ACCESS TO LEGAL ABORTION IN A POST-ROE WORLD

BY:

MADISON ELIZABETH JANE DOSER

A Thesis Submitted to The W.A. Franke Honors College

In Partial Fulfillment of the Bachelor of Arts Degree
With Honors in

Law

THE UNIVERSITY OF ARIZONA

DECEMBER 2022

Approved by:

Professor Andrew Shepherd
College of Law

Abstract

Women's bodily autonomy and abortion access have been topics of mass debate since the 1800s. On June 24, 2022, the Supreme Court overturned decades of precedent providing access to abortion nationwide in *Dobbs v. Jackson Women's Health Organization* (2022). The ruling immediately led to the overturn of abortion access in 13 states and returned the legislation of abortion access to the states. Women felt the immediate effects of the limitation of their reproductive rights. Access to legal abortion can be returned nationwide, however, through the codification of *Roe v. Wade* (1974) into federal law.

Currently, the only major issues standing in the way of returning nationwide abortion access are politics – both from Congress and the Supreme Court. With Congress' power to regulate interstate commerce, there are multiple constitutionally justifiable methods of protecting abortion access in federal law despite the Supreme Court's ruling. The Executive Branch also has numerous methods of returning abortion access to the women of the United States including regulation of federal lands, mail, and telemedicine.

The fall of *Roe v. Wade* (1973) and *Planned Parenthood of Southern Pennsylvania v. Casey* (1992) immediately impacted the lives of women in 13 states. The Supreme Court's ruling affected women by limiting their ability to make pivotal decisions about whether or not to carry a pregnancy to term. In doing so, the right to privacy upon which the *Roe* and *Casey* decisions were based was weakened. The impacts of overturning *Roe* and *Casey* are numerous. Medical professionals are left wondering if the provision of life-saving care requiring an abortion procedure is legal, women are already having to travel out of state to obtain care, and Congress grapples with the possibility of codifying, or completely eliminating, the right to an abortion in federal law. Despite the uncertain nature of reproductive rights in the United States, Congress and the Executive have multiple constitutionally justified methods of instating abortion rights including the power to regulate interstate commerce, mail, federal lands, and by expanding access to telemedicine.

History

Abortion access has been a topic of political contention since the early to mid-1800s (Lindsey 1). The view of abortion as murder stems from the 1869 Catholic church when Pope Pius IX declared all abortions to be murder, which continues to be the church's official standing (Hovey 1). Despite these beliefs, abortion was readily available early in United States history. Abortion was safe, legal, condoned, and allowed until "'quickening'– the first time a mother feels the baby kick – which can happen anywhere from 14 weeks to 26 weeks into pregnancy" (Dine 1). Official laws regulating abortion did not appear in the United States' books until 1821 when Connecticut became the first state to make abortion a criminal offense (Dine 1).

The right to abortion stemmed from the landmark case of *Griswold v. Connecticut* (1965), where the Supreme Court of the United States determined that an intrinsic right to marital privacy existed in the Constitution (*Griswold v. Connecticut* 381; hereinafter *Griswold*). Although not explicitly stated, it was argued that the Bill of Rights created penumbras – or zones – that established the right to privacy. The right to marital privacy was determined to be created by the First, Third, Fourth, Fifth, and Ninth amendments. The legal distinction between married and unmarried women in regard to privacy rights was later thrown out in 1972 (*Eisenstadt v. Baird* 405).

The Supreme Court declared abortion as falling under the constitutional right to privacy in the case of *Roe v. Wade* (1973). In this ruling, abortion was determined to be a fundamental right. Bans were considered to be detrimental to women's mental and physical health and could cause a significant amount of economic burden or lead to issues resulting from the stigmatization of single motherhood. The right to an abortion was found to have existed within the Due Process clause of the Fourteenth Amendment as a privacy right, no longer relying on the penumbras of rights argument in *Griswold*. The Court held that substantive due process, the principle that the Court may protect rights unenumerated directly in the Constitution and the standard *Roe* was based on, obliquely alluded to a fundamental right to privacy for medical decisions. *Roe v. Wade* became a landmark case and developed the three-trimester framework for gauging whether abortion restrictions were constitutional and balanced the interests of the life and health of the woman and the state's interests in the life of the fetus (*Roe v. Wade* 156). In the first trimester of pregnancy, the decision to carry to term is solely the decision of the woman and her medical provider. In the second trimester, states may legislate on abortion insofar as the regulations apply

to maternal health. Finally, in the third trimester, once the fetus reaches viability, the states may regulate abortion access, including prohibiting access entirely (*Roe v. Wade*).

The right to an abortion as a fundamental privacy right was upheld in *Planned Parenthood of Pennsylvania v. Casey* (1992) but the three-trimester framework was thrown out and replaced with the undue burden test (*Planned Parenthood of Pennsylvania v. Casey* 880; hereinafter *Casey*). With the new test, abortion restrictions would be declared unconstitutional if they created a substantial obstacle in the way of the woman seeking an abortion. *Roe* and *Casey* were pivotal cases and have been consistently upheld, until the case of *Dobbs v. Jackson Women's Health Organization* (2022).

Dobbs and its Implications

June 2022 marked the end of two landmark Supreme Court decisions protecting the established right to obtain an abortion, an issue of great importance for women. Following the release of the *Dobbs* opinion, bans in 13 states immediately took effect, restricting access to abortion according to either pre-Roe restrictions still in state records or legislation passed post-Roe, some as recently as May of 2022 (Guarnieri & Nash 1). Women and abortion providers immediately felt the effects of the trigger bans, resulting in halted procedures, canceled appointments, and legal confusion: an issue requiring immediate attention.

Supreme Court Justice Samuel Alito wrote the majority opinion for the *Dobbs* case. He argued that "*Roe* was egregiously wrong from the start" and it signified obscene levels of judicial overreach (*Dobbs v. Jackson Women's Health Organization* 6; hereinafter *Dobbs*). Unsurprisingly, this ruling came shortly after the appointments of three new and openly conservative Supreme Court justices by President Trump. *Dobbs* called for the overturning of

Roe and *Casey*, disregarding the principle of stare decisis, otherwise known as respect for precedent, in an effort to return the issue of abortion rights to the state legislatures. The right to an abortion is now dependent on location rather than necessity, limiting women's reproductive rights in ways unknown by many politicians legislating on the matter.

Prior to the overturning of *Roe* and *Casey*, the constitutional right to an abortion encompassed restrictions against laws requiring spousal and parental consent, that contain a lack of deference to the woman's health and desires during pregnancy complications, and that requires a second physician for post-viability abortions (*Casey* 880; *Bellotti v. Baird* 443; *Planned Parenthood of Central Missouri Danforth v. Danforth* 428; *Thornburgh v. American College of Obstetricians and Gynecologists* 476). Protection of the right to an abortion from burdensome state restrictions has been consistently upheld in the Supreme Court. Now, states are likely free to create any restriction they deem necessary, including those already deemed unconstitutional, as abortion is no longer a protected privacy right. Without a written constitutional right to abortion, any appeals of state laws brought before the Court will now be subject to the rational-basis test, the least restrictive form of constitutional review.

The *Dobbs* opinion enforced the rule that unwritten rights, to be enforced by the courts, must be deeply rooted in history. In contrast, it was argued that abortion has not been a right: referencing several restrictions against it up until the ratification of the Fourteenth Amendment, including the laws of quickening (Dine 1). The dissent references that relying on historical analyses would restrict the rights to contraception that were also previously based on an unwritten privacy right (*Dobbs* 163). However, the majority argues that contraception does not affect another being, referencing the unborn fetus for abortion cases. It seems that the court has developed the idea that bodily autonomy and privacy are guarded when an individual is

sovereign. A privacy right that harms another, non-consenting body, as the court claims a fetus to be, cannot stand. Or, rather, the court decides that it is a state's right to determine if abortion does restrict a non-consenting party (*Dobbs* 79). This argument doesn't seem to take into account a legal rights analysis but rather makes a moral distinction considering the fact that state restrictions on women's ability to obtain an abortion directly affect a non-consenting party as well: the women experiencing a new lack of bodily autonomy. Reliance on a fetal personhood standard also infringes upon religious groups that do not recognize a fetus as a sovereign being until birth (National Council of Jewish Women 1). The Court's non-consenting standard seems to only appeal to a fetus in a manner that they deem morally acceptable, disregarding the opinions of the women forced to carry an unwanted pregnancy to term.

The Court takes on a very specific definition of fundamental rights and their likelihood to stand against future legal challenges. The Court argues that the Due Process clause only protects two categories of substantive rights including rights guaranteed by the first eight amendments and rights that are deemed fundamental but not mentioned elsewhere in the Constitution. According to Justice Alito, the historical implications of abortion's past classification as a crime eschews its possibility of being considered a fundamental right. Unlike other fundamental rights, at the time the Fourteenth Amendment was ratified, the Court brings up that abortion was a crime in three-quarters of U.S. states. The Court concludes that abortion is not a fundamental right rooted in the nature, history, or traditions of the nation, and *Roe* "...either ignored or misstated this history" (*Dobbs* 3). Furthermore, the Court assumes that "the people of various states" evaluate "potential life" differently than a single Court-created standard (*Dobbs* 4). Given the Court's need to balance the interests of the states and the interests of the "woman who wants

an abortion," the Court argues that a single standard is too restricting (*Dobbs* 4). Instead, the Court provides the states with the ability to create that single standard.

While *Roe* and *Casey* held that abortion was a right granted implicitly by the Fourteenth Amendment's mention of "liberty," the *Dobbs* court finds this analysis to be lacking in legal merit (US Const. amend. XIV). *Roe*'s analysis was based primarily on the argument that liberty referred to privacy within one's own medical decisions. The *Dobbs* court, however, argues that it is not acceptable for the Court to define liberty according to each Court's "own ardent views about the liberty that Americans should enjoy," but should rather be based upon the legal belief of the right in question during the Fourteenth Amendment's ratification (*Dobbs* 2). For this reason, the Court relies on historical analysis of abortion as a right and finds that there is no historical justification for abortion to remain a legal right. The *Dobbs* court does not share the same belief as the *Casey* court, that abortion falls under a substantive right implicit in the Constitution. The Court also fails to find a State's regulation of abortion as a sex-based classification, precluding the Court from utilizing a higher form of judicial scrutiny in its analysis of abortion legislation by referencing that abortion does not fall within an Equal Protection Clause issue. *Dobbs* makes explicit mention of other Court precedents denying abortion as a sex-based classification (*Geduldig v. Aiello* (1974); *Bray v. Alexandria Women's Health Clinic* (1993)).

When writing the majority opinion for *Dobbs*, Justice Alito made it very clear that the limiting of privacy rights only applied to abortion, and that the right to privacy is still an implied right within the Constitution that applies to the rights established in past court cases. These rights include interracial marriage, engagement in private sexual acts, same-sex marriage, and birth control access (*Loving v. Virginia*; *Lawrence v. Texas*; *Obergefell v. Hodges*; *Griswold*).

However, the *Dobbs* opinion created a fear that other privacy rights are at stake primarily based on Justice Clarence Thomas' concurrence. He explained that the right to an abortion is clearly not a constitutional right because the Constitution does not secure any substantive rights. In fact, Justice Thomas refers to all substantive due process decisions as "demonstrably erroneous" (*Dobbs* 119). He claims that the only reason the other cases are not at issue in the *Dobbs* case is that no party has asked the Court to reconsider "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised" (*Dobbs* 119). Justice Thomas, as an originalist, believes that the Constitution should not be newly interpreted to match current society, but rather, the Constitution should be interpreted according to the meaning of the written words during its creation. As a result, the cases based upon a Constitutional interpretation rather than explicit language are argued by him to be unable to stand. His concurrence called for the reconsideration of past cases based upon substantive due process, specifically *Griswold*, *Lawrence*, and *Obergefell*. Overall, the *Dobbs* case both turned over years of upheld judicial precedent and sparked fear for the potential loss of other fundamental privacy rights.

Codifying *Roe* and *Casey* in Congress

Congress has a multitude of avenues before it to codify *Roe* into federal law. Politics is the current major obstacle, yet the protection of women's reproductive rights should not be put off as a result of political disagreement. Following the leak of Justice Alito's draft opinion of the *Dobbs* case in May of 2022, talk of codifying *Roe* in Congress was commonplace. Congress has attempted to pass the Women's Health Protection Act which would protect all people with the capacity for pregnancy's ability to determine whether to continue or end a pregnancy and to protect a healthcare provider's ability to provide abortion services (United States Congress,

House Bill 3755). The bill is Congress' first effort to codify *Roe* and *Casey* but, with the current divided Congress, it struggled to do so. The Women's Health Protection Act was based upon Section 5 of the Fourteenth Amendment which allows Congress the ability to enforce the amendment's liberty guarantees by "appropriate legislation" (US Const. amend. XIV, sec. 5). Congress has the ability to enforce constitutional rights through legislative measures but arguments suggest that it does not have the authority to enforce legislation to define Constitutional rights, unlike the Supreme Court. The Supreme Court made this distinction in the case of *City of Boerne v. Flores* (1997), in which the Court stated that Congress may pass legislation protecting constitutional rights but may not determine the manner in which the rights are protected by state legislation (*City of Boerne v. Flores* 521). Creating a constitutional right to abortion through the means of legislation is unlikely to pass should it be challenged in front of the current Supreme Court.

Commerce Clause

One of Congress' strongest powers is that of the regulation of interstate commerce. The Commerce Clause provides Congress with one of its most significant powers of legislation and would provide ample justification for Congressional protection of abortion rights.

The Commerce Clause permits Congress only to regulate the channels of interstate commerce, persons or things participating in interstate commerce, and economic activities that substantially affect interstate commerce (*United States v. Lopez*; *United States v. Morrison*; *National Federation of Independent Business (NFIB) v. Sebelius*). In *Linder v. the United States* (1925), the Supreme Court ruled that the federal government cannot directly control medical practices in the states (*Linder v. United States* 268). *Gonzales v. Raich* (2005) ruled that Congress could regulate the practice of medicine indirectly but this was strictly utilized in a larger

regulatory manner to limit the local cultivation and use of marijuana (*Gonzales v. Raich* 1). The Supreme Court did not extend this ability past the regulation of local activities that are part of a class of activities that impact interstate commerce and it would most likely not be possible for Congress to codify *Roe* utilizing the Court's reasoning here because abortion does not fall under this described category.

It is unlikely that the federal government will be able to compel states to provide abortion services utilizing any current constitutional protections given the current split Congress and Supreme Court makeup, making the codification of *Roe* into federal law improbable but not entirely impossible. It is also true that should anti-abortion legislators take over a congressional majority and the presidency, a national abortion ban would also be ruled unconstitutional. The Supreme Court has protected the states' interests in legislating on abortion and it would be unlikely to strip the states that are allowing abortion access of their ability to do so. Using the same logic, it seems equally likely that a federal ban against abortion would be held unconstitutional because of *Linder*'s restriction on the control of medical practices. In 2007, the Supreme Court heard the case of *Gonzales v. Carhart* which handled the challenge of Congress' partial-birth abortion ban. The Supreme Court upheld the law because it only applied to the intact D&E ("dilation and evacuation") method and not to the more commonly utilized D&E procedure (*Gonzales v. Carhart*). Because of this, the Supreme Court stated that it did not pose an undue burden. Although the issue of commerce was not addressed, the partial ban was upheld. *Gonzales* does not provide a substantive rule stating that commerce cannot be used, indicating that the Supreme Court's silence can at least be considered a supporter of the idea that there is a substantial effect on interstate commerce. Should a complete federal abortion ban be brought before the Supreme Court, it would be unlikely to be upheld as the partial ban was because the

Supreme Court has made an effort to fully allow states to legislate on abortion as they see fit (*Dobbs*). The Supreme Court does not believe that the federal government is the proper entity to make abortion legislation, which should include full bans, even if the undue burden test is no longer applicable.

There is, however, a strong possibility for Congress to utilize the Commerce Clause to protect reproductive rights in some form through regulations of state restrictions on out-of-state abortions. While not active in any state, many have attempted to create abortion restrictions that limit not only access within its borders but also limit a woman's ability to travel out of state for reproductive purposes. SB 8, otherwise known as the Texas Heartbeat Act, allowed private individuals to sue anyone aiding and abetting in the acquisition of abortion services, whether it be the pregnant person, doctor, Uber driver, etc. (Texas Legislature 1-25). Other states have proposed fines and the potential for jail time should a woman who traveled out of state be discovered to have obtained an abortion. However, regulations of this nature are violations of interstate commerce and are unconstitutional because it affects people participating in interstate commerce. When a woman cannot obtain an abortion in their own state and are determined to do so, they will travel out of state: crossing state lines and spending money across state lines, technically contributing to interstate commerce. The effects on interstate commerce are a result of the restrictive legislation and would then be viewed as a violation of the Commerce Clause.

In *Kent v. Dulles* (1958) the Supreme Court held that the right to travel is a part of liberty and cannot be curtailed without Due Process of the law (*Kent v. Dulles* 357). The Commerce Clause protects only the federal government's ability to regulate interstate commerce as it pertains to persons or things. State regulations of interstate travel by people to obtain abortion services is a clear violation of the Commerce Clause and, should such a law be passed and

challenged before a court, would be ruled unconstitutional. However, states could, feasibly, still bring about criminal charges for the intent to travel, as the intent to travel for an abortion occurred in the state where the restriction exists.

Another of Congress' more probable methods of reinstating abortion access utilizing the powers of the Commerce Clause is to utilize a broad reading of the clause. In the past, Congress has been able to utilize its powers of regulating interstate commerce to protect other rights, most notably being the use of the commerce argument to protect civil rights in *Heart of Atlanta Motel, Inc. v. United States* (1964) and *Katzenbach v. McClung* (1964). In 1964, Congress had just passed the Civil Rights Act prohibiting segregation in public spaces. In the *Heart of Atlanta Motel* case, the Supreme Court heard arguments against Title II of the Civil Rights Act which utilized Commerce powers to prohibit places providing public accommodations from discriminating on the basis of race (Civil Rights Act of 1964). The Supreme Court ultimately decided that because hotels host out-of-state inhabitants, they are entities participating in interstate commerce–especially given that this particular hotel was positioned by two interstates–and Congress has the power to regulate them (*Heart of Atlanta Motel, Inc v. United States*). In *Katzenbach*, the Supreme Court heard the arguments of Ollie's Barbecue, a restaurant refusing to serve African American customers. Ollie's challenged the constitutionality of the Civil Rights Act by claiming that the restriction of restaurants from choosing their customers was unconstitutional because restaurants are privately owned entities and Congress could not place restrictions on private-owned businesses utilizing Commerce powers. The Supreme Court ultimately acknowledged that Ollie's itself did not have a direct effect on interstate commerce. However, utilizing a broad reading, the Court ruled that racial discrimination in places like restaurants as a whole had a "direct and highly restrictive effect upon interstate travel" by

African Americans as it discouraged travel and affected interstate commerce (*Katzenbach v. McClung* 379). Both cases led to upholding the constitutionality of the Civil Rights Act and represented the use of commerce to protect other fundamental rights.

Utilizing these precedents, it is possible for Congress to codify *Roe* into federal law by arguing that limiting abortion access has a current and future effect on commerce, granting them the power to enact federal legislation allowing access. According to a 2013 study, the most common reason that women obtained an abortion was financial reasons (Biggs et al. 5). Financial reasons can apply to the cost of child care, medical costs, housing, etc. Financial limitations resulting from forced motherhood limit the ability of these individuals to participate in interstate commerce, similar to the arguments in *Katzenbach*. Also similar to *Katzenbach*, this would be an effect that Congress has the ability to legislate on. The excessive burden that women will face in their participation in interstate commerce as a result of state abortion bans can be equated to the limitations prohibited within the Commerce Clause and those that were deemed unconstitutional in *Katzenbach*. Furthermore, the Turnaway Study (the first cohort study that looked at the consequences of having or being denied an abortion) noted that the "reasons women gave for wanting an abortion strongly predict the consequences they experience when they are denied that abortion" (Greene Foster 36). If state bans on abortion can lead to a multitude of financial ramifications impacting interstate commerce, states are ill-equipped to legislate on abortion access in the first place.

Freakonomics, authored by Steven D. Levitt and Stephen J. Dubner, looks into the financial and criminal ramifications of *Roe v. Wade* as it pertains to the first generation of children that would have been born had abortion not been legalized. Prior to the early 1990s, violent crime in the United States was at an all-time high. However, in early 1990, crime rates

decreased suddenly and rapidly in a way that was inexplainable for many years. Reasons such as tougher gun laws, increased reliance on prisons, and changes in the crack and other drug markets were attributed to the decrease but none were able to fully pass muster (Dubner & Levitt 121). What did closely correlate with the change in crime rates was that 16-18 years earlier, coincidentally the age that men were most likely to commit crimes, *Roe v. Wade* was decided and abortion access had been widened immeasurably. In the first year after *Roe* was decided, "750,000 women had abortions in the United States… By 1980, the number of abortions reached 1.6 million" (Dubner & Levitt 138). The women most likely to take advantage of the newly provided abortion access included those that were unmarried, in their teens, or poor. Of these factors, childhood poverty and single-parent households are "among the strongest predictors that a child will have a criminal future. Growing up in a single-parent home roughly doubles a child's propensity to commit a crime" (Dubner & Levitt 138). Crime decreases as a result of abortion legalization were prevalent in every state analyzed and were fact-checked according to crime rates in states where abortion was legalized prior to *Roe v. Wade*. It seems that there is a causation between the legalization of abortion and the decrease in crime rates as the psychological toll that an unwanted child faces were further limited. When crimes are committed that interfere with or obstruct interstate commerce, Congress has the ability to legislate.

Given the potential increase in crime rates and limitation of women's ability to participate in commerce as a result of abortion bans, there is ample justification for Congress to codify *Roe* into federal law utilizing the Commerce Clause, despite the *Dobbs* ruling. Though abortion bans are now state-specific, Congress can make the argument that state-specific bans have the ability to affect interstate commerce. However, because these justifications are heavily based on an attempt to predict future effects, it seems probable that should a law be passed and challenged

before the Supreme Court, it will not stand given the Court's current political makeup and especially its propensity to stray from precedent. This does not, however, mean that Congress should not make the effort given the constitutional justifications available.

Utilizing their ability to regulate interstate commerce, it seems that the only surefire method of protecting reproductive rights is through the passing of legislation that specifically limits states' abilities to restrict interstate travel for the purpose of obtaining or providing abortion services. Such a law has been proposed in Congress, the "Freedom to Travel for Health Care Act," yet was blocked by Senate Republicans (United States Congress, Senate Bill 4504). Such a roadblock, however, is not determinative of a future lack of legislation protecting interstate travel and politics are the only major roadblock. Congress has a multitude of constitutional justifications within the Commerce Clause that would allow them to pass legislation providing abortion access.

Health and Economic Impacts of Forced Birth

Commerce is greatly affected as a result of forced birth through the existence of adoption and foster care given as solutions to unwanted pregnancy. At any given moment, there are approximately 424,000 children in the foster care system in the United States. In 2019, over 672,000 children spent time in the foster care system (2019 Foster Care Stats). Families that are unable or unwilling to care for a child born from an unwanted pregnancy will contribute to increased rates of children in foster care, a historically underfunded system. Children in foster care will also experience more than two placements a year, some of which are out of state, living with different families and creating an effect on interstate commerce (Annie E. Casey Foundation). A lack of abortion services also disproportionately affects women of color more than white women due to a lack of societal support for families struggling for birth control access

and significant history of wealth inequality. State-specific abortion restrictions require out-of-state travel to attain basic medical care, creating significant, and oftentimes insurmountable, economic burdens (Mhatre 1). As families of color experience forced parenthood at an increased rate, there becomes both an issue of interstate commerce and a limitation of the ability to participate in commerce and the labor market as a result of race–similar to the circumstances *Katzenbach* was based on. Systemic issues within abortion bans cannot be overlooked and, utilizing the Commerce Clause, Congress possesses the ability to legislate to provide nationwide abortion access.

As abortion restrictions occur across the country, the incidence of families raising children in poverty will increase, leading to multiple avoidable health risks and a contribution to the cycle of generational poverty. Behavioral issues, the accumulation of adverse childhood experiences (ACEs), and low educational attainment are all associated with maternal poverty, which occurs with inadequate abortion access. The cost of giving birth is also an incredibly burdensome undertaking. With average costs of nearly $11,000 for a vaginal birth and $20,000 for a cesarean section, not including prenatal or postnatal care, it is unsurprising that pregnancy is a luxury that impoverished families can ill afford and perpetuate the cycle of generational poverty (Doser 1). Generational poverty is the result of systemic barriers limiting particular groups from participation in commerce–creating further justification for the use of Congress's powers to regulate interstate commerce to provide abortion access.

The Protective Powers of the Executive

The President, although able to pass executive orders not requiring Congressional approval, has limited, but doable options for protecting abortion access. Considering that, as of

November 2022, 13 states have full abortion bans in effect, any executive order by the President is likely to face great scrutiny, yet only party politics and moral arguments remain in the way of reinstating reproductive rights nationwide.

Following the release of the *Dobbs* opinion, President Biden took swift action to enact an executive order protecting access to abortion services for women attempting to obtain services out-of-state. The executive order makes clear that should any state official attempt to interfere with a woman's right to travel out-of-state for abortion services, "the Biden Administration will fight that deeply un-American attack" (Biden, Fact Sheet June 24, 2022). President Biden's executive order also attempts to eliminate legal ambiguities surrounding physicians' rights to provide abortion services and, especially, life-saving care. The executive order makes careful note of physician responsibilities and protections under the Emergency Medical Treatment and Labor Act (EMTALA), effectively eliminating confusion surrounding the time it is acceptable for physicians in states with abortion restrictions to provide lifesaving care to pregnant people (Biden, Fact Sheet July 8, 2022).

A month later, President Biden released a second executive order on securing access to reproductive and other health services. It is emphasized that with the *Dobbs* opinion came multiple restrictive laws creating a significant amount of uncertainty surrounding physicians' abilities to provide reproductive health care in all manners, not simply abortion services. President Biden attempted to eliminate the confusion by outlining the services that are allowed according to his order as well as outlining the methods of care protected. President Biden directs the Secretary of the Department of Health and Human Services (HHS) to consider actions to provide access to women traveling out of state for abortion services, including by providing Medicaid coverage for services. The Order also ensures that healthcare providers comply with

federal non-discrimination laws so that women may receive the medically necessary treatment without delay (Biden, Fact Sheet July 8, 2022).

There have been cases of pharmacies limiting access to reproductive health care materials including emergency contraception. President Biden and HHS outline guidance for nearly 60,000 pharmacies regarding their inability to prevent access to reproductive health care services on the basis of race, color, national origin, sex, age, and disability including denying access to medications and advising patients on the suitability of prescribed medications. This statement comes as a result of the Department of Justice filing suit to enjoin Idaho's abortion law as it outlines criminal ramifications for abortion procedures with no exceptions for risks to the health of the woman, which is in direct violation of EMTALA (Biden, Executive Order 14076).

Action Steps

Advisors have argued that President Biden should challenge state bans on abortion medication, otherwise known as the abortion pill. The abortion pill contains the medications mifepristone and misoprostol, both of which were approved by the United States Food and Drug Administration (F.D.A.) and are used to terminate early pregnancies, typically at 11 weeks or less. In April of 2021 as a pandemic-era protocol, the F.D.A. halted the requirement that the first two drugs to terminate an early pregnancy had to be administered in a clinical setting and allowed for the use of telemedicine prescriptions and receipt of the medication through the mail (Belluck 1). In December 2021, the agency made the decision a permanent change. However, 19 states have directly opposed the change by passing legislation that requires pregnant people to take the abortion pill in the presence of a clinician, creating a further burden for abortion treatment (Anderson, Salganicoff, & Sobel).

The Biden Administration and the DOJ have the ability to challenge the 19 state laws that contradict the federal F.D.A. regulations for the administration of the abortion pill. Article VI of the Constitution establishes federal law as the supreme law of the land that takes precedence over state laws. The 19 state laws that directly contradict F.D.A. regulations can be challenged and the Department of Justice would most likely prevail as they have done so in the past (*Zogenix, Inc. v. Deval Patrick*). In 2014, Massachusetts "attempted to regulate a new opioid more stringently than the F.D.A. did" (Cohen et al. 1). However, the United States District Court in Massachusetts invalidated the law as it was inconsistent with the purpose of the F.D.A. regulation (*Zogenix, Inc. v. Deval Patrick*). On a similar front, the F.D.A. provided mail access to the abortion pill in an effort to alleviate the cumbersome effects of having a clinician administer the pill in person. The state regulations denying this opportunity clearly create a burdensome effect that is inconsistent with the F.D.A.'s purpose. The Biden Administration and the Department of Justice should ultimately argue against these states' regulations as they have the opportunity for success.

It is also possible for President Biden to provide access to abortion services on federal lands. Allowing clinics to operate out of federal buildings or allowing access to federal lands for mobile abortion clinics would eliminate states' abilities to regulate all abortion services within their borders (Cohen et al. 1). Federal lands within the states with abortion restrictions can then be used to provide abortion services without worries of civil action being brought. Criminal actions could be brought but should not apply if the federal government has weighed in on the issue because, in the past, the Hyde Amendment has restricted the use of state and individual taxpayer money to fund abortion services (United States Congress, Senate Bill 142). The disallowed use of local government taxes for federal regulations can be used as ample evidence for state laws being inapplicable on federal land, as the Hyde Amendment previously had

separated the two on the issue of abortion services. In this case, the abortion provider would be paying the federal government, not the state, removing state jurisdiction.

Finally, and probably the most likely method that the President could enact would be to expand access to telemedicine. If the federal government were to increase funding efforts that work to eliminate technology disparities for access to telemedicine, as well as encourage the adoption of interstate licensure compacts that allow doctors to prescribe medication across state lines with telemedicine, it could limit the disparities in abortion access (Cohen et al. 1). The federal government also maintains a form of enforcement discretion that has been exercised previously within the Obama administration. In October 2009 and June 2011, the Department of Justice issued guidance for federal prosecutors "concerning marijuana enforcement under the Controlled Substances Act (CSA)" (United States, Dept. of Justice, Office of the Deputy Attorney General 1). The federal government announced that it was choosing not to prosecute federal crimes related to marijuana use, allowing states to create their own regulations related to recreational use. The Biden administration could take a similar path and choose not to prosecute federal crimes related to procuring or dispensing abortion medication. Furthermore, the federal government could extend its reach by utilizing its oversight of the post office to prevent any investigation of shipments of abortion pills through the mail (Cohen et al. 1).

While politics somewhat stand in the way of these efforts, there is no foolproof method that the executive can take to protect and provide abortion access in states with strict regulations. It is only through legitimate attempts that abortion rights can be returned to women as there are multiple legal justifications and methods.

The Right to Medical Privacy

There remain many murky issues surrounding the right to medical privacy following the overturn of *Roe* and *Casey*. Although very clearly a medical procedure, abortion has become such a contentious and politicized issue that it is no longer viewed as such, but rather as an issue of morality. However, medical rights still exist and it is the cooperative responsibility of the federal and state governments to both inform the public of their rights and refrain from passing legislation intended to infringe upon these rights.

Following the *Dobbs* opinion, HHS released new guidance that clarified the Health Insurance Portability and Accountability Act (HIPAA) privacy rule in relation to state abortion restrictions. As multiple states begin instigating their criminal bans on abortion, the right to medical privacy is a major issue of debate. Privacy within one's medical information has been a protected right since 1996, but HIPAA is a historically ambiguous law. On its face, HIPAA protects patients' medical history from being shared or used without their consent (Health Insurance Portability and Accountability Act of 1996, CDC; hereinafter HIPAA 1996). However, it was not until 2013 that the definition of a breach of privacy was outlined in a manner that attorneys and healthcare providers could understand. Initially, the risk of harm standard was defined to mean that there is no breach of medical information privacy unless there is a substantial risk of harm to the patient. In 2013, HHS redefined the standard as a two-pronged test in which the assessment focus is no longer on the harm to the patient but rather, on whether information has been compromised. Secondly, the burden of proof lies on the person whose information was compromised (Sullivan 1). The only permitted disclosure of private medical information is to the individual, to treatment or payment facilities, or to a limited dataset for public research with the name of the patient anonymized (HIPAA 1996). HIPAA also allows

disclosure of patient information without their consent for national priority purposes, in the case that it is required by law, requested by law enforcement, requested for judicial and administrative proceedings, victims of abuse or neglect or domestic violence, tissue or organ donation, to lessen a threat to public safety, essential government functions, worker's compensation, identification of the deceased, public health activities, health oversight activities, and some research instances (HIPAA 1996).

It is obvious, then, why state regulations that require criminal sanctions for patients or for medical practitioners providing abortion care are a topic of debate in the realm of medical privacy. On the one hand, HIPAA allows for medical information regarding received procedures to be shared with government entities should there be a requirement by law. However, the HIPAA law may not compel medical providers or insurance agencies to share patients' private health information (PHI), it states that they "may use and disclose protected health information without individual authorization as required by law" (Office for Civil Rights, Summary of the HIPAA Privacy Rule 1). HIPAA does not force compliance with the law but would offer medical practitioners legal protections should they share PHI. The use of the language "may" instead of must reflects both the ambiguous nature of HIPAA as well as the potential arguments for the protection of abortion services. Should a state law require disclosure but the federal government takes a stance against the disclosures, federal law would take precedence and medical practitioners would not be forced to share their patients' PHI.

Because HIPAA, as a federal law, protects the right to privacy within one's medical information, state laws infringing on this right by means of requiring disclosure of abortion services should not be allowed to stand. The Supremacy Clause of the Constitution (Article IV) clearly distinguishes federal law as superior to state, rendering state laws opposing HIPAA

privacy protections unconstitutional. Furthermore, HHS has specified that HIPAA only does not override state laws in cases when state laws provide more protections than HIPAA, not less (Office for Civil Rights, Does HIPAA override the State law?). Otherwise, state laws that are "contrary to the Privacy Rule are preempted by the Federal requirements" (Office for Civil Rights, Does the HIPAA Privacy Rule preempt state laws?). States can apply for exemptions from the federal requirements, but given the contentious nature of abortion regulations, it is unlikely that they will be granted as they do not work in tandem with medical privacy rights, the interests of the patient, and the general health of those seeking abortion care.

Despite these technical federal protections, without federal action, physicians and healthcare providers may feel compelled to share private medical information regarding abortion treatment with law enforcement that they would otherwise not share. States have begun instigating steep penalties for abortion, some including a life sentence for providing abortion care and complete loss of a physician's medical license. These laws build fear leaving healthcare providers to grapple with the moral ramifications of exposing a woman's privacy in her treatment so that she may face penalties in exchange for avoiding a complete loss of the provider's lifestyle and stability. In many cases, and without the protection of clear HIPAA rights, it would not be uncommon for healthcare providers to choose the former in an effort to avoid penalties resulting from covering up a state crime or never performing the procedure in the first place. Furthermore, some healthcare providers may agree with state legislation criminalizing abortion and would violate a woman's privacy to further their own moral and political agenda.

Considering the significant salaries of healthcare providers and the protections in place for healthcare facilities, a HIPAA violation could be only a minor roadblock, with penalties costing as low as $100 and as high as $50,000 per violation for willful neglect of HIPAA

(Reciprocity 1). However, when state laws remain so heavily in favor of abortion criminalization, it would be only a matter of time before states provide payments to healthcare organizations to cover violation fees. After all, Texas SB 8 provided monetary compensation for private citizens willing to report people obtaining or aiding a patient in obtaining an abortion (Texas Legislature 1-25). There is, however, a potential for a one-year prison sentence for willful ignorance of HIPAA standards, but enforcement is entirely dependent on the Department of Justice's inclination to act. With numerous and constant violations, this could become an administratively burdensome undertaking.

The ramifications of disregarding privacy concerns regarding medical care are numerous. While HIPAA may not be a cure-all for abortion access, it very clearly protects patients from unnecessary intrusions of law enforcement into a patient's private medical history. Should law enforcement become an "omnipresent force in doctor's offices" in an attempt to limit pivotal aspects of reproductive healthcare, it could discourage healthcare attainment altogether out of fear of privacy violations (Buchanan & Stovicek 1). In a country that is already falling behind other developed nations in infant mortality and maternal health rates, policing medical privacy in such a manner is a risk the state of national healthcare can ill afford (America's Health Rankings 2021 Report). It is necessary for the federal government to stress the importance of HIPAA compliance, provide easy access to resources surrounding patient rights, and develop strong justice responses to HIPAA privacy violations. While treated as a political issue, privacy violations in medical care should not be the subject of political debate.

Conclusion

The actions that can be taken by Congress and the Executive branch to protect reproductive rights may be minimal and full of uncertainty but without decisive action by Congress and the Executive, there will be irreparable consequences to the women forced into motherhood. The Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* sparked an influx of abortion restrictions, fear, protests, legal questions with no obvious answer, and a slew of calls on Congress and the President to protect women's access to reproductive healthcare. Use of the Commerce Clause, Executive action, and federal power may be able to return women's reproductive rights despite the Supreme Court's ruling.

In lieu of the changes in state regulations, it is astounding that a woman's bodily autonomy lies in the hands of privileged legislators that do not experience the woman's life nor have a voting public that supports abortion access. The prevalence of abortion restrictions with caveats allowing abortion access in the case of rape or incest perpetuates the notion that in order for a woman's body to be her own, it must first be violated by someone else. This notion is not only deplorable but dangerous for the lives of women. It is of great importance that lawmakers and judicial members alike acknowledge the fact that their opinions do not matter on this front and that a state interest in the life of an unborn fetus is of no interest to the woman who will suffer at its hands. The lives of women should cease to be recognized as second-class to those of men who do not bear the reproductive burden. Abortion has become a contentious issue full of morality discussions and has lost the stories of those that matter in these cases. Women matter. Congressional and Executive action can and should be taken to eliminate the gender disparities in reproductive health care access.

Works Cited

Anderson, Emma, et al. "State Restrictions on Telehealth Abortion." *KFF*, 2 Dec. 2021, https://www.kff.org/womens-health-policy/slide/state-restrictions-on-telehealth-abortion/.

The Annie E. Casey Foundation. "Child Welfare and Foster Care Statistics." *The Annie E. Casey Foundation*, 16 May 2022, https://www.aecf.org/blog/child-welfare-and-foster-care-statistics.

Bellotti v. Baird, 443 U.S. 622 (1979).

Belluck, Pam. "F.D.A. Will Allow Abortion Pills by Mail during the Pandemic." *The New York Times*, The New York Times, 13 Apr. 2021, https://www.nytimes.com/2021/04/13/health/covid-abortion-pills-mailed.html?register=email&auth=register-email.

Biden, Joseph R. President. "Fact Sheet: President Biden Announces Actions in Light of Today's Supreme Court Decision on Dobbs v. Jackson Women's Health Organization." The White House, The United States Government, 24 June 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/24/fact-sheet-president-biden-announces-actions-in-light-of-todays-supreme-court-decision-on-dobbs-v-jackson-womens-health-organization/.

Biden, Joseph R. "Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services." The White House, The United States Government, 8 July 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/08/fact-sheet-president-biden-to-sign-executive-order-protecting-access-to-reproductive-health-care-services/.

Biggs, M Antonia, et al. "Understanding Why Women Seek Abortions in the US." *BMC Women's Health*, vol. 13, no. 29, 5 July 2013, pp. 1–13., https://doi.org/10.1186/1472-6874-13-29.

Bray v. Alexandria Women's Health Clinic, 506 U. S. 263, 273– 274

Buchanan, Maggie Jo, and Nadia Stovicek. "Using HIPAA to Protect Patient Privacy and Fight Abortion Criminalization." *Center for American Progress*, 17 Aug. 2022, https://www.americanprogress.org/article/using-hipaa-to-protect-patient-privacy-and-fight-abortion-criminalization/.

City of Boerne v. Flores, 521 US 507 (1997).

Cohen, David S., et al. "Joe Biden Can't Save Roe v. Wade Alone. but He Can Do This." *The New York Times*, The New York Times, 30 Dec. 2021, https://www.nytimes.com/2021/12/30/opinion/abortion-pills-biden.html.

Dine, Ranana. "Scarlet Letters: Getting the History of Abortion and Contraception Right." *Center for American Progress*, 8 Aug. 2013, https://www.americanprogress.org/article/scarlet-letters-getting-the-history-of-abortion-and-contraception-right/

Dobbs v. Jackson Women's Health Organization. Supreme Court of the United States. No. 19–1392, 24 June 2022. https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf

Doser, Madison. "Pregnancy and Poverty: Forging a Path Forward for Families." *The Catalyst*, American Public Human Services Association, 26 Sept. 2022, https://aphsa.org/APHSABlog/mhhspp/pregnancy-and-poverty-forging-a-path-forward-for-families.aspx. Accessed 22 Nov. 2022.

Dubner, Stephen J., and Steven D. Levitt. *Freakonomics*. Penguin Books, 2006.

Eisenstadt v. Baird, 405 U.S. 438 (1972).

Geduldig v. Aiello, 417 U. S. 484, 496, n. 20

Gonzales v. Carhart, 550 U.S. 124 (2007)

Gonzales v. Raich, 545 US 1 (2005).

Greene Foster, Diana. *The Turnaway Study: Ten Years, a Thousand Women, and the Consequences of Having--or Being Denied--an Abortion*. Scribner, 2021.

Griswold v. Connecticut, 381 U.S. 479 (1965).

Guarnieri, Isabel, and Elizabeth Nash. "13 States Have Abortion Trigger Bans-Here's What Happens When Roe Is Overturned." *Guttmacher Institute*, 6 June 2022, https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned.

"Health Insurance Portability and Accountability Act of 1996 (HIPAA)." *Centers for Disease Control and Prevention*, Centers for Disease Control and Prevention, 27 June 2022, https://www.cdc.gov/phlp/publications/topic/hipaa.html#:~:text=The%20Health%20Insurance%20Portability%20and,the%20patient%27s%20consent%20or%20knowledge.

Heart of Atlanta Motel, Inc. v. United States, 379 US 241 (1964).

Hovey G. Abortion: a history. Plan Parent Rev. 1985 Summer;5(2):18-21. PMID: 12340403. https://pubmed.ncbi.nlm.nih.gov/12340403/.

"International Comparison: 2021 Annual Report." *America's Health Rankings*, https://www.americashealthrankings.org/learn/reports/2021-annual-report/international-comparison.

Katzenbach v. McClung, 379 US 294 (1964).

Kent v Dulles, 357 US 116 (1958).

Lawrence v. Texas, 539 US 558 (2003).

Linder v. United States, 268 U.S. 5 (1925).

Lindsey, Treva B. "Abortion Has Been Debated in the U.S. since 18th Century." *The Ohio State News*, The Ohio State University, 6 May 2022, https://news.osu.edu/abortion-has-been-debated-in-the-us-since-18th-century/.

Loving v. Virginia, 388 US 1 (1967).

Mhatre, Nikita. "Abortion Restrictions Hurt Women of Color." *National Partnership for Women and Families*, 25 Apr. 2019, https://www.nationalpartnership.org/our-impact/blog/general/abortion-restrictions-hurt-women-of-color.html. Accessed 22 Nov. 2022.

National Federation of Independent Business v. Sebelius, 567 US (2012).

Obergefell v. Hodges, 576 U.S. 644 (2015).

(OCR), Office for Civil Rights. "2032-a State Law Requires That a Health Care Provider Give Individuals One Free Copy of Their Medical Records but HIPAA Permits the Provider to Charge a Fee. Does HIPAA Override the State Law?" *HHS.gov*, 28 June 2021, https://www.hhs.gov/hipaa/for-professionals/faq/2032/a-state-law-requires-that-a-health-care-provider-give-individuals/index.html.

(OCR), Office for Civil Rights. "399-Does the HIPAA Privacy Rule Preempt State Laws." *HHS.gov*, 28 June 2021, https://www.hhs.gov/hipaa/for-professionals/faq/399/does-hipaa-preempt-state-laws/index.html.

(OCR), Office for Civil Rights. "Summary of the HIPAA Privacy Rule." HHS.gov, 19 Oct. 2022. https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html.

Planned Parenthood of Central Missouri Danforth v. Danforth, 428 U.S. 52 (1976).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

Reciprocity. "What Are the Penalties for Violating HIPAA?" *Reciprocity*, 10 Mar. 2022, https://reciprocity.com/resources/what-are-the-penalties-for-violating-hipaa/.

Roe v. Wade, 410 U.S. 113 (1973).

Sullivan, Tom. "Q&A: On Remaining Ambiguities in the Final HIPAA Rule." *Healthcare IT News*, 11 Feb. 2013, https://www.healthcareitnews.com/news/qa-remaining-ambiguities-final-hipaa-rule.

Texas Congress, Senate. SB 8, *Relating to abortion, including abortions after detection of an unborn child's heartbeat; authorizing a private civil right of action.* 19 May 2021. https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00008F.pdf.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

United States. *Civil Rights Acts of 1964.* Washington: U.S. Govt. Print. Off., 1969.

United States, Congress, House. Women's Health Protection Act of 2021. 117th Congress, 1st session, House Bill 3755, Introduced 24 September 2021. https://www.congress.gov/bill/117th-congress/house-bill/3755.

United States, Congress, Senate. Freedom to Travel for Health Care Act of 2022. 117th Congress, Senate Bill 4504, Introduced 12 July 2022. https://www.congress.gov/bill/117th-congress/senate-bill/4504/text

United States, Congress, Senate. Hyde Amendment Codification Act. 113th Congress, Senate Bill 142, Introduced 24 January 2013. https://www.congress.gov/bill/113th-congress/senate-bill/142#:~:text=Hyde%20Amendm

ent%20Codification%20Act%20%2D%20Prohibits,benefits%20coverage%20that%20includes%20abortion

United States Constitution. Amend. XIV, Sec. 5.

United States, Department of Justice, Office of the Deputy Attorney General. "Guidance Regarding Marijuana Enforcement." 29 August 2013. https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

United States, Executive Office of the President [Joseph Biden]. Executive Order 14076: Protecting Access to Reproductive Healthcare Services. 13 July 2022. *Federal Register*. Vol. 87, No. 133. Pp. 42053-42055. https://www.whitehouse.gov/briefing-room/presidential-actions/2022/08/03/executive-order-on-securing-access-to-reproductive-and-other-healthcare-services/.

United States v. Lopez, 514 US 549 (1995).

United States v. Morrison, 529 US 598 (2000).

Zogenix, Inc. v. Deval Patrick, N. 14-11689-RWZ, (2014). https://www.mad.uscourts.gov/training/pdf/zohydro.pdf

"2019 Foster Care Stats." Children's Rights, 2 Aug. 2022, https://www.childrensrights.org/newsroom/fact-sheets/foster-care/.