now. But even those rights may be in doubt if the final *Dobbs* decision undercuts the privacy rationale supporting federal constitutional autonomy rights. This could permit federal legislation that overrides state constitutional protections for abortion rights, and eliminate state constitutional power to protect reproductive liberty.

### In California, the Fundamental Right to Autonomy Is the Source of Reproductive Liberty

Abortion presents policy makers with a choice between a woman and an embryo. California's legislature and courts

have chosen the woman: both favor a woman's autonomy over the more attenuated state interest in future lives. The legislature has focused on the woman's health.<sup>2</sup> And the California Supreme Court views this issue as implicating at least two fundamental rights: the woman's right to life and her right to choose whether to bear children.<sup>3</sup>

Abortion rights have dual support in California's constitution: those fundamental liberty interests in life and making childbearing decisions, and privacy. The rights to life and to make childbearing decisions flow from the California constitution's liberty, due process, and equal protection clauses, and are sufficiently fundamental liberty interests that restrictions on them are subject to strict scrutiny.<sup>4</sup> Add to that the express constitutional right to privacy in Article I, section 1, and California law has robust protections for abortion rights. And because abortion rights in California are protected by the state constitution, they exist even if the federal constitution provides no analogous protection.<sup>5</sup>

### The California Autonomy Right Evolved from Due Process to Privacy

California has never banned abortion. The state initially authorized abortions in limited circumstances:

1. U.S. Supreme Court, docket 19-1392, argued Dec. 1, 2021, [https://www.supremecourt.gov/oral\\_arguments/argument\\_calendars/MonthlyArgumentCalDecember2021.pdf](https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalDecember2021.pdf) (as of Apr. 29, 2022); Josh Gerstein and Alexander Ward, "Supreme Court has voted to overturn abortion rights, draft opinion shows," *Politico*, May 2, 2022, <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> (as of May 5, 2022). Note that the leaked draft opinion may not reflect the court's final decision. See *Roe v. Wade* (1973) 410 U.S. 113; *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833.

2. *People v. Barksdale* (1972) 8 Cal.3d 320, 326.

3. *Ibid*; *Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 275.

4. *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 332–33, 340.

5. *Id.* at 325–26.

ROE ET AL. v. WADE, DISTRICT ATTORNEY OF  
DALLAS COUNTY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF TEXAS

No. 70-18. Argued December 13, 1971—Reargued October 11,  
1972—Decided January 22, 1973

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford. *Held*:

The U.S. Supreme Court's decision in *Roe v. Wade*. Library of Congress.

California's first law on criminal abortion (Penal Code section 274, enacted in 1850) permitted abortions when necessary to preserve the woman's life.<sup>6</sup>

Restrictions on California abortions fell away in pieces, in parallel with the right's basis evolving from due process to privacy. In *People v. Belous* the California Supreme Court invalidated the first version of Penal Code section 274 on due process grounds.<sup>7</sup> Next, in *People v. Barksdale* California's high court considered the revised version of section 274, applied strict scrutiny because two fundamental constitutional liberty interests were implicated, and held that the statute failed to meet the heightened standard of specificity and did not satisfy minimum due process requirements.<sup>8</sup> Finally, the legislature repealed section 274 in 2000; now criminal liability for abortion exists only for unlicensed individuals who perform or assist in an abortion under Business & Professions Code section 2253.

The next expansion in California's abortion protections was addressing whether age affected the autonomy right. In *Ballard v. Anderson* the court held that it did not: it would be irrational to assume a "legislative purpose to deny to minors life-saving therapeutic abortions for lack of parental consent while permitting all other pregnancy-related surgical and medical care" without this consent.<sup>9</sup>

In 1972 California abortion rights found a new textual constitutional basis: privacy. California has long protected a common law privacy right, but it did not

affect the early abortion decisions. Instead, *Belous* and *Barksdale* relied on the void-for-vagueness rule, a due process requirement that requires specificity in penal laws.<sup>10</sup> Yet after the voters in 1972 installed a new, broader constitutional privacy right in Article I, section 1, the constitutional justification shifted from due process to the express textual protection for a woman's right to privacy. This constitutional privacy right gives Californians broader protections for procreative decisions than those recognized by the federal constitution.<sup>11</sup>

Despite their distinct origins, the twin bases for abortion rights in California (autonomy and privacy) now overlap. Modern California constitutional privacy doctrine includes informational and autonomy subsets: interests in precluding the dissemination or misuse of sensitive and confidential information (informational privacy), and interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference (autonomy privacy).<sup>12</sup> Federal law similarly divides the unenumerated federal constitutional privacy right into information and autonomy categories.<sup>13</sup>

Thus, a woman's unenumerated autonomy interest now has express textual protection in California as a privacy right under Article I, section 1. And that includes minors: in a post-1972 echo of *Ballard v. Anderson*, the California Supreme Court applied the new constitutional privacy right to invalidate restrictions on a minor's right to obtain an abortion, holding that "minors, as well as adults, possess a constitutional right of privacy under the California Constitution."<sup>14</sup>

## The Federal Floor May Fall Away

Abortion rights are affected by a combination of competing law and policy variables: liberty versus state interests, existing life against potential life, and broader justice concerns. Federal and California authorities diverge on how those variables should be balanced, and that divergence may become starker after *Dobbs*. Yet even if the federal floor falls away, California's constitutional protection for abortion rights will remain.

Even a fundamental liberty interest must be balanced against competing state interests. For example, because free speech rights are limited by the state's interest in preventing riots, the state may proscribe advocacy directed at and likely to incite or produce imminent lawless action.<sup>15</sup> The competing liberty and state interests con-

10. See *Connally v. General Construction Co.* (1926) 269 U.S. 385, 391.

11. *Johnson v. Calvert* (1993) 5 Cal.4th 84, 100.

12. *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 850–51.

13. *Griswold v. Connecticut* (1965) 381 U.S. 479, 483; *Whalen v. Roe* (1977) 429 U.S. 589, 599–600.

14. *Lungren, supra*, 16 Cal.4th at 334.

15. *Brandenburg v. Ohio* (1969) 395 U.S. 444, 447.

6. *Barksdale, supra*, 8 Cal.3d at 325–26.

7. (1969) 71 Cal.2d 954.

8. *Barksdale, supra*, 8 Cal.3d at 330, 332.

9. *Id.* at 881.

cerning abortion are difficult to balance because both involve high stakes (sometimes the woman's life) and a complex definitional question about whether the state's interest involves protecting an unborn life. Speech rights are broad because the countervailing interests are often general and diffuse, compared with the specific, direct, and more equivalent impacts on the life of a woman and a fetus.

Abortion rights analysis requires identifying the equivalent countervailing interest against which the woman's right to life is to be balanced. This explains why abortion debates often focus on defining when life begins. Framing the issue as between the life of a woman and the life of her unborn child evokes a difficult analysis that requires a binary choice between similarly high-value alternatives. Yet California law frames the competing values differently: the woman's right to life and autonomy against the state's vaguer interest in one who has not yet come into being. Between those competing interests "the law has always recognized that the pregnant woman's right to life takes precedence over any interest the state may have in the unborn."<sup>16</sup>

Abortion also has broader implications for other important social values, such as protecting women from violence and punishing wrongdoers. For example, because a fundamental principal underlying *Belous* is that the unborn fetus is not a human being, a man's assault on his wife that kills her fetus cannot be murder. When a man did just that in *Keeler v. Superior Court* the court held that an unborn-but-viable fetus is not a "human being" who can be murdered.<sup>17</sup> The dissenters noted the inherent tension between permitting a woman to medically terminate a pregnancy and punishing a man for doing so by force: a fetus is either a life and killing it is homicide, or neither is true. The legislature acted quickly after *Keeler* to resolve that conflict by limiting punishment for fetal homicide to acts committed with malice, and then only when the fetus progressed beyond seven-to-eight weeks.<sup>18</sup>

Biases rooted in gender, age, and religious norms are also evident in abortion decisions: Justice Raymond Sullivan railed against conferring "on girls under the age of 21 the awesome power to extinguish human life" by "permitting any girl under 21 to obtain a therapeutic abortion without parental consent," which in his view granted "a minor child the power to choose between life and death."<sup>19</sup> He concluded with a Bible verse, referring to "the ancient mandate that 'the innocent and the just you shall not put to death' (Exodus 23:7)."<sup>20</sup> Earlier, a Court of Appeal justice had invoked outdated views on

eugenics, chattel laws, and religion in upholding Penal Code section 274 as a shield against "interference with a woman's natural process of procreation" based on the state's "power and discretion to enact statutes for the purpose of conserving the race even in the stream of gestation."<sup>21</sup>

These wider variables (including the anachronisms) continue to influence public debate, court rulings, and legislative policy on abortion, and have resulted in divergent federal and state law frameworks for abortion rights. Thus, abortion rights in California have independent federal and state law sources because rights guaranteed by California's constitution are not dependent on those guaranteed by the United States.<sup>22</sup> And state constitutions can be interpreted to provide greater protection for individual rights than the federal constitution.<sup>23</sup> Having two separate sources for abortion rights under federal and state law means that even if the federal floor on abortion rights drops after *Dobbs*, California's constitution can independently provide greater protection.<sup>24</sup>

**Thus, abortion rights in California have independent federal and state law sources because rights guaranteed by California's constitution are not dependent on those guaranteed by the United States.**

The greater protection for privacy under article I, section 1 gives California courts a strong basis for distinguishing the state's autonomy right from federal law. Given that California precedent already departs from federal law on abortion, the state's courts are unlikely to reverse those decisions. That reduces the chance that a future California court could link the state and federal abortion rights.<sup>25</sup> Rather than being concerned about California law aligning with a lowered federal floor on abortion law, the larger looming problem is the possibility of a new federal ceiling being imposed.

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16. *Belous*, 71 Cal.2d at 969.

17. (1970) 2 Cal.3d 619.

18. See *People v. Davis* (1994) 7 Cal.4th 797, 803.

19. *Ballard, supra*, 4 Cal.3d at 885–86.

20. *Id.* at 886.

21. *People v. Gallardo* (1952) 243 P.2d 532, 535 (vacated by *People v. Gallardo* (1953) 41 Cal.2d 57).

22. Cal. Const., art. I, § 24.

23. Decisions of the federal high court do not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, 81.

24. *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 89; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 354.

25. Still, that chance is not zero. See, e.g., *People v. Buza* (2018) 4 Cal.5th 658 (following federal law in holding that obtaining arrestee DNA is constitutional).

## California's Constitutional Right to Abortion

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### A New Federal Ceiling, Versus a Federal Floor

If the final *Dobbs* decision voids federal abortion rights, that could also impact state constitutional protections. That's because federal law can set either a ceiling or a floor for state liberty guarantees. A federal floor is the more common scenario in state constitutional doctrine: federal constitutional protection sets the minimum degree of protection, rendering unenforceable any parallel state constitutional provision providing less protection.<sup>26</sup> In such cases California and other states may provide greater liberty protection in their state constitutions.

But if *Dobbs* opens the door to a court granting a fetus federal constitutional rights, then federal law could impose a ceiling that would restrict a woman's autonomy and limit a state's ability to provide greater rights to women. If for example federal constitutional protections attach to a fetus at 12 weeks, that would effectively eliminate a state's ability to guarantee a woman's right to an abortion *after* 12 weeks. As a practical example, California's Reproductive Privacy Act provides that a woman has the right to obtain an abortion before fetal viability or when necessary to protect her life or health.<sup>27</sup> The draft *Dobbs* opinion leaves the door open to a federal judicial decision concluding that fetal rights attach before California's viability point, which would invalidate that act. And even just leaving the matter to the political process, as the *Dobbs* draft suggests, appears to permit federal legislation that bans abortion nationwide. Such a law would precipitate a major legal battle over state sovereignty, commerce clause limits, and the supremacy clause.

This scenario has chilling implications for returning to the days of perilous abortions. In pre-1972 California,

some abortions were performed in relative safety by medical doctors at professional facilities (as in *People v. Ballard*) even if the facility was clandestine and not owned by a doctor (as in *People v. Gallardo*). But many California women, desperate to end unwanted pregnancies, risked infection, infertility, and death at the hands of barbers with no medical training.<sup>28</sup> Many early abortion cases were prosecutions for homicide because the woman died: for example, *People v. Balkwell* affirmed Mary Balkwell's second degree murder conviction for accepting \$2.50 to perform an unlicensed abortion that killed the pregnant woman.<sup>29</sup>

### Conclusion

California law has long provided women greater reproductive liberty than federal law and will safeguard Californians even if federal protections disappear. But federal law may eventually go beyond merely removing federal constitutional protection for abortion, and instead permit federal judicial decisions or legislation that ban abortion. If that happens, it could extinguish the power of California and other states to protect reproductive liberty rights in their state constitutions. ★

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DAVID A. CARRILLO is a Lecturer in Residence and the Executive Director of the California Constitution Center at the Berkeley School of Law.

ALLISON G. MACBETH is an attorney in public service and a Senior Research Fellow at UC Berkeley's California Constitution Center.

BRANDON V. STRACENER is an attorney in private practice and a Senior Research Fellow at UC Berkeley's California Constitution Center.

26. *People v. Brisendine* (1975) 13 Cal.3d 528, 550–51.

27. Health & Safety Code § 123460 et seq.

28. See *People v. Buffum* (1953) 40 Cal.2d 709 and *People v. Morani* (1925) 196 Cal. 154.

29. (1904) 143 Cal. 259.