

Two Years Since *Dobbs*: How Access to Contraceptives and IVF Has Changed

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I. Introduction

Prior to June 24, 2022, the government “could not control a woman’s body or the course of a woman’s life: It could not determine what the woman’s future would be.”¹ On that date, the Supreme Court denied women reproductive freedom by holding that abortion is not a constitutional right and that abortion issues would be left to the states.² This decision not only limited access to abortion care, but created a volatile and confusing landscape for women’s healthcare throughout the United States.³ This blog post examines what has happened in two areas of women’s healthcare that have been impacted by the *Dobbs* decision: contraceptives and in vitro fertilization.

II. Overview of *Dobbs*

The issue of abortion came before the Supreme Court in 2022 after nearly fifty years of recognizing abortion as a constitutional right.⁴ The Court had to decide whether Mississippi’s Gestational Age Act violated the Supreme Court’s precedent set in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁵ The Gestational Age Act prohibited abortions after fifteen weeks except in a

¹ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 359 (2022) (Kagan, J., dissenting).

² *Id.* at 302 (“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.”).

³ See Kelly Baden et al., *Clear and Growing Evidence That Dobbs Is Harming Reproductive Health and Freedom*, GUTTMACHER INSTITUTE (May 2024), <https://www.guttmacher.org/2024/05/clear-and-growing-evidence-dobbs-harming-reproductive-health-and-freedom>; I use “women” throughout this piece to reflect terminology used in many areas of scholarship but recognize that the *Dobbs* decision has implications for the reproductive autonomy of all people with a capacity for pregnancy.

⁴ See Anna Grace Cole, *Dobbs v. Jackson Women’s Health Organization* 90 TENN. L. REV. at 361 (2023).

⁵ *Id.* at 368.

medical emergency or when there is a severe fetal abnormality.⁶ Jackson Women’s Health filed suit to contest the constitutionality of the Act.⁷ Thomas Dobbs, a Mississippi State Health officer, filed a petition for certiorari.⁸ The Supreme Court granted certiorari to “answer the question of whether all pre-viability prohibitions on elective abortions are unconstitutional.”⁹

In *Roe v. Wade*, the Supreme Court considered interests in protecting both the health of pregnant women and the potential life of the fetus.¹⁰ To protect the potential life, the Supreme Court decided that there was a point of viability after which the State could regulate and prohibit abortion.¹¹ *Roe v. Wade* determined the point of viability to be the end of the first trimester.¹² Then, the Supreme Court readdressed abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. The idea of “viability” remained, but the *Casey* decision shifted the determination of viability.¹³ The Court determined that the point of viability was twenty-three to twenty-four weeks, instead of the twenty-eight weeks understood in *Roe*.¹⁴ The “pre-viability” issue arose in *Dobbs* because Mississippi’s Gestational Age Act prohibited abortions after fifteen weeks, eight to nine weeks earlier than *Casey*’s point of viability at which states could start regulating abortion.¹⁵

⁶ See Cornell Law School, *Dobbs v. Jackson Women’s Health Organization*, LEGAL INFORMATION INSTITUTE (June 2022), https://www.law.cornell.edu/wex/dobbs_v._jackson_women%27s_health_organization_%282022%29; see MISS. CODE ANN. § 41-41-191 (2018).

⁷ *Id.*

⁸ *Id.*

⁹ Cole, *supra* note 4 at 368 (external quotations omitted).

¹⁰ 410 U.S. 113, 162 (1973).

¹¹ See Cole, *supra* note 4 at 364–65; *Roe v. Wade* 410 U.S. 113, 163 (“With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.”).

¹² 410 U.S. 113, 164 (“For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.”).

¹³ See Cornell Law School, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, LEGAL INFORMATION INSTITUTE (June 2022), [https://www.law.cornell.edu/wex/planned_parenthood_of_southeastern_pennsylvania_v_casey_\(1992\)](https://www.law.cornell.edu/wex/planned_parenthood_of_southeastern_pennsylvania_v_casey_(1992)).

¹⁴ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 860 (1992).

¹⁵ See MISS. CODE ANN. § 41-41-191 (2018).

Dobbs held that pre-viability prohibitions on abortion are constitutional, overruling *Roe* and *Casey*.¹⁶ This ruling sent the authority to regulate or prohibit abortions to each State.¹⁷ Thirteen states had “trigger” laws outlawing abortion that were written in anticipation of the ruling and went into effect almost immediately after the *Dobbs* decision was released.¹⁸ As of October 2024, thirteen states have total abortion bans, twenty-eight states have abortion bans based on gestational duration, and nine states along with the District of Columbia do not restrict abortion based on gestational duration.¹⁹ Most states have exceptions to their regulations in instances of threats to the life of the pregnant person, but physicians are “limited in their ability to care for their patients” and could face legal consequences for providing care that doesn’t comply with their state’s regulations.²⁰ Evidence shows that women’s healthcare since *Dobbs* “struggles to meet people’s reproductive needs . . . ,”²¹ including access to contraceptive and in vitro fertilization.

III. Contraceptives

Justice Thomas’s *Dobbs* concurrence stated that other legal precedents which used the overturned *Roe* legal grounding should be reconsidered, including *Griswold v. Connecticut*.²² *Griswold*’s key holding was that there is a constitutional right privacy, which protects the intimate relations of married couples and their use of contraceptives.²³ Not only did Justice Thomas’s concurrence create concerns about contraceptive access, it opened up “viable avenues states may take to limit access to contraception.”²⁴

¹⁶ See *Dobbs v. Jackson*, 597 U.S. 215, 302.

¹⁷ *Id.*

¹⁸ See Jesus Jiménez & Nicholas Bogel-Burroughs, *What are abortion trigger laws and which states have them?*, N.Y. TIMES, June 24, 2022; see also Maya Manian, *The Ripple Effects of Dobbs on Health Care beyond Wanted Abortion*, 76 SMU L. REV. 77, 77 (“[T]he [*Dobbs*] decision almost immediately wreaked havoc on the delivery of medical care for both patients seeking abortion care and those not actively seeking to terminate a pregnancy.”).

¹⁹ See *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INSTITUTE (October 1, 2024) (Seven states ban abortion at or before eighteen weeks’ gestation, twenty-one states ban abortion at some point after eighteen weeks.).

²⁰ Cole, *supra* note 4 at 372.

²¹ Megan Kavanaugh & Amy Friedrich-Karnik, *Has the fall of Roe changed contraceptive access and use? New research for four US states offers critical insights*, 2 HEALTH AFFS. SCHOLAR, Feb. 2024, at 1, 2.

²² See *Dobbs v. Jackson* 597 U.S. 215, 332 (Thomas, J., concurring).

²³ See Madeline Tatro, *The Shifting Landscape of Substantive Due Process: Could Dobbs Pose a Threat to Contraceptive Rights?*, 17 ST. LOUIS U. J. HEALTH L. & POL’Y 317, 318 (2024); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); Seven years after *Griswold v. Connecticut*, the Supreme Court extended the right of contraception to unmarried people. *Eisenstadt v. Baird*, 405 U.S. 438, 465 (1972).

²⁴ Tatro *supra* note 23 at 318; see Kavanaugh & Friedrich-Karnik, *supra* note 21 at 1.

Policymakers themselves are announcing they think *Griswold* was wrongly decided or constitutionally unsound, demonstrating a desire to make laws that don't support access to contraceptives.²⁵ Some states, such as Idaho, Texas, and Missouri, have restricted access by banning funding for emergency contraceptives programs and incorrectly claiming that some contraceptives act as abortifacients.²⁶ A few states use conscience clauses in their statutes that "may allow pharmacists to refuse to dispense emergency contraceptives."²⁷

Dobbs could also limit providers' abilities "to prescribe certain contraceptive devices that disrupt implantation, like Plan B or intra-uterine devices (IUDs)."²⁸ A study conducted in four different states prior to and following the *Dobbs* decision found that access to broader contraceptive care is, in fact, worsening.²⁹ In this study, women in Arizona, Iowa, New Jersey, and Wisconsin found that barriers to accessing contraceptives increased a year after the *Dobbs* decision.³⁰ These women experienced difficulty "discussing information about, and/or having a checkup or medical test related to, and/or receiving a contraceptive method or prescription . . ."³¹ *Dobbs*' impact on contraceptives threatens healthcare by threatening women's self-determination and ability to decide what happens in their bodies.

IV. IVF

In addition to restrictions on contraceptives, the *Dobbs* decision has threatened access to fertility treatments, including in vitro fertilization (IVF).³² IVF is used by hundreds of thousands of people in the United States hoping to create as many healthy embryos for each patient as possible.³³ While the Supreme

²⁵ See *Don't Be Fooled: Birth Control is Already at Risk*, NATIONAL WOMEN'S LAW CENTER (June 17, 2022), <https://nwlrc.org/resource/dont-be-fooled-birth-control-is-already-at-risk/>.

²⁶ See Manian, *supra* note 18 at 80–81; see also Tatro, *supra* note 23 at 330 (Abortifacients are "medications that induce an abortion in a pregnant person."); *Don't Be Fooled: Birth Control is Already at Risk* *supra* note 25.

²⁷ Juliet Dale et al., *Access to Contraception*, 25 GEO. J. GENDER & L. 271, 292; see DEP'T OF HEALTH AND HUM. SERVS., *Conscience and Religious Freedom*, <https://www.hhs.gov/conscience/conscience-protections/index.html>, (last visited Oct. 5, 2024) (Conscience laws allow healthcare providers, patients, and other participants to refuse certain healthcare services based on religious or moral grounds.).

²⁸ Tatro, *supra* note 23 at 330.

²⁹ See Kavanaugh and Friedrich-Karnik, *supra* note 21 at 1.

³⁰ *Id.*; see Baden, *supra* note 3.

³¹ Kavanaugh and Friedrich-Karnik, *supra* note 21 at 2.

³² See Manian, *supra* note 18 at 84.

³³ See Jan Hoffman, *Infertility Patients and Doctors Fear Abortion Bans Could Restrict IVF*, N.Y. TIMES, July 5, 2022, at 1.

Court did not address IVF and *Dobbs*' impact on it, the Court did explain that abortion is not protected because it destroys potential life.³⁴ IVF attempts to initiate pregnancy, but the process can place embryos and fetuses at risk of damage or death, with embryo destruction commonly occurring.³⁵ The concern is that legislators could ban or restrict IVF because it could pose a threat to the potential lives of embryos and fetuses.³⁶ Already, the Alabama Supreme Court classified frozen embryos as "children," creating questions about what fertility treatment centers are able to do with the embryos.³⁷ With no established IVF constitutional protection, IVF practitioners "may be afraid to provide patients with services that were once commonplace, lest they be labeled abortionists and indicted."³⁸ One example is the practice of selective reduction, which terminates "one or more embryos in multifetal pregnancies that can result from IVF."³⁹ This practice could violate criminal bans states have on abortion, resulting in penalties of fines or jail time.⁴⁰

Legislators can use definitions of abortion and related terms in laws to create confusion about the legality of IVF. Some states have laws that are too vague to determine definitively that they do not threaten IVF.⁴¹ In Wisconsin, it is a felony to intentionally destroy an unborn child; "unborn child" is defined as "a human being from the time of conception until it is born alive."⁴² Prosecutors could argue that healthcare providers who intentionally discard IVF embryos, whether they are abnormal or surplus, could be charged.⁴³ Legislators could also try to regulate IVF to protect embryos by enacting laws against discarding IVF embryos, prohibiting services like preimplantation genetic diagnosis that can harm or kill embryos, or outlawing multifetal pregnancy reductions.⁴⁴ *Dobbs* created more avenues for states to

³⁴ See Kerry Lynn Macintosh, *Dobbs, Abortion Laws, and In Vitro Fertilization*, 26 J. HEALTH CARE L. & POL'Y 1,1 (2023).

³⁵ *Id.* at 2; see Manian, *supra* note 18 at 84.

³⁶ See Macintosh, *supra* note 34 at 3.

³⁷ See Baden, *supra* note 3.

³⁸ Macintosh, *supra* note 34 at 10; Manian, *supra* note 18 at 84.

³⁹ Manian, *supra* note 18 at 85.

⁴⁰ *Id.*; see also Macintosh, *supra* note 34 at 11 ("Sanctions for violation include a fine up to \$100,000 and/or a prison sentence of up to ten years.").

⁴¹ See Macintosh, *supra* note 34 at 13.

⁴² *Id.* (quoting Wis. Stat. § 940.04(6) (2022)).

⁴³ *Id.* at 13–14.

⁴⁴ *Id.* at 19–21.

protect embryos, at the potential cost of IVF practices.⁴⁵ With IVF in its present form no longer certain, fertility providers and patients must prepare for legal challenges and adjusted medical practices.⁴⁶

V. Conclusion

By overturning *Roe*, *Dobbs* allowed policies and laws to alter abortion care and, consequently, women's healthcare.⁴⁷ Doctors are fleeing anti-abortion states while women lose access to contraceptives, pre-natal care, and safe birth conditions.⁴⁸ While the overruling of *Roe* is evidently impacting all people who need access to women's healthcare, inaccessibility of contraceptives is especially problematic for minors, low-income individuals, people of color, and other groups such as immigrants and survivors of sexual assault.⁴⁹ In order to navigate the post-*Dobbs* landscape of healthcare, more research needs to be conducted to learn how policies and legislation is impacting access to healthcare. Additionally, women need access to information about their rights, the status of healthcare legislation in their state, and what they can do to protect themselves even though their autonomy is not respected by their government. Policymakers and advocates need to use this information to create a healthcare environment that champions women, respects their autonomy, and upholds accessible, high-quality care.

⁴⁵ *Id.*

⁴⁶ *Id.* at 48.

⁴⁷ See Baden, *supra* note 3.

⁴⁸ See Manian, *supra* note 18 at 91; At Liberty Podcast, *Two Years Post-Roe: Life in the Aftermath*, ACLU, at 28:59 (June 20, 2024), <https://www.aclu.org/podcast/two-years-post-roe-life-in-the-aftermath>.

⁴⁹ See Dale, *supra* note 27 at 295; see also Manian, *supra* note 18 at page 81 (“Yet the Supreme Court has undermined efforts to reduce health disparities in access to contraception, which disproportionately impacts low-income populations and people of color.”).