

THE DECLINE OF WOMEN'S REPRODUCTIVE RIGHTS IN AMERICA:
A HISTORICAL OVERVIEW AND AN EXAMINATION OF THE FUTURE OF
WOMEN'S REPRODUCTIVE RIGHTS

By

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Abstract

With this honors thesis, I want to examine why and how we are where we are today, in 2023, with abortion and women's reproductive health laws. I want to start by examining the key cases concerning abortion and women's reproductive rights and analyze the changes in reasoning and language. I also want to pay attention to who was on the Court during the time these cases were decided and see if there were any shifts in reasoning when justices on the Court changed. I will also contextualize these changes. I will go into depth as to which president appointed each justice and why they decided to appoint that specific justice. This thesis will tell the story of the cases on a timeline. Then there will be a deep dive into *Dobbs v Jackson Women's Health Organization*. This will bring us to where we are today in 2023 with reproductive legislation. There will then be an examination of what the future looks like in regard to abortion laws and decisions and what the effect *Dobbs* will have on America and women's roles within it. Some questions that will be posed, answered, and analyzed in this thesis are; How does this affect democracy and women's role in it? How does this affect how women see America and the government? What's the future of abortion and women's health laws? What do women need to do today to get back what we have had for decades? Or is that impossible? Have women lost that right for good?

Introduction

Modern women in America are worse off in terms of reproductive rights than women were in the '70s. Last summer (2022), after 50 years of having the right to an abortion, women in America lost that right with the decision of *Dobbs v Jackson Women's Health Organization* (2022) which overturned *Roe v Wade* and determined that the right to an abortion was not protected by the Constitution.

To examine the extent of the concept of women being worse off today than in recent decades with reproductive rights being true, this thesis will analyze and offer ideas in a few sections. This thesis will begin by giving a summary of relevant Supreme Court cases while analyzing the changes in reasoning and wording in each case. The thesis will go into depth on how the Supreme Court's opinion has changed over decades concerning women's reproductive rights. After, the thesis goes into what the effect of *Dobbs* might be. Justice Thomas, in his opinion, stated that the Court might need to reexamine other Supreme Court cases that rely on due process because they decided that due process does not protect the right to an abortion. One of these cases that Justice Thomas explained might need to be re-examined is *Griswold*, which allows married couples to buy and be counseled on birth control. This thesis will then transition into the changes that have occurred on the Supreme Court in the past, and the most recent changes that could have brought about the decision in *Dobbs*. The next section of the thesis is whether the decision to overturn *Roe* was political. This section offers up the current Supreme Court's opinion on this matter, as they stated in *Dobbs* that they were not influenced by any outside forces and only answered the Constitution. However, three out of the nine justices were appointed by one conservative president who was accused of being sexist, of sexually assaulting women, and who has been very verbal about his dislike of abortion. Therefore, was overturning

Roe what was best for the nation and the Constitution, or was it what a few wanted? The following section answers the question of what the lack of abortion means for women in America. Women in America have had access to abortion for 50 years. For many women, they have had access to it all their lives. For numerous women, abortions are seen as an action that can be taken if all else fails. Now many women in certain states have lost this right. Without this fail-safe, women's relationships will be affected and their ability to participate in society will be disturbed and reduced. In states where the right to an abortion is still up in the air, due to the majority of American politicians being men, women have to ask men to grant them rights. There is also instability for women as they are unsure of the rights they and their daughters will have. One of the last sections examines the potential outcomes and actions that can be taken post-*Dobbs*. One potential action is that *Dobbs* can be re-examined in some years after the Court has gone through some change to see if *Roe*, or a case with a similar effect, can be decided. Other potential actions are discussed and all actions are analyzed to determine feasibility. The final section covers why all of this matters. Due to the Supreme Court's decision, many Americans' reactions, and certain states passing laws to further take away and restrict women's reproductive rights, many women are losing faith in America. Many also see the taking away of women's rights as a ploy to get men back on top in society and to take away all the progress women have made. Ultimately, this thesis will show that there has been a push to slowly strip rights and privileges away from women. Conservatives have been pushing for this action to be taken for years. Now women are losing their place in society and are being controlled because they have lost bodily autonomy. Now the question is what will America do next in terms of women's reproductive laws and rights?

Summary of Relevant Cases

Griswold v Connecticut (1965)

This case started a change toward allowing reproductive and sexual rights in the United States. A Connecticut statute made it illegal for anyone to use a drug to prevent contraception. It also made it illegal for anyone, specifically doctors to advise anyone about birth control use or devices. A gynecologist in Connecticut opened up a birth control clinic with Griswold, the head of planned parenthood in Connecticut. Medical directors gave medical advice on how to prevent conception to married people and prescribed contraceptives. They were then arrested for violating Connecticut law and fined. The Appellant claimed the Connecticut law violated the 14th Amendment. The question, in this case, is, “Did the Constitution protect the right of marital privacy against state restrictions on a couple’s ability to be counseled in the use of contraceptives?”

Justice Douglas gave the opinion of the Court. The Court believes the appellants have standing. The Court says this Connecticut law operates directly on a marital relationship between a husband and wife, and a doctor’s role in that relationship as well.

The Court claimed that there are many rights that are not directly mentioned in the Constitution or the Bill of Rights but are seen as rights today such as the right to educate a child in a school that the parent chooses. Due to this, precedent from *Pierce v Society of Sisters* and *Meyer v Nebraska* says that going with the First Amendment, the state may not contract the range of knowledge available. In other words, the First Amendment protects people’s right to information. The right to freedom of speech and freedom of the press also includes the right to distribute information, and the right to read and receive information. The First Amendment also includes freedom of inquiry, freedom of thought, and freedom to teach. The Court also found that

precedent cases established a right to assembly, ideology, and the right to express one's attitude or philosophy by membership in a group. The Court also said there was a right to privacy in *NAACP v Alabama* because this case said people have a right to associate and have privacy for their associations. In the past, the Court has held that the First Amendment has many instances where the right to privacy is protected from the government. The right to association involves more than the right to assemble, it includes the right for a person to express their beliefs, attitudes, or philosophies by being a member of a group. Here, freedom of association includes freedom of expression, which although not directly written in, is included in the First Amendment.

The right to privacy is also established through guarantees. One guarantee is from the Third Amendment which prohibits the quartering of soldiers during times of peace. Another guarantee is the Fourth Amendment which establishes the rights against unreasonable searches and seizures. The Fifth Amendment also works to establish the right to privacy through its Self-Incrimination Clause, which creates a zone of privacy that the government may not penetrate to force someone to surrender to their detriment. The Ninth Amendment also establishes the enumeration in the Constitution, of certain rights. It says these rights shall not be construed to deny or disparage others retained by the people. The Court also decided in *Mapp v Ohio* that the Fourth Amendment created a right to privacy. They also determined that this right was just as important as any other right and that this right is reserved for the people.

The Court decided that the Connecticut law created a situation where a relationship is within the zone of privacy created by various Constitutional guarantees. The Court also found that since the law works to stop the use of contraception devices, rather than limit the manufacturing of such devices it goes against a principle established by the Court in *NAACP v*

Alabama, "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms" (*NAACP v Alabama*, The Supreme Court of the United States). The Court also found that enforcement of and the overall idea of this bill goes against the notions of privacy surrounding marriage. The Court's opinion mentioned that the law goes against notions of privacy concerning a marriage, which is older than the Bill of Rights. They also mentioned that marriage promotes our way of life and harmony. Ultimately, this Supreme Court decision struck down the Connecticut law.

Justice Black and Justice Stewart dissent. They argued that one could not infer the Constitution contained the right to privacy. Justice Black also disagreed that the right to privacy could be found in the Ninth and Fourteenth Amendments.

As previously mentioned this was the first in a stream of cases dealing with women's reproductive health and rights. Although, this case deals specifically with birth control for married couples. This case set a precedent for the right to privacy to be used for the legalization of reproductive health care. The reasoning and rights this case established was also used in the reasoning to legalize abortion in *Roe v Wade* and *Casey v Planned Parenthood*. When *Dobbs v Jackson* was decided, the Court said that the right to privacy that *Griswold v Connecticut* established existed in the Constitution in the First Amendment, Third Amendment, Fourth Amendment, Fifth Amendment, etc. did not actually exist. Although *Dobbs v Jackson* did not overturn *Griswold v Connecticut*, it did decide the right to privacy does not exist within the Constitution which *Griswold v Connecticut*, decided in 1964, helped to establish. This case, although very monumental for women, does not use women's rights or increasing equality for women as reasoning for the legalization of birth control, the case instead focuses on preserving

the integrity of marriages. However, this is the first step in granting women more rights and equality in the law.

***Roe v Wade* 1973**

Almost ten years after *Griswold v Connecticut* was decided the Court expanded women's reproductive healthcare rights and protections through *Roe v Wade* which legalized abortion. This Supreme Court case dealt with a pregnant Texas woman who challenged her state's criminal abortion laws. She claimed her life was in danger if she did not get an abortion and she was unable to afford to travel to another jurisdiction to obtain an abortion. Texas abortion laws which said that attempting an abortion was not allowed except in cases to save the mother's life, no matter the stage of the pregnancy. The Court found *Roe* had standing to sue and her case was not moot.

The Court found that this state abortion law and others similar that only allow abortions to save the mother's life, without regard to the stage of the pregnancy violate the Fourteenth Amendment Due Process Clause. The Court found that the Due Process Clause included a right to privacy against state action, this protects a woman's right to terminate her pregnancy. The Court also found that a state does have a vested interest in protecting the life of the mother and the potential human life. The state's interest in protecting potential human life increases as pregnancy develops closer to term. The Court found that for the stage of a pregnancy close to the end of her first trimester, the decision of whether or not to have an abortion must be left up to the woman and her doctor. The stages after the first trimester may regulate abortion as long as it is still reasonably related to maternal health and allows for exceptions to preserve the mother's life or health. The Court found that in the third trimester, the state does have a vested interest in the

unborn fetus and therefore is able to regulate. The Court decided the Texas criminal abortion statutes are unconstitutional.

The Court explained that common law allowed abortions before the first recognizable movement of the fetus. This came from ideas about when life begins. However, there seem to be conflicting ideas about when life begins, it is thought to be sometime between conception and birth. Christian theology had some contradictions about when this was and it changed over time. English statutory law made abortion of a quick fetus a capital crime, but it provided lesser penalties for an abortion before quickening. In American law, after the civil war, many states' initial statutes dealing with abortion were severe in their penalties for abortion after quickening, but more lenient for abortion before quickening. By the 1950s a majority of jurisdictions banned abortion unless they were needed to save the life of the mother. Years before *Roe v Wade* there was a trend toward liberalization of abortion statutes. One-third of states changed their abortion laws to be less restrictive. The Court explains that at the time the Constitution was written and adopted abortion was not seen as bad among citizens as it was during the 1970s (and prior). Women even enjoyed more reproductive rights during that time than during the time of *Roe*. The Court believes that the reason for recent anti-abortion laws may have been to discourage illicit sexual conduct, although they do not believe the Texas laws fit into this category. Another reason may be that when most criminal abortion laws were enacted, abortion was a hazardous medical procedure and could result in harm to women. However, medical care has advanced past this concern.

The Court found that a state does have a vested interest in the mother's health and in the unborn's potential life, but only in the third trimester. Many believe the unborn counts as life because they believe life begins at conception. Therefore, the state's interest to preserve life

extends to prenatal life. However, the Court found that this belief is not at odds with their decision.

The Court found that the right to privacy is not explicitly mentioned in the Constitution, however, in numerous previous cases, the Court has continuously recognized the right to privacy. As mentioned in *Griswold v Connecticut* the Court has recognized that there exist some zones of privacy that certain guarantees create and protect. This has been found in the First Amendment, Fourth Amendment, Fifth Amendment, penumbras of the Bill of Rights, Ninth Amendment, and the concept of liberty granted by the Fourteenth Amendment. The Court found that the previous Court decisions prove that only personal rights that can be deemed fundamental or “implicit in the concept of ordered liberty” are included in the guarantee of personal privacy. The Court found that wherever the right to privacy is found, it is broad enough to include a woman’s decision to have an abortion. States could cause detrimental harm to pregnant women by denying this choice because it may force the woman into a distressful life and future, cause psychological harm, and problems to her physical health. The Court found that a woman does not have the right to an abortion at whatever time and for whatever reason. This is because the Court's decisions that recognized a right to privacy also recognized some state regulations in areas protected by that right are appropriate.

This case is the first Supreme Court case that protects the right to an abortion. Before this, as stated in the majority’s opinion, some state laws against abortion have been in effect for a century. The Court does however say that there is evidence that abortions took place in ancient antiquity and Rome, although there is some conflicting evidence on this. It does seem that abortions became to be condemned once Christianity took off and the Hippocratic Oath became the pinnacle of medical ethics. *Roe v Wade* only protects the right to an abortion for the first and

second trimesters. After that, the Court leaves it up to the state to decide. *Casey v Planned Parenthood* goes back on this and merges the two trimesters. This case is more vague as it does not create a standard by which to judge exactly what is legal or not. This landmark decision did however decide abortion is legal to an extent. It also used what *Griswold v Connecticut* established as a precedent for reproductive rights for women. *Griswold* established that the Fourteenth Amendment is a guarantee that works to establish the right to privacy. This case decision heavily relied on the decisions of other cases, such as *Griswold* which established a right to privacy existed and had been used to decide many other cases. In this case, *Roe v Wade* uses this reasoning to conclude that abortions are legal in the first and second trimesters. Interestingly, this case does not give much information about why or how legalizing abortion is important for women. It does not say when life begins, it just summarizes the viewpoints concerning this topic. It also does not give much detail on the future of Court decisions concerning this topic so after this case there were a lot of questions about whether *Roe* would be overturned. This case has since been overturned with *Dobbs v Jackson (2022)*.

Summary of *Planned Parenthood v Casey* 1992

The five provisions of the Pennsylvania Abortion Control Act of 1982 are at issue. Provision one is that a woman seeking an abortion must give consent, must be given certain information at least 24 hours before the abortion, a woman seeking an abortion must show she has notified her husband and imposes certain reporting requirements on abortion clinics. This case reaffirms *Roe*'s essential holdings, such as that a woman's decision to terminate a pregnancy is a liberty protected from state laws by the due process clause. The Court will determine the boundaries of society versus the individual. Many believed *Roe* was unworkable, but this case revised *Roe* and determined it is workable. The Court found that the ability of women to

participate as equals in society (economic and social) relies on their ability to control their reproduction. This is a development for women's reproductive rights as the Court is expressing women's stake in abortion, rather than just focusing on the history or religious perspectives.

Many people believed that this case would overturn *Roe*, and although it did add some abortion restrictions, it did not overturn *Roe*. Additionally, this case also addresses the effect of *Roe* and the potential effects that might occur if *Roe* were to not exist. The Court found that the effect of *Roe* cannot be completely understood but neither can the world without *Roe* since people have now lived their lives in a way due to the case. Society has become reliant on the option of abortions. The Court also found that state interest does not override individual liberty if *Roe* is seen as stating the rule of personal autonomy. The Court decided that later divergences from *Roe*'s main conclusion have no bearing on its main conclusion. Interestingly, when considering what overruling *Roe* would mean for the Supreme Court itself the Court found that overruling *Roe*'s main or central conclusion would undermine the Supreme Court and its legitimacy. The Court does overturn *Roe*'s strict scrutiny standard of review and put undue burden standard in its place. The Court defines an undue burden as the undue burden standard, undue burden is if there are substantial obstacles placed in the way of a woman obtaining an abortion of an unviable fetus. The Court decided states may take measures to ensure a woman's choice is informed, as long as it does not place an undue burden on the woman from obtaining an abortion. The state may pass laws to further the health and safety of a woman seeking an abortion. The Court did not overturn or reverse the main premise of *Roe*, the Court decided that the undue burden standard does not change *Roe*'s holding that regardless of whether a state has made exceptions, a state may not interfere with the woman's decision to end her pregnancy. Justice Stevens dissented from the majority opinion for many reasons. Justice Stevens explained

that the majority opinion saying that the State has an interest in the unborn does not explain whether that interest outweighs that of the pregnant woman's interest in personal liberty. He explains that saying the State has an interest does not go against what was established in *Roe*. Justice Stevens also said, "The authority to make such traumatic and yet empowering decisions is an element of basic human dignity". Justice Stevens does not disagree that the state has some interest, however, he questions why the state has the authority to weigh in on this life-changing decision for women with what they believe is right. He says the state may advocate for their belief by funding childbirth, but should not actively try to deter women from having abortions. Under *Roe*, states could only make laws, before viability, concerning women's health, not laws that try to change the woman's mind. Concerning the Court's decision to uphold the 24-hour waiting period law, Justice Stevens states, " The Commonwealth cannot further its interests by simply wearing down the ability of the pregnant woman to exercise her constitutional right".

This case also reaffirmed *Roe's* holding that an abortion may be prescribed or advised for the safety of a mother. This case still left some questions unanswered. The Court found that the medical emergency definition does not pose a threat to a woman's ability to get an abortion although it may cause problems if interpreted a certain way. They decided to leave this issue up to lower courts to deal with. The Court decided that the husband's provision in the Pennsylvania law violated the undue burden standard. This is because the Court found that it cannot be claimed that the father's interest in the fetus' welfare is equal to the mother's liberty. This part of the decision is very interesting as it points out that abortion is a woman's liberty issue and that women have more interest in this issue than other parties.

There are major changes in this case from what is established in *Roe*. For instance, this case introduced the idea of viability versus the inviability of a fetus. Although the case does not

define these terms, they can be understood to mean that viability is when a fetus developed enough to be able to live outside of the mother. This is a major change from *Roe* which does not mention viability. *Roe's* abortion law classification relies on trimesters, but this case changes that to classify pregnancies by whether or not the fetus is viable. This is a major change from *Roe* because it basically merges the first and second trimesters and makes those restrictions the same. In this case, the Court found that if the fetus is unviable the undue burden standard applies. However, if the fetus is viable the Court found states have an interest and can regulate it, as long as exceptions are made for the woman's health. This is a restriction the Court applied to abortion.

This case relies heavily on what is found in *Griswold* because that reasoning is in large part what the reasoning of *Roe* relies on. This case takes a step back from the trend during this time of the Supreme Court allowing and extending more rights to women. This case relies upon what *Roe* established, the right to an abortion through the right to privacy that is created through the zones of privacy created and protected in some guarantees within the Constitution. This case also creates restrictions for a woman obtaining an abortion because it merged the first and second trimesters and established "viability" and it created the undue burden standard. As previously mentioned in the discussion of the dissenting opinions of *Casey*, the undue burden standard restricts abortion because it allows for the state to implement actions meant to deter women from receiving abortions as long as those deterrents don't fall under an undue burden. An example of this occurs in this case where the Court held that Pennsylvania's 24-hour waiting period law did not create an undue burden. Under the strict scrutiny standard established in *Roe*, none of the provisions in the Pennsylvania law would have been upheld (Justice Blackmun). This law was only meant to deter a woman's right to choose, but because it did not create an undue burden it was allowed. The concern with this is that if abortion is legal and a woman has a right to choose

why can the state put deterrents in place at all? This case takes steps towards restricting abortion and allows states to get away with trying to deter abortion without actually overturning *Roe*. Interestingly, this case, in Justice's decision, does explain why abortion is important to women. *Roe* is a little vague about why abortion is important and needs to be legal, however, this case lies out what abortion and reproductive health care mean for and to women. It addresses the women's side of this debate and points out that women have the most stake in this issue. In 2022, this case from 1992 was overturned along with *Roe v Wade*.

Dobbs v Jackson's Women's Health Organization 2022

Casey v Planned Parenthood takes steps away from *Roe* to regulate abortion, however, this recent case completely overturned *Roe* and *Casey*. The Court found that the right to an abortion was not found or protected in the Constitution and left the decision up to the states. From this, the Court has said they will look at *Griswold* as well.

The Mississippi Gestation Age Act says that only in cases of medical emergencies or severe fetal abnormalities is a woman allowed to knowingly perform an abortion after 15 weeks. This would ban almost all cases of abortions. The district attorney, following *Casey*, decided that the Mississippi law had not provided evidence that a fetus would be viable by 15 weeks so the law was stopped from being enforced since *Casey* determined that states cannot ban abortions before viability.

The case decided that the constitution does not confer a right to an abortion, overruling *Casey* and *Roe*, authority to regulate abortions given to states. The Court also found that the Court's precedents establish that the right to abortion is not a sex-based classification and therefore not subject to the 14th Amendment due process, or equal protection clause. This means that regulations and prohibitions of abortions are governed under the same standards as regular

health and safety measures. The Court found the right to an abortion is not rooted in the history and tradition of the nation. The Fourteenth Amendment does not protect the right to an abortion and the case said the term and concept of “liberty” do not provide enough guidance. The majority opinion stated that it is reluctant to recognize rights that are not explicitly mentioned in the Constitution because it is a human tendency to confuse liberty with what people should enjoy. The majority opinion, in this case, had a very strict interpretation of the Constitution. This was used to justify their reasoning that since history and tradition do not support past Courts’ interpretation of liberty, the Fourteenth Amendment does not protect the right to an abortion. Other precedents also do not support the right to abortion. The Court’s decision also pointed out that prior to the 20th century, there was no support found in American law for the right to an abortion. Similarly, they said no state or federal court had recognized abortion as a right until a few years before *Roe* and many states made abortion illegal at any time within a pregnancy at the time the Fourteenth Amendment was adopted. The Court acknowledged that in *Roe* abortion was tied to the entrenched right of privacy and *Casey* said that abortion was tied to the freedom to make “intimate and personal choices” that are “central to personal dignity and autonomy”. These cases also balanced this right that a woman has with the state’s interest in the unborn. However, in this case, the Court decided to leave it up to the states and state representatives to decide the balance.

The Court also compared *Roe* to *Plessy v Ferguson*, saying it was “on a collision course with the constitution since the day it was decided”. Said *Roe* acted as almost a statute or regulation, imposing a set of rules on the entire country. The Court also said *Casey*’s undue burden is not workable enough. Mississippi State Gestation Act was not struck down and the 15-week ban was allowed.

Casey found that women have become reliant on the option of abortion and therefore removing this right may cause unknown problems or outcomes for women and society because people have lived their lives in a way because they have the option to choose abortion. However, *Dobbs* overturned this thought and determined that abortion and the right to choose is not deeply rooted in society or in the nation's history and are not a part of ordered liberty.

Roe and *Casey* both found that abortion is protected by the Constitution through the right to privacy which is found throughout certain amendments; First Amendment, Third Amendment, Fourth Amendment, Fifth Amendment, Ninth Amendment, Fourteenth Amendment Due Process Clause, and the Bill of Rights. Both cases found that the Constitution and the Bill of Rights create zones of privacy that allow for abortion. Additionally, both cases found that based on precedent cases, abortion and the right to privacy are supported. However, *Dobbs* also overturned this and found that the Constitution does not support the right to an abortion. The Court found that precedent and history also do not support a right to an abortion. The reasoning *Dobbs* used is that using this entrenched right explanation to support *Roe* could also be used to justify illicit drug use and prostitution. The Court explained that abortion is different from the other rights cited in the precedent cases by *Casey* and *Roe* because *Roe* "destroys potential or an unborn human being". Additionally, as *Casey* determined that *Roe* could be workable, *Dobbs* decided that *Roe* is in fact not workable because it caused distortion of the law in other areas. They also determined that *Casey's* undue burden standard was very difficult to apply to cases. The majority decision even cited Justice Stevens's concurring and dissenting opinion in *Casey* here.

Overall, there seems to have been a trend to increase the rights of women's reproductive health from the years 1964-1973 with *Griswold* and *Roe*. Then *Casey* takes a few steps to restrict

the right to an abortion in the 90s. Then in the present day, 2022 *Dobbs v Jackson, Roe v Wade*, and *Planned Parenthood v Casey* get overturned and the right to an abortion is found to not exist within the Constitution. It is interesting to think about what changed in American society, politics, or law for such a drastic change to occur from the 70s to the 2020s, a 50-year range. I predict that certain political parties, organizations, and advocacy groups are directly linked to this change and overall to abortion being found unconstitutional. Specifically, moves made by the republican party over the past 50 years which led to changes in the perception of abortion among many groups in society and newly appointed judges that are anti-abortion contributed to the overturn of *Roe* and *Casey*.

What's Next? Effect of *Dobbs v Jackson's Women's Health Organization*

Following the decision of *Dobbs v Jackson's Women's Health Organization*, many wonder what the effect will be on the nation, on women, and on families. Also, what does this mean legally? Many fear this will have an effect on other Supreme Court cases that are similar to *Roe*, such as *Griswold*. While the Court did decide in *Dobbs v Jackson* that this decision does not overturn the Supreme Court case of *Griswold v Connecticut*, Justice Thomas had some choice words about *Griswold* and other precedent cases that use the due process clause as their reasoning. In the case, *Dobbs v Jackson*, Justice Thomas stated he would reconsider and overrule, "All of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*" (Thomas; *Dobbs*). His reasoning is that he believes the doctrine of substantive due process is, "Particularly dangerous" because it, "Exalts judges at the expense of the People from whom they derive their authority...distorts other areas of constitutional law...is often wielded to disastrous ends" (Thomas; *Dobbs*). There are many reasons why Justice Thomas is against the doctrine of substantive due process. He believes it gives judges too much power and

it negatively affects constitutional law. Due to this, he aims to reevaluate *Griswold*, which said that bans on contraceptives violated the right to marital privacy (“*Griswold v Connecticut*”). Also to reevaluate *Lawrence*, which made homosexual behavior legal in every state (“*Lawrence v Texas*”). Finally, he plans to reexamine *Obergefell*, this case requiring every state to allow and give out marriage licenses for same-sex marriage (“*Obergefell v. Hodges*”). With these cases being potentially re-examined, the rights they protect and procure might be on the chopping block.

While the decision to look at *Griswold* and other cases could lead to the case being overturned, another potential result of reexamining these cases is that they are upheld through the finding of different reasoning. An issue many political scientists, legal experts, and feminists had with *Roe* was that the reasoning that allowed women the right to an abortion was based on the right to privacy. Many felt that this was not strong enough to keep abortion rights from being taken away. Some hoped that the Court would find abortion was protected by other means or that it was directly protected by the reasoning in the Constitution. The problem Justice Thomas explains they have is that those cases rely on due process. The problems Justice Thomas finds with this have been previously explained. Possibly by reexamining those cases, they could determine that those rights procured by the cases are not protected by due process, but instead by another means.

While in my personal opinion, I believe it would be beneficial for the Court to reconsider and ultimately overturn *Dobbs v Jackson's Women's Health Organization*, I do not believe this will happen in the near future. *Dobbs* has not been in place for even a year yet, and although it has begun negatively affecting women's lives the Court has said that they are indifferent as to the effect that it has on women, in fact, they have been clear that that is not part of their job

description, they are only to evaluate the law. Furthermore, the Court has not changed enough in the past year that one might believe if they looked at *Dobbs* again, the verdict would change. There have been no new members appointed to the Supreme Court since the summer of 2022. The most recent appointee was Justice Jackson, who was appointed by President Biden in February 2022 (Fritze, 2022). Perhaps in the future, if those on the Court who do not support women's right to an abortion retire and are replaced by those who have more progressive views toward reproductive rights, *Dobbs* might be reconsidered. However, for this to happen Presidents who are willing to appoint justices to the Court who support abortion need to be elected. This means that there is a lot of work the American population and advocacy groups can do to help restore the sentiment of *Roe*. By campaigning, voting, and supporting politicians and leaders who support a woman's right to choose, the tide can be changed. Right now we are on a downward slope when it comes to women's reproductive freedoms, but this can be redirected and changed.

Changes on the Supreme Court

As one can imagine there were many changes on the Court from when *Roe v Wade* was decided in 1973 to the most recent decision in 2022 *Dobbs v Jackson*. *Roe v Wade* was a 7-2 decision. The majority decision was made by Justice Blackmun, joined by Justices Burger, Douglas, Brennan, Stewart, Marshall, and Powell with Justice White, joined by Justice Rehnquist dissenting (*Britannica, Roe v. Wade*). The decision of *Dobbs v Jackson* was a 5-4 vote to overturn *Roe v Wade* and to find that there is no constitutional right to an abortion. Those who voted with the majority decision were Justices Samuel Alito, Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. The justices who voted against the decision were Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Interestingly, there are three women on the Court, and two of them voted to not overturn *Roe*.

It is important to consider what happened on the Court in the past 50 years to bring about such a drastic change in the Court's opinion on reproductive rights. The Court in 1972-1975 consisted of Justice Douglas, who was considered a liberal and was appointed by Roosevelt. Justice Burger a Republican but he supported many liberal ideologies appointed by Nixon. Finally, there was Justice Brennan who was appointed by Eisenhower to appease leftists and show some goodwill. During this time the Court was also made up of Justice Stewart, a known centrist also appointed by Eisenhower. Justice White who had a difficult placing ideology because he focused mainly on facts was appointed by Kennedy. Justice Marshall a liberal appointed by Johnson. Justice Blackmun leaned left and was appointed by Nixon (“Supreme Court nominations” 1789-present). Finally on the Court there was Justice Powell, a moderate who supported abortion appointed by Nixon, and Justice Rehnquist a conservative Judge appointed by Reagan. This was followed by Reagan appointing 2 more conservative Justices Scalia and Kennedy in 1989 (“Supreme Court nominations” 1789-present). These three right-leaning Justices banded together in their conservative alliance. Thereby, with the appointments of these Justices, Reagan caused a big shift in the Court (*Justices by Court*).

Similar to the changes on the Court that Reagan made, during Trump’s presidency he added three conservative justices to the Court. To shed some light on this topic, it is important to note that out of the 5 Supreme Court Justices who voted to overturn *Roe* three of the Justices were appointed by former President Trump. He also replaced Justice Ruth Bader Ginsburg, a female Justice who was a huge proponent of women’s reproductive rights and continuously fought for women’s rights with Barrett, a woman who is outspoken concerning her belief that a woman does not have the right to choose. When Justices who supported women’s rights resigned or passed away, they were replaced with those who do not support a woman’s right to choose.

Was the decision to overturn *Roe* political?

Many argue that a contributing reason *Roe* was overturned was largely because of former President Trump. Former President Trump was a conservative who was very vocal about his dislike for abortion. As previously mentioned he appointed three new conservative Justices to the Court. Some have argued that Trump purposefully appointed these Justices with the instructions to re-examine and ultimately overturn *Roe v Wade* thereby taking away women's right to abortions. Possibly to boost his chances of reelection because he could take credit to conservatives for reducing or even potentially eliminating abortion. However, the Court has made it clear that their decision was not made in response to political pressure. In response to assumptions that the Court made their decision because of outside influences, the Court explained in its reasoning in *Dobbs* that their decision was free of outside influence. The Court explained in the decision, "We cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work" (*Dobbs v Jackson's Women's Health Organization*). The Court points out in their statement that they are governed by the Constitution, not by outside influences and pressures. They even make it a point to say that they will not be influenced by the public's reaction. This could lead one to believe that if there is a mass negative reaction to *Dobbs*, this would not be enough for the Court to re-examine and change their opinion of *Dobbs*. They claim that they had to overturn *Roe*, not because of political pressure, or because of public outcry or opinion, but instead because they answer to the Constitution.

The Court also explained that *Roe* did not diminish the controversy surrounding abortion, it did not unify the nation to be pro-choice. Therefore, their decision to overturn *Roe*, while they understood it may be controversial, they determined to not be divisive. The Court understands

that there is a lot of support for keeping *Roe* as well as support for overturning *Roe*. Therefore, their decision to overturn *Roe* was not because there is overwhelming support or influence on either side, they are only focused on the Constitutionality. The Court added that “*Roe* certainly did not succeed in ending division on the issue of abortion. On the contrary, *Roe* ‘inflamed’ a national issue that has remained bitterly divisive for the past half century” (*Dobbs v Jackson's Women's Health Organization*). Here the Court is explaining that *Roe* did not unify the nation, and in fact, they blame *Roe* for making the controversy surrounding abortion worse. It is interesting though, that while the Court acknowledged the opinions on both sides of the issue, they do not acknowledge the difference in the value of the opinions. While on one side people are fighting for their rights in America and fighting for bodily autonomy, others are fighting for what they believe to be morally correct. To acknowledge that both positions exist does not seem to be enough. It might be necessary to go into how the Court's decisions affect either side differently. If abortion is overturned, half of the population in America loses a right that they have had for half a century. Women's lives are made harder, many women will be forced to carry an unwanted pregnancy to term and this will drastically change their lives. Lives will be lost and ruined due to this decision. The Court does not acknowledge this. The Court also does not acknowledge that if abortion is not overturned, those on the other side of the debate who disagree with abortion will just have to live with the fact that something they are morally opposed to is legal. Many religions, organizations, and communities deal with this all the time. For example, Mormons or Latter-Day Saints are morally opposed to alcohol. However, it is legal in all fifty states. While morally they believe drinking alcohol is wrong, it would not make sense for them to advocate to make alcohol illegal because then they would be forcing others to live within and conform to beliefs that are not their own. Similarly, Muslims are morally opposed to women

dressing in an immodest manner. However, this is another thing that is legal. Interestingly, in other countries, such as Afghanistan, when women are forced to comply with laws for religious reasons, this is heavily attacked in America. Although, somehow this sentiment is lost when it comes to forcing women to carry a pregnancy to term because it goes against some people's religious beliefs. The Court says they understand that controversy exists around abortion. They say that *Roe* did not unify, so this decision will not be divisive. However, they do not offer any statements about the effects it will have on women. They do not offer any statements of understanding about how those on opposite sides of the issue of abortion are not equal.

What does the lack of abortion mean for women?

The Court closes its opinion in *Dobbs v Jackson's Women's Health Organization* by saying that their decision is not to outlaw abortion, but rather to give the decision back to the states. The Court's majority opinion states, "Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives" (*Dobbs v Jackson's Women's Health Organization*). The Court has decided to overrule *Roe v Wade* and leave the legality of abortion up to each individual state to decide. Here the Court acknowledges that abortion is a moral question, they do not give their opinion about whether morality has affected their position and opinion, nor do they give their opinion on the answer to the moral question.

After the decision in *Dobbs*, women all across America have to deal with what the lack of abortion access means for women and what America in 2023 will look like without *Roe*. One potential problem with this is instability. When *Roe* was in place there was some sort of clear consensus among the states. There were guidelines and regulations in place. However, now there

is a lot of instability because as congressional seats in each state switch parties or transfer between congressmen, abortion laws may change. This creates instability for women as they must stay up to date on their state's attitude and laws on abortion. However, there are mounds of misinformation and with changing laws, it may prove difficult to find up-to-date information on local abortion laws. There is also the problem of women who do not have the means to travel for an abortion. While some can make the trip to another state to receive an abortion if needed, there are many who are unable to for many different reasons. Those women are just out of luck and either have to carry a pregnancy to term or go through potentially illegal and dangerous routes to obtain the abortion. Overall, states having different abortion laws creates instability for women and families in America.

Another potential problem with giving power to the states is that it puts women at the mercy of the patriarchy. While the majority of Congress is still made up of men, and there has never been a woman president, the patriarchy is still ruling America. Women are at the mercy of men. *Roe* was so significant in part because it protected women from the patriarchy. While many claim *Roe* did not go far enough, it still gave women rights over their bodies. Now women's rights are in the hands of men. Women have to work to convince men to fight for their rights. This puts women in a vulnerable position as many women are uncertain as to what will happen in their state. Women in that situation have to play the waiting game to see if they are going to lose the rights they have, for some women, their entire life. While there is much women can do to advocate for pro-abortion laws, due to the majority of Congress being made up of men, women are still asking for men to grant them rights to their own bodies.

In the Supreme Court case *Planned Parenthood v Casey*, the Court said that having access to abortion has had a significant effect on the people of America. It has affected women's

ability to participate in society as well as relationships. *Casey* determined, “people [had] organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail” and that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives” (*Planned Parenthood v Casey*). *Casey* determined that the availability of abortion does significantly affect the nation and women in more ways than just women being able to get an abortion. Since *Roe v Wade* was decided and implemented women have been able to rely on *Roe* and receive an abortion if all else fails and it becomes necessary. However, with the overruling of *Roe*, and with the decision of *Dobbs v Jackson's Women's Health Organization* women have lost that fail-safe. This will have an effect on women's ability to participate economically and socially in society. If women become pregnant they might be forced to drop out or decide not to pursue higher education. They also are forced to not might take a more vigorous job and as a consequence take a lower pay. Due to not being able to rely on abortions in case of emergencies, many women might also be forced to move out of states with anti-abortion laws. Some women might be driven out of their homes and away from their families in order to protect themselves. Furthermore, as more women are increasingly pregnant there will be fewer women in positions of power and more women in the home. This creates an imbalance of power in the home and in society as men are able to be carefree and take higher-paying positions and pursue higher education, while women might be deterred. This also affects women's relationships as women can be controlled by their male sexual partners to carry a pregnancy to term. Women may also engage in less sexual activity with men for fear of failed contraception. This may have an unwanted effect on intimate relationships between men and women.

The Court here responded (quoting Chief Justice Rehnquist's dissent in *Planned Parenthood v Casey*) that, "This Court is ill-equipped to assess 'generalized assertions about the national psyche... That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women'" (Justice Rehnquist, *Planned Parenthood v Casey*). The Court then repeated that its decision here does not, "Cast doubt on precedents that do not concern abortion," such as *Obergefell*, *Lawrence*, and *Griswold* (*Planned Parenthood v Casey*). The Court does not deny assertions that taking away abortion debilitates women, they acknowledge that *Casey* makes this assertion as well and they say basically that that is not their problem to decide if that's the case. They don't say that it is not true, they just say that it is not their decision to make. It is interesting to see how much has changed since *Casey* in the way the Court discusses the effects of anti-abortion legislation. In *Casey*, the Court seems to believe that there is a significant effect on women and the nation if abortion is not legal. However, in *Dobbs*, the effect the decision will have on women is not really examined thoroughly. This may lead one to wonder if today's Court believes that taking away *Roe* will not have a significant effect on women, or if they do not care about the effect their decision will have on families or women.

Potential outcomes and actions following *Dobbs*

In the summer of 2022, the Supreme Court decided to overturn *Roe v Wade* (1973) with the decision of *Dobbs v Jackson Women's Health Organization*. Now women in America are living without the reproductive protections that *Roe* provided for them. There are many factors that contributed to *Roe* getting overturned that have been reviewed throughout this thesis. However, it is important to look into the possible acceptable responses to this problem and potential solutions to get back what women lost.

There are many initiatives that can be taken to get women back the rights they lost, one is to wait for the Supreme Court to change. If a few of the members of the Supreme Court who voted to overturn *Roe v Wade* were to retire or pass away, then the Court could be packed with those in favor of women's reproductive rights. Although, this would require that the president at the time appointing these new justices were to be in favor of abortion or appoint those in favor of abortion. Another issue with this initiative is that it will take time and it is difficult to know exactly when this would be able to happen. Although, if this were to take place and the majority of the Supreme Court justices were to view abortion favorably, they would need to either overturn *Dobbs* by finding that abortion does lie within the 14th amendment, or they could say that abortion is found within another part of the Constitution. This solution does rely on many contingencies and could take many years to come to pass. It brings up the question of what are women supposed to do in the meantime.

Another potential action that can be taken to help women secure reproductive rights is that an amendment could be passed in favor of abortion. In 2022, California decided to write in its Constitution that the state will not deny or interfere with one's freedom to have an abortion or use contraceptives ("After *Roe* Fell: Abortion Laws by State - California"). The United States government could follow suit and decide to write in the national Constitution that the United States Government will not deny or restrict access to abortion or the use of contraceptives. However, for this to happen *Dobbs* would first have to be overturned because *Dobbs* determined that states have a right to regulate access to abortion. Furthermore, there is the question of the legality of creating this amendment. One can assume there would be a lot of backlash towards this action and possibly many lawsuits brought about to block it. Although this solution has many potential problems, it does create a lot of stability and security for abortion laws. It is the

least fickle solution. If abortion laws are constantly being given and taken away from women it creates a lot of confusion and instability. It also makes it hard for women to make plans for the future and to feel safe using abortion even if it is legal because it might not be very soon.

Another potential solution is that President Biden could even write an executive order that guarantees the right to an abortion. However, the next time a president who disagreed with abortion got into power they could overturn this or write an executive order that cancels this out. Plus, the president might not even have the authority to do this and many lawsuits may come up if this were to occur. Also, again the issue with *Dobbs* ruling that states have a right to regulate abortion because it is not “deeply rooted” in the country’s history comes up. If the President writes an executive order that abortion is legal, it takes away a lot of the state’s power to regulate abortion.

Another course of action that may occur is what is happening right now. States are taking action toward protecting or denying abortion and women’s reproductive rights. States like California, as previously mentioned, are writing protections for abortion in their Constitutions while states like Texas are coming up with laws where Texans can be rewarded for ratting out those they know who have gotten abortions, and doctors who are administering abortions will be punished (“Abortion in Texas”). The issue with this is that abortion laws vary so much across the country and many cannot afford to travel to another state to procure an abortion. Also, it can become confusing to know what each state's exact abortion laws are since they differ so much from state to state. Many women do not really understand the abortion laws of their own state. Also, legal writing can be very confusing to many, especially to those who are uneducated. Another major issue with this solution is that many states are against abortion. Most red states are and will pass laws against abortion and women in those states whether they want to or not

will be subject to those laws. Some states such as swing states or states with a largely female population may be able to vote for candidates in office who support abortion. Although, for this to happen it would be necessary to rally support for abortion and get people to the polls who support abortion. Even if many swing states were to pass laws in favor of abortion rights, there would still be the inevitable states that would still be against abortion and the women in those states would be without reproductive rights.

The solution where the Supreme Court overturns *Dobbs* and finds that the right to an abortion is in the Constitution seems to be a very viable solution. However, as with all the solutions it has its drawbacks. It might be necessary for all of these solutions to be implemented or at least be attempted to be implemented. This way, work is being done to secure and guarantee as many women have access to reproductive rights as possible.

Why it matters

This is a crucial issue because women are raising daughters who will have fewer rights than they did. Women also have to figure out how to maneuver in a world without definite access to abortion. Not having access to abortion also creates obstacles for women and inspires fear in many women. Many women are afraid that they will be unable to get an abortion in times when it is necessary for their health, for example in ectopic pregnancy scenarios. Women are afraid they will have to choose between prison time or dying. Many women also have lost faith in America's institutions and democracy. They believe that the country and government have forsaken them. They believe the American government does not want to protect them.

This is about so much more than just abortion laws. An effect overturning *Roe* has had is that many women believe and fear that abortion was taken away to stop women from being prominent members of society. There has been an increase in women working outside the home

and becoming active members of society (Paquette, 2021). More women are running for public office, attending higher education, and applying for more prestigious and influential jobs than ever before in America (Fry, 2022). Due to more women working, women overall are making more money than before. There are prominent and influential movements where women are standing up to men and the system that has kept them down such as the “Me Too” movement. Women had finally become a powerful group to be reckoned with, they finally found their voice. Women have proved to men and the patriarchy that they are capable of doing and being everything they were told they could never be. It is convenient timing that during this time when women have constructed such an impactful role in society that their rights are being stripped away.

The taking away of abortion may have been enacted to keep women down and to reduce their influence and power in society. If women are unable to have autonomy over their bodies and over their reproduction, they are unable to actively and successfully participate in society. For example, if we look at the groups of women who typically get an abortion; low-income, young women, older women, women with health problems, working women, or students, it shows that these women get an abortion because it is necessary (Sanger-Katz et al.). If a student is unable to get an abortion she may be forced to drop out of school due to raising a newborn and the effects of pregnancy. Even if she decides to give up the baby, she still has to deal with being pregnant which is extremely difficult to do while in school because of the changes in physical health and mental health problems that come along with being pregnant. Plus, once she gives birth it takes months to recover and thousands of dollars in medical bills. Even if the women do not drop out completely, they might face persecution by their peers or faculty, and will not be able to perform as well as they normally would. This case is very similar for working women, as

women are unable to work as much as they could before the pregnancy. Taking away abortion access deters women from graduating with higher education and from working which secures women financial freedom and power in society. Furthermore, women who are low income are a group of women who often obtain abortions because they are unable to afford a child or a pregnancy. If these women are forced to carry a baby to term they will have to spend the little money they have on doctor visits and medical bills. They will be unable to work for many months because of the pregnancy and the birth. Being forced to carry a pregnancy to term may force these women into debt or into dangerous situations. Women who have health problems or are older are another group of women who obtain abortions. Now that they are denied this right their health may decline even more being forced to be pregnant and give birth. Many will even die. Many young women also get an abortion for a number of reasons such as they are unable to afford a child or pregnancy or their parents would retaliate against them for getting pregnant. Also if they were to have a child or be pregnant at such a pivotal time in their life it may force them on a hard and unrewarding path in their life. Currently, in many states, children are forced to carry pregnancies to term. This may increase the amount of homeless young women and young women who are unable to build a life for themselves so they have no choice but to choose a lifestyle that is unsafe, immoral, and unrewarding.

Overall, the decision the Supreme Court made to overturn *Roe* makes it increasingly difficult for women to get a basic education, pursue higher education, have a job, gain wealth, and procure a stable life. Women are forced to give up their health and in many cases their lives as well. Due to this, it is not surprising that many women believe the taking away of their bodily autonomy is an effort to keep women from having power in society and to keep women down so men can rise above them as they have all throughout history. It is in an effort to take away the

progress feminism has made. Although America is not actually taking away women's right to vote or forcing women back into the home legally, the effect of taking away *Roe* is very similar.

Conclusion

Over the past 50 years, there have been many Supreme Court cases that have dealt with abortion and women's reproductive rights. With the Supreme Court cases *Griswold v Connecticut* (1965), and *Roe v Wade* (1973) women's reproductive rights were expanded. Women were granted access to contraceptives and the right to abortions. In the case of *Planned Parenthood v Casey* (1992) provisions and restrictions were placed on women's reproductive rights, but *Roe v Wade* was upheld and women still had the right to an abortion. However, recently with the case of *Dobbs v. Jackson Women's Health Organization* (2022), women lost even more reproductive rights as *Roe* was overturned and the decision of the legality of abortion was given over to the states. Abortion has become such a hot topic since *Dobbs* and now each state is passing legislation to either grant women the right to an abortion or to restrict women's reproductive rights. Since this is all so recent, there is little information about what the national government will do in terms of women's reproductive rights. Many wonder if the national government will follow the direction of the Supreme Court and continue to restrict women's rights, or if they will legalize abortion.

There is much unknown right now. However, there are many ways that women can get back the rights they have lost. To name a few, the Court can re-examine and ultimately overturn *Dobbs* and determine that abortion is found within the Constitution. The President might also take action toward securing women's reproductive rights. However, any of the solutions will certainly take time and until then women are at the mercy of their state legislature. There are many negative effects that will and already have become apparent now that many women and

children are forced to carry unwanted pregnancies to term. Women are left feeling as though their government has forsaken them. Women are also now placed in a very vulnerable and many times dangerous situations now that in many states abortion is being restricted or even criminalized. Due to the uncertainty of this time, women all across the country are waiting to find out whether or not they will have reproductive rights and bodily autonomy. At a time when women are making progress towards being more powerful in society than they ever have been, women's rights begin to be taken away. Women are being forced to carry unwanted pregnancies to term and are being forced to give birth to unwanted offspring. The effects of this are that these women are unable to pursue higher education, gain financial independence, and be an active participant in society. It is alarming to think that women are now raising daughters who will have fewer rights than they do and that in 2022 women's rights are being stripped away.

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