

Reproductive Healthcare in a Post-*Dobbs* United States

The constitutional right to privacy that forms the basis for reproductive healthcare law in the United States is rooted in cases about the prevention or termination of pregnancy. In June 2022, the Supreme Court overturned its 1974 decision establishing a national fundamental right to abortion. We explain how the new legal landscape of abortion care is greatly influenced by geographic location and financial means. We also discuss associated constitutional questions of federalism, the preemption of state laws, and the future of other fundamental rights including contraceptive use.

Descriptors: Abortion; *Roe v. Wade*; *Dobbs v. Jackson Women's Health*; Reproductive Healthcare.

Legal norms: Foreign Law; *Roe v. Wade*, 410 U.S. 113 (1973); *Dobbs v. Jackson Women's Health*, 597 U. S. ____ (2022).

By Matthew Grogan and Ellen M. Key

1. Abortion Law and Reproductive Healthcare in the United States

1.1. Establishing a Constitutional Right to Abortion

In the United States (US), reproductive healthcare falls under the right to privacy, which is rooted in cases involving the prevention or termination of pregnancy. Rather than being explicitly recognized in the Constitution, privacy protection is inferred by the penumbras of amendments covering, among other things, freedom of association, security of persons, homes, papers, and effects, and protection against self-incrimination. The expressed liberties protected in these amendments are read to imply additional protections; the overlap of these implied liberties creates a “zone of privacy.”¹

This right to privacy was first acknowledged in 1964 by the Supreme Court of the United States in the 1964 case *Griswold v. Connecticut*,² a case in which the Court narrowly interpreted privacy to overturn a state law prohibiting the purchase of contraceptives by married couples. Privacy rights were extended to encompass unmarried couples' right to purchase contraceptives six years later, wherein the majority argued the right to privacy belongs to individuals rather than couples.³ Rooted in reproduc-

tive healthcare, these decisions paved the way for the right to privacy to be extended to abortion.

Access to abortion was recognized as part of the fundamental right to privacy in the 1974 case of *Roe v. Wade*⁴ with restrictions subject to the strictest scrutiny. The right to abortion care could only be limited in service of a compelling governmental interest and the law must be narrowly tailored to achieve this goal in the least restrictive means. To balance the competing interests of privacy, maternal health, and the state's interest in the future life of the fetus, the Court established the trimester framework wherein a different right was deemed compelling in each trimester. As a pregnancy progressed, more abortion restrictions were permitted, first to protect the health of the pregnant person and subsequently to protect the fetus. While *Roe* remained controlling until June 2022, the substance of the decision including the standard of review and trimester framework were abandoned.

In 1992, the trimester framework was discarded and the standard of review shifted from only permitting restrictions that serve a compelling governmental interest in the least restrictive means to an “undue burden” standard.⁵ Criticized as vague and difficult to apply,⁶ this standard permitted regulation of pre-viability abortion so long as the restrictions do not place an undue burden on a person seeking an abortion. For example, a federal law prohibiting the D&X (dilation and extraction) procedure without an exemption for cases where the procedure was necessary to save the life of the pregnant person was upheld using the undue burden standard because the law only prohibited one form of abortion.⁷ Notably, under this undue burden standard, states were prohibited from banning abortion before the point of viability.

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

2 *Griswold*, supra 1.

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

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

5 *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

6 Ziegler, Mary. 2018. „Taming Unworkability Doctrine: Rethinking Stare Decisis.“ *Ariz. St. LJ* 50: 1215.

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

1.2. The *Dobbs* Decision

Continuing the pattern of chipping away at *Roe*, the right to an abortion in the United States was upended when the Supreme Court issued its ruling in *Dobbs v. Jackson Women's Health*⁸ almost 50 years after the nationwide right was established by the same court. In general terms, this majority opinion reverses precedent, lowers the standard of scrutiny, and returns abortion law to states. Arising from a challenge to a Mississippi law prohibiting abortion at 15 weeks gestation,⁹ the *Dobbs* decision fundamentally alters the landscape of abortion in the US, creating a much more heterogeneous set of laws and potential jurisdictional conflicts among states and between states and the federal government.

In addition to explicitly overturning *Roe* and its progeny, *Dobbs* once again changed the standard of review from the undue burden standard to the most lenient rational basis review. After this paradigm shift, states have authority to pass abortion law virtually unfettered. States are permitted to enact abortion restrictions at any point so long as they are in service of a legitimate governmental interest. In other words, states are now allowed to ban abortion prior to viability and it is as of yet unclear whether this extremely deferential standard requires states provide exceptions in the case of rape or incest. This creates a spectrum for abortion access in the United States, with citizens in different states having vastly different levels of abortion access and restrictions.

2. States Respond

2.1. Abortion Restrictions

Now that states have the authority to regulate abortion individually, access to abortion varies greatly between

states and regions in the United States. Four states amended their constitutions declaring that the right to an abortion is not protected. While none of these amendments prohibit abortion, they do preclude using the state constitution to assert a right to abortion care. Even if states have not amended their constitutions, almost a quarter have statutorily banned abortion at conception. Seventeen states have prohibitions before 20 weeks gestational age, and 43 prohibit abortion by the point of fetal viability.¹⁰

Reproductive healthcare clinics provide approximately 95% of abortion care in the United States.¹¹ The return of control over abortion policy to states has precipitated the closing of facilities¹² resulting in abortion care deserts, or large geographical areas without any abortion facilities.¹³ As a consequence, some people seeking an abortion must travel many states away to obtain care. For example, when Texas banned abortions at 6 weeks gestational age prior to *Dobbs*, the average one-way travel distance increased to 247 miles (397.5 km).¹⁴ Research shows that a distance of 50 miles (80.5 km) or more results in delayed abortion care by at least 4 weeks.¹⁵ Such a delay in a post-*Dobbs* world means many may be ineligible for abortions even if they are in a state that does not ban abortion in the earliest weeks of pregnancy.

Additionally, twenty-four states require waiting periods of 24 to 72 hours after abortion counseling.¹⁶ As with many other issues, the burden of these clinic closures and waiting periods is felt unequally across social and racial groups.¹⁷ For patients traveling long distances within a state permitting abortion or from a state hostile to abortion, these waiting periods may make abortion care unavailable for those from lower socioeconomic backgrounds who cannot afford such a long trip to seek care.

8 *Dobbs v. Jackson Women's Health*, 597 U. S. ____ (2022).

9 Mississippi Gestational Age Act, HB 1510

10 Guttmacher Institute. "Abortion Policy in the Absence of *Roe*." <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe>

11 Jones, Rachel K., Elizabeth Witwer, and Jenna Jerman. 2019. "Abortion Incidence and Service Availability in the United States, 2017." *Guttmacher Institute*. <https://www.guttmacher.org/report/abortion-incidence-service-availability-us-2017>.

12 Venator, Joanna, and Jason Fletcher. 2021. "Undue Burden beyond Texas: An Analysis of Abortion Clinic Closures, Births, and Abortions in Wisconsin." *Journal of Policy Analysis and Management* 40 (3): 774–813.

13 Cohen, David S., and Carole Joffe. 2020. *Obstacle Course: The Everyday Struggle to Get an Abortion in America*. University of California Press.

14 Nash, Elizabeth, Jonathon Bearak, Naomi Li, and Lauren Cross. "Impact of Texas' Abortion Ban: A 14-Fold Increase in Driving Distance to Get an Abortion." *Guttmacher Institute*. <https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion>.

15 Pleasants EA, Cartwright AF, Upadhyay UD. 2022. "Association Between Distance to an Abortion Facility and Abortion or Pregnancy Outcome Among a Prospective Cohort of People Seeking Abortion Online." *JAMA Network Open* 5(5):e2212065. doi:10.1001/jamanetworkopen.2022.12065.

16 Guttmacher Institute. "An Overview of Abortion Laws." <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.

17 Bearak, Jonathan M., Kristen Lagasse Burke, and Rachel K. Jones. 2017. "Disparities and Change over Time in Distance Women Would Need to Travel to Have an Abortion in the USA: A Spatial Analysis." *The Lancet Public Health* 2 (11): e493–500. Jones, R. K., and J. Jerman. 2022. "Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014." *American Journal of Public Health* 112 (9): 1284–96. <https://doi.org/10.2105/AJPH.2017.304042>. Roberts, Sarah, Nicole E. Johns, Valerie Williams, Erin Wingo, and Ushma D. Upadhyay. 2019. "Estimating the Proportion of Medicaid-Eligible Pregnant Women in

2.2. Abortion Protections

Although many states have either altered their laws in light of the *Dobbs* decision or reverted to prior laws stayed by *Roe*, not all states have moved in a more restrictive direction. Seven states place no gestational limits on abortion. In contrast to the 4 states denying abortion constitutional protection, 17 states statutorily protect the right to abortion either prior to viability or throughout pregnancy. In the November 2022 elections, 3 states voted to protect the right to abortion in their constitutions.¹⁸

2.3. The Hyde Amendment

Because the United States does not have universal healthcare, states vary in the degree to which they prohibit or permit public funding to go to abortion care and whether they place restrictions on the use of private insurance for abortion-related services. Health coverage for low-income residents is provided by Medicaid, a joint federal-state program. Four years after *Roe*, Congress attached the Hyde Amendment to that year's Medicaid appropriation.¹⁹ This amendment – re-enacted every year since – prohibits the use of federal funds to pay for abortion except in instances of rape, incest, or when the health of the mother is threatened.²⁰ With the average cost of a first-trimester abortion over \$500 and rising as gestational age increases,²¹ the Hyde limitations greatly affect the degree to which low-income women are able to seek abortion care.

As Medicaid is partially funded by states, states may choose to cover abortion care as long as the money comes from state revenue. Patients in the 16 states that provide abortion coverage under Medicaid have no out-of-pocket costs. In contrast, not only do Medicaid recipients in states that do not cover abortion have to pay for care out-of-pocket, abortion costs are higher on average in states with more restrictive abortion policies.

2.4. Medicaid Expansion

The United States has the third highest maternal mortality rate among OECD countries.²²

In an attempt to improve maternal and infant health outcomes, the nation's COVID-19 relief bill²³ included financial incentives for the states that had yet to expand Medicaid coverage as provided in the Affordable Care Act.²⁴ Six of the 12 states that have yet to agree to expansion also ban abortion at conception. A seventh state's ban is currently enjoined from taking effect. The American Rescue Plan Act also allows all states to extend postpartum Medicaid coverage from 60 days to a full year for pregnancy-related and infant care. Of the seventeen states that have taken no postpartum coverage extension action, 11 have passed abortion bans. While expanding Medicaid and postpartum coverage would improve maternal health outcomes and close racial disparities in healthcare, many states hostile to abortion are refusing to extend the social safety net to the residents denied abortion care.

3. Constitutional Questions

3.1. Medication Abortion and Preemption

Medication abortions count for over half of the abortions in the United States,²⁵ and mifepristone is the only Food and Drug Administration (FDA) approved drug to end pregnancy during the first 10 weeks of gestation. The Risk Evaluation and Mitigation Strategy (REMS), the vehicle through which the FDA issues safety controls necessary for approval, was modified in 2021 to change the in-person dispensing requirement, removing federal prohibitions on telehealth prescription and dispensing by mail. State laws banning induced abortion apply to medication abortion as well, and the availability of mifepristone depends on state law. While the FDA no longer limits the use of the drug to certain healthcare settings, several states still restrict the drug's use. Two states prohibit its use as early as 7 weeks. Twenty-nine states prohibit physician assistants and midwives from prescribing the medication, and 18 states prohibit the use of telemedicine prescription of mifepristone.²⁶

The conflict between state and federal laws raises questions of federalism and preemption. The federal constitution's supremacy clause²⁷ may allow the federal gov-

Louisiana Who Do Not Get Abortions When Medicaid Does Not Cover Abortion." *BMC Women's Health* 19 (1): 1–8. Engle, Olivia, and Cordelia Freeman. 2022. "All This Way, All This Money, for a Five-Minute Procedure": Barriers, Mobilities, and Representation on the US Abortion Road Trip." *Mobilities*, 1–15.

18 Guttmacher Institute, *supra* 7.

19 Hyde Amendment 5 Codification Act, Pub. L. 94-439.

20 H.Amdt.185 to H.R.2518.

21 Schroeder R, Munoz I, Kaller S, Berglas N, Stewart C, Upadhyay UD. 2022. "Trends in abortion care in the United States, 2017-2021." *Advancing New Standards in Reproductive Health (ANSIRH)*, University of California, San Francisco.

22 OECD. "Health Status: Maternal and Infant Mortality." <https://stats.oecd.org/index.aspx?queryid=30116>.

23 American Rescue Plan Act, Pub. L. 117-2.

24 Patient Protection and Affordable Care Act, Pub. L. 111-148.

25 Jones, Rachel K., Elizabeth Nash, Lauren Cross, Jesse Philbin, and Marielle Kirstein. 2022. "Medication Abortion Now Accounts for More Than Half of All US Abortions." *Guttmacher Institute*. <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions>.

26 Guttmacher. "State Laws and Politics: Medication Abortion." <https://www.guttmacher.org/state-policy/explore/medication-abortion>.

27 U.S. Const. art. 6.

ernment's regulation of mifepristone to preempt state regulatory control of abortion. After the *Dobbs* decision was announced, the Attorney General clarified that states cannot ban mifepristone or its transfer through the mail simply because they disagree with the FDA's judgment of the drug's safety and efficacy, indicating the Department of Justice's position that the Supremacy Clause of the Constitution allows for federal preemption of state laws that obstruct access to medication used for abortions.²⁸

3.2. Prosecution of Abortion Seekers and Providers

States' newly returned control over abortion policy also raises questions about whether states can extend abortion legislation beyond their borders. For instance, anti-abortion groups are promoting model legislation to allow private citizens to sue anyone who performs or facilitates an abortion outside of the state. In other words, this legislation would permit private citizens to file civil suits not only against abortion providers in another state but also against someone providing transportation from an abortion hostile state to a less restrictive one for the purposes of obtaining abortion care. While only one state has considered such a bill thus far,²⁹ it is likely similar legislation will be introduced in the coming legislative sessions.

The constitutionality of extraterritorial legislation is unclear. On one hand, the Supreme Court has permitted states to enforce laws beyond their borders³⁰ and apply civil law to absent citizens.³¹ Conversely, precedent and constitutional provisions also run counter to the idea of extraterritorial enforcement. First, the Supreme Court has acknowledged a right to interstate travel.³² Perhaps more powerfully, the Constitution grants Congress the power to regulate interstate commerce.³³ Inferred from the structure of this affirmative grant of power, dormant commerce clause jurisprudence prohibits states from restricting interstate commerce. That is, legislation in one state that affects commerce in another state may be struck down if the effect is deemed unduly burdensome or discriminatory.³⁴ Likewise, should the federal government choose to protect abortion nationwide, the federal law may preempt state laws prohibiting abortion.³⁵

Given the uncertainty surrounding the permissibility of extraterritorial abortion regulation, several states have taken action to shield citizens and abortion providers from criminal and civil penalties in other states. Governors in eight states have signed executive orders to that effect, whereas two states protect patients and providers legislatively.³⁶

4. An Uncertain Future

4.1. Federal Action

States have been very active post-*Dobbs*; the federal government less so. The primary attempt at codifying abortion protection is in the form of the Women's Health Protection Act, while the primary attempt at creating a national abortion regulatory standard is the Pain-Capable Unborn Children Protection Act.³⁷ The Women's Health Protection Act's purpose is to make access to abortion more streamlined and readily available by prohibiting pre-viability abortion bans, requiring exceptions to abortion restrictions after fetal viability if the life or health of the pregnant person is in danger, and disallowing any restrictions to be imposed based on the reasoning for getting an abortion. Reintroduced in the 117th Congress, the bill passed the House of Representatives in July 2022 supported by all but one Democrat and no Republicans. The bill has been sent to the Senate, but no action has been taken at the time of writing.

In the opposite policy direction, the Pain-Capable Unborn Children Protection Act would impose federal abortion regulations, and ban abortion nationally after 15 weeks gestational age, with some exceptions in cases of rape, incest, and where the mother's health is in danger. Introduced at the beginning of the 117th Congress, no action has been taken by either chamber at the time of writing. With the end of the 117th Congress rapidly approaching, it is likely both pieces of legislation will be reintroduced at the start of the next Congress. As demonstrated by the recent votes, abortion is a very polarizing issue that typically follows party lines. With the incoming House under Republican control and a Democratic Senate, it is unlikely that federal legislation will pass before the 2024 election.

28 Office of the Attorney General. "Attorney General Merrick B. Garland Statement on Supreme Court Ruling in *Dobbs v. Jackson Women's Health Organization*." (No. 22-663) <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s>.

29 Missouri HB 2012.

30 *Skiriotes v. Florida*, 313 U.S. 69 (1941).

31 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

32 *Crandall v. State of Nevada*, 73 U.S. 35 (1867). *Saenz v. Roe*, 526 U.S. 489 (1999).

33 U.S. Const. art. 1, § 8, cl. 3.

34 *Kassell v. Consolidated Freightways*, 450 US 662 (1981).

35 The federal government's police powers are not as broad as states', so preemption is not a given. For examples, see *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).

36 "Tracking the States Where Abortion Is Now Banned." *New York Times* <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>.

37 Pain-Capable Unborn Children Protection Act, SB 61.

4.2. State Action

The future of state-level abortion regulation is uncertain, and a variety of bills have been introduced at the state-level throughout the country. As previously suggested, votes on abortion legislation tend to follow party lines, meaning traditionally Democratic legislatures will move towards lessening restrictions, and codifying abortion access, while Republican legislatures move towards tightening abortion regulation. As of December 2022, abortion bans have been challenged in 19 states and litigation will likely continue apace as states innovate legislatively and expand their reach beyond their borders.

4.3. Citizen-Initiated Action

The *Dobbs* decision was not popular in many parts of the country. Fifty-seven percent of respondents to a summer 2022 Pew survey disapproved of the decision to overturn *Roe*. This disapproval is likely due to the 62% of Americans who believe abortion should be legal in all or most cases. As with many things in American politics, opposition to *Dobbs* varies according to partisanship, with 84% of Democrats disapproving compared to 38% of Republicans. Racial, age, education, and religious differences also contribute to varying levels of support. Nonwhite, younger, nonreligious, and more educated citizens are less likely to agree with the decision to overturn *Roe*.³⁸

The public's feelings about *Dobbs* also affected perceptions of the challenges facing the country. According to a Gallup poll in July 2022, abortion was the 4th most important issue for respondents. The 5th most important issue was the judicial system. Again, these rankings differ by party. Abortion and the judicial system were the 2nd and 3rd most important issue respectively for Democrats; they were tied for 8th most important for Republicans.³⁹ At the state level, direct legislative action from elected bodies is not the only way for policy to change. Approximately half of the states (24) allow voters to put issues on the ballot and weigh in on the actions of the legis-

lature through the initiative and referendum processes, and 18 allow voters to weigh in directly on state constitutions. All citizen-initiated abortion ballot measures have moved in the direction of expanding access, and no ballot measure has successfully enacted further restrictions. As of December 2022, ballot initiatives expanding abortion access have passed in California, Michigan, and Vermont, while initiatives restricting abortion have failed in Kentucky, Montana, and Kansas. The rejection of anti-abortion constitutional amendments in states with very conservative legislatures highlights the disconnect between legislators and citizens; a disconnect exacerbated by the process of gerrymandering. As Justice Alito noted, "women are not without electoral or political power,"⁴⁰ however gerrymandering limits the ability of citizens to directly affect policy and in effect turns issues over to legislators that are drawn into increasingly homogenous, safe districts.

4.4. Revisiting Other Liberties

Dobbs signals a shift in the interpretation of liberties previously deemed fundamental. Prior to the decision, freedoms considered "implicit in the concept of ordered liberty" were protected using the strictest scrutiny as part of substantive due process. In *Dobbs*, liberties are fundamental only if they are "deeply rooted in history and tradition." In altering this interpretation, the Court ignored traditional reliance arguments undergirding previous decisions, rejecting the idea that people structure their lives around when and if to have a child and that doing so is a necessary component of liberty. While the majority cabins the scope of the opinion to abortion cases,⁴¹ Justice Thomas's concurrence suggests the will to revisit other areas of substantive due process jurisprudence including same-sex marriage, sodomy, and contraceptive use.⁴² This historical recognition of liberty requirement also limits constitutional protection to those protected at the time of ratification, effectively excluding women, people of color, and other marginalized groups from the full protection of the law.

38 Pew Research Center. "Sizable race, age and educational differences in views of Supreme Court's decision to overturn *Roe v. Wade*." https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/pp_2022-07-06_roe-v-wade_00-05/.

39 Gallup. 2022. "Abortion Moves Up on 'Most Important Problem' List." <https://news.gallup.com/poll/395408/abortion-moves-important-problem-list.aspx>.

40 *Dobbs v. Jackson Women's Health*, 597 U. S. ____ (2022) at 65.

41 "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion...We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed 'potential life.'" *Dobbs v. Jackson Women's Health*, 597 U. S. ____ (2022) at 66.

42 THOMAS, J., concurring. *Dobbs v. Jackson Women's Health*, 597 U. S. ____ (2022).

5. Conclusion

In light of the *Dobbs* decision, states now have the freedom to regulate abortion as they see fit. This has resulted in a high level of variance in reproductive healthcare legislation among the states, with some states choosing to codify abortion rights, and others introducing legislation that has (or would) ban abortion in virtually all instances. Although much will continue to be in flux for years to come, what is certain is that the patchwork of laws means a person's ability to access care is

greatly influenced by geographic location and financial means.

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