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The Shifting Landscape of Substantive Due Process: Could Dobbs Pose a Threat to Contraceptive Rights?

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THE SHIFTING LANDSCAPE OF SUBSTANTIVE DUE PROCESS: COULD *DOBBS* POSE A THREAT TO CONTRACEPTIVE RIGHTS?

ABSTRACT

Nearly two years ago, the Supreme Court issued its infamous decision in Dobbs v. Jackson Women's Health Organization*, a challenge to one of the then-most restrictive abortion bans in the country. In a stunning—yet not entirely surprising—6-3 decision, the Court held that the Fourteenth Amendment's Due Process Clause does not protect abortion as a fundamental right and returned the power to regulate abortion to the states. Of course, legal questions abound as to the future of reproductive care in the United States following this infamous decision, and Justice Thomas' concurring opinion raises one of the largest-looming concerns. In that concurrence, Thomas calls on the Court to revisit seminal substantive due process precedents, including* Griswold v. Connecticut*, the case that established that access to contraceptives is a federally protected right.*

This Note seeks to determine whether Dobbs *could be extended to overturn one of* Griswold's *central holdings, a decision that would open the door for states to limit access to contraception in countless ways. The Note begins by discussing the three prominent theories the Court has employed in construing rights under substantive due process, highlighting the inconsistency with which the Court has approached substantive due process issues over time. With this context, the Note then looks to the Court's approach to substantive due process in* Dobbs*, an opinion that cements the Court's commitment to viewing rights through the lens of "history and tradition." The narrow lens through which the Court views our country's legal history suggests that access to contraception could be in jeopardy. The Note concludes by assessing how states could frame future restrictions on contraception and offers some avenues for action. While the future of contraceptive access as a legal right is difficult to predict, one thing is certain: should the Court ultimately revisit* Griswold*, its decision on its central holding will shape the lives of women for decades.*

I. INTRODUCTION

On June 24, 2022, the Supreme Court issued its ruling in *Dobbs v. Jackson Women's Health Organization*.[1] The case arose from an abortion provider's constitutional challenge to Mississippi's Gestational Age Act, a near-total ban on abortions after fifteen weeks.[2] In *Dobbs*, the Court held that the Constitution "does not confer a right to abortion" and returned the power to regulate abortion to the states, overturning nearly five decades of precedent in the process.[3]

While many have noted that the majority's opinion will undeniably shape reproductive rights in the years to come, reproductive health advocates and constitutional scholars alike turned their attention to Justice Thomas' concurring opinion. While Justice Thomas agreed that abortion "is not a form of 'liberty'" substantive due process was intended to protect,[4] he also opined that decades of the Court's substantive due process precedent was "demonstrably erroneous" and should be reconsidered.[5] Though the majority opinion explicitly states that *Dobbs* should not be read to "cast doubt on precedents that do not concern abortion,"[6] Thomas' pointed callout of *Griswold*[7]—key precedent underlying the right to contraceptive access—leads many to worry that contraception may soon come under attack.

This Note seeks to determine whether the *Dobbs* decision could be extended to eliminate the federal constitutional right to contraception, thereby permitting states to limit women's ability to use, purchase, and possess contraception. Specifically, this Note will examine the constitutional basis for such a decision and, if found, the viable avenues states may take to limit access to contraception. It is plausible that the *Dobbs* ruling could be extended to undermine the right to access contraceptives given the Court's application of the historical tradition theory of substantive due process to analyze whether abortion should be considered a federally protected right. Despite contraception's legal history and widespread usage before 1868, the Court's emphasis on *Glucksberg* and what state laws explicitly "embraced" before the Fourteenth Amendment was ratified could undermine the right to contraceptives, given that they were not regulated until the 1870s.[8] The patterns evident in state legislation both before and after *Dobbs* further suggest that an opportunity to revisit the right to contraception may soon arise.

1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
2. *Id.* at 232–33.
3. *Id.* at 292.
4. *Id*. at 330 (Thomas, J., concurring).
5. *Id.* at 332.
6. *Dobbs*, 597 U.S. at 295.
7. Griswold v. Connecticut, 381 U.S. 479 (1965); *See Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).
8. *See* discussion *infra* Section III.

This Note proceeds in four parts. Part II outlines the history of the Supreme Court's Fourteenth Amendment jurisprudence to demonstrate the inconsistency with which the Court has interpreted and applied substantive due process, providing context for the approach the Court ultimately used in *Dobbs*. Part III discusses the Court's substantive due process analysis in *Dobbs* and how that analytical framework could feasibly be extended to contraceptives in the future. Part IV takes a theoretical view of how states could attempt to limit access to contraception and concludes with closing thoughts on state and federal actions that could help preserve access to contraception in the law.

II. THE LEGAL BASIS FOR THE RIGHT TO CONTRACEPTION: A BRIEF HISTORY OF SCOTUS' PRIVACY JURISPRUDENCE

A. The Right to Privacy and Zones of Privacy

The constitutional basis for the right to access contraception originally stems from the right to privacy. The right to privacy is based on a patchwork of doctrines that, taken together, protect citizens' ability to engage in private activities without fear of government intrusion.[9] The right to privacy stems from several constitutional rights: (1) the right to hold private beliefs under the First Amendment;[10] (2) the right to have private spaces protected against unreasonable government searches and seizures under the Fourth Amendment;[11] (3) the unenumerated rights established by the Ninth Amendment—including a "zone of privacy," which extends to procreation and contraception;[12] and (4) the implied right to personal privacy under the Due Process Clause in the Fourteenth Amendment.[13]

One of the Court's first articulations of the right to privacy in contraception is found in *Griswold v. Connecticut*, which introduced the idea of the "zone of privacy" and established the right of married couples to use contraception.[14] In *Griswold*, the appellants—medical providers and directors for a Planned Parenthood clinic—were fined for prescribing contraception to a married woman in violation of a Connecticut statute.[15] Under that statute, it was illegal to assist any person in "us[ing] any drug…or instrument for the purpose of preventing conception."[16] The Court reversed the Connecticut Supreme Court

9. Ieuan Jolly, *Privacy in the United States: Overview*, THOMPSON REUTERS PRACTICAL LAW (Jan. 24, 2022), https://1.next.westlaw.com/9-574-3765?VR=3.0&RS=cblt1.0&__lrTS=20221016173308839&transitionType=Default&contextData=%28sc.Default%29.

10. *See*, *e.g.*, Stanley v. Georgia, 394 U.S. 557, 565 (1969).

11. *See* Katz v. United States, 389 U.S. 347, 353 (1967).

12. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

13. *See* Washington v. Glucksberg*,* 521 U.S. 702, 720, 772 (1997).

14. *Griswold*, 381 U.S. at 485–86.

15. *Id.* at 480.

16. *Id.*

of Errors' decision to uphold the fines.[17] The Court reasoned that much of its precedent interpreted the guarantees of the Bill of Rights to have "penumbras" that must naturally follow enumerated rights, which in turn create "zones of privacy."[18] The Court further explained that the marital relationship is a zone of privacy that deserves protection from government intrusion: banning the use of contraceptives would allow the government to destructively intrude on "sacred" marital relationships by searching marital bedrooms for contraceptives, a destructive and overbroad means of state regulation.[19] The Court extended this right to unmarried couples in *Eisenstadt v. Baird* a few years later in 1972.[20] While the Court in *Eisenstadt* did not address substantive due process, it relied on much of *Griswold*'s rationale and held that treating married and unmarried persons differently failed rational basis scrutiny.[21]

B. Substantive Due Process

The concept of substantive due process derives from the Due Process Clause of the Fourteenth Amendment, which states that the government may not deprive any person of "life, liberty, or property without due process of law."[22] In determining whether the government has deprived a citizen of life, liberty, or property rights in a particular case, two types of inquiries can arise. Procedural due process asks whether the government has followed all proper procedures in revoking said rights.[23] Substantive due process asks whether the government had a sufficient justification for depriving a person of life, liberty, or property.[24]

The 1973 case *Roe v. Wade* signaled the beginning of the Court's shift away from analyzing "personal marital, familial, and sexual privacy" rights as living within "zones of privacy" toward a modern substantive due process analysis.[25] In *Roe*, the Court held that the right to terminate a pregnancy was protected under the Due Process Clause.[26] The Court reasoned that the right to privacy properly extends to a woman's decision to terminate a pregnancy, as that decision is founded in "personal liberty."[27] Writing for the majority, Justice Stewart explained that the Court's precedent "recognized 'the right of the individual, married or single, to be free from unwarranted governmental intrusion into

17. *Id.* at 486.
18. *Id*. at 484.
19. *Griswold*, 381 U.S. at 485–86.
20. Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972).
21. *Id.* at 447.
22. U.S. CONST. amend. XIV, § 1.
23. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1998).
24. *Id.*
25. Roe v. Wade, 410 U.S. 113, 129 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
26. *Id.* at 154.
27. *Id.* at 153.

matters so fundamentally affecting a person as the decision whether to bear or beget a child.'"[28] The Court did not completely abandon its zone of privacy analysis, however; rather, it adopted the same interest balancing test found in many zone of privacy cases, finding that a Texas statute criminalizing most abortions was not narrowly tailored to achieve the state's legitimate interests in protecting pregnant women's health and potential life.[29]

Almost twenty years later, the Court reaffirmed *Roe*'s approach to substantive due process in *Planned Parenthood v. Casey*.[30] *Casey* not only reemphasized that a woman's right to make her own reproductive choices constituted a "fundamental liberty" under the Fourteenth Amendment,[31] but also explicitly held that decisions regarding privacy in abortion and contraception beget similar protection from government intrusion:

> It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which Griswold v. Connecticut, Eisenstadt v. Baird, and Carey v. Population Services International afford constitutional protection. We have no doubt as to the correctness of those decisions. They support the reasoning in Roe relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.32

In sum, *Roe* and *Casey* established that a woman's right to make reproductive decisions—including whether to use contraception—was a fundamental liberty interest that enjoyed the highest level of substantive due process protection.[33]

Despite the Court's reaffirming of *Roe* in *Casey*, precedent overall demonstrates that the Supreme Court's approach to substantive due process over time has been far from consistent. Since 2003, the Court has used at least three separate frameworks for defining rights under substantive due process: (1) historical tradition theory; (2) reasoned judgment theory; and (3) evolving national values theory.[34] The inconsistency with which the Court has utilized these theories over time necessarily affects how the right to contraception could be impacted by future cases; thus, an understanding of each theory helps illuminate just how much could be at stake for contraceptive rights following *Dobbs*.

Historical tradition theory combines a textualist approach with the importance of American history and traditions to construe rights under

28. *Id.* at 169–70 (Stewart, J., concurring).

29. *Id.* at 153–54, 161–65 (majority opinion).

30. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

31. *Id.* at 896 (majority opinion), 943 (Blackmun, J., concurring).

32. *Id.* at 852–53 (majority opinion).

33. *Roe*, 410 U.S. at 154; *Casey*, 505 U.S. at 943.

34. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N. Carolina L. Rev. 67–68 (2006).

substantive due process.[35] This theory can be seen in both Justice Harlan's dissent in *Poe v. Ullman*,[36] decided in 1961, and the majority's opinion in *Bowers v. Hardwick*, decided in 1986.[37] While *Poe* was dismissed on justiciability grounds,[38] Harlan's dissent assessed the case on the merits and articulated the rationale behind historical tradition theory, which the Court would later apply in *Bowers*:

> Due process has not been reduced to any formula . . . [T]hrough the course of this Court's decisions it has represented the balance which our Nation…has struck between that liberty and the demands of organized society. … The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. … It is this outlook which has led the Court continuingly to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision's larger context…of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.[39]

In *Bowers*, the Court heard a challenge to a Georgia sodomy statute after the plaintiff was charged with sodomy for engaging in consensual intercourse with another man.[40] The Court again looked to history in finding that gay citizens did not have a "fundamental right" to engage in intercourse with same-sex partners:

> Proscriptions against that conduct have ancient roots. … Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. … Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.[41]

Under historical tradition theory, the Court's ability to define fundamental rights is necessarily constrained by the nation's "history and tradition."[42] Under this

35. *Id.* at 83.

36. Poe v. Ullman, 367 U.S. 497, 549 (1961) (Harlan, J., dissenting).

37. Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986).

38. *Poe*, 367 U.S. at 508–09.

39. *Id.* at 542–43 (Harlan, J., dissenting).

40. *Bowers*, 478 U.S. at 187–88.

41. *Id.* at 192–94.

42. Does that phrase sound familiar? That may be because the Supreme Court has grown particularly fond of it in recent years—so fond, in fact, that the words "history" and "tradition" appear a whopping sixty-seven and forty-seven times throughout *Dobbs*' majority, concurring, and dissenting opinions, respectively. *See* Joe Brandt, *The Supreme Court Keeps Citing 'History and Tradition.' Whose History?*, LX NEWS (June 24, 2022), https://www.lx.com/politics/the-supreme-court-keeps-citing-history-and-tradition-whose-history/54733/. Ironically, while advocates of historical tradition theory laud the approach for its objectivity, many constitutional law scholars

view, the Supreme Court nears "illegitimacy" by construing any practice that is not rooted in the language or design of the Constitution or a past state law as a fundamental right.[43]

Reasoned judgment theory takes quite a different approach to substantive due process, allowing the Court to use philosophical and moral reasoning to evaluate rights.[44] In this framework, the Court "weighs the liberty interests of the individual…against competing governmental concerns" to determine whether the interest deserves constitutional protection.[45] *Casey* provides an illustrative example. The Court in *Casey* affirmed that a woman's ability to make her own reproductive choices is a fundamental right.[46] While the Court relied in part on stare decisis to reaffirm *Roe*,[47] the Court spent part of its opinion using its "reasoned judgment" to evaluate the liberty interest at stake:

> Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and … to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman … cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history…[48]

With this liberty interest in mind, the Court—as it did in *Roe*[49]—acknowledged states' "profound" interest in preserving fetal life;[50] however, the Court ultimately reaffirmed *Roe*, finding that pre-viability restrictions on abortion must satisfy strict scrutiny.[51]

have found that its application allows judges to "cherry pick" historical facts and allows implicit biases to further entrench themselves into the law, perpetuating inequity in the process. *See id; see also* Alexandra Michalak, *Historians Wear Robes Now? Applying the History and Tradition Standard: A Practical Guide for Lower Courts*, 32 WILLIAM & MARY BILL RTS. J. 479 (2023); Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUSTON L. REV. 901 (2023); Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 DUKE L. REV. 901 (1993).

43. *Id.* at 194.

44. Conkle, *supra* note 34, at 66.

45. *Id.* at 66–67.

46. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 943 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

47. *Id.* at 845–46.

48. *Id.* at 852.

49. Roe v. Wade, 410 U.S. 113, 150 (1973).), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

50. *Casey*, 505 U.S. at 878.

51. *Id.* at 846, 871.

Finally, the majority opinion in *Lawrence* hints at the existence of an implied third theory that combines elements of historical tradition and reasoned judgment. This theory is often referred to as "evolving national values" theory.[52] Evolving national values theory allows the Court to both consider the history of how the potential "right" had previously been addressed in the law and reflect on how national sentiments and attitudes have changed over time.[53] In *Lawrence*, the Court heard a constitutional challenge to a state law, similar to the statute challenged in *Bowers,*[54] criminalizing same-sex intercourse.[55] The Court employed both the historical tradition and reasoned judgment theories in striking down the Texas statute as unconstitutional.[56] The Court explicitly questioned the historical logic employed in *Bowers*; while it conceded that relations between same-sex partners had long been regarded as immoral,[57] this was not the only conduct that sodomy laws were designed to address.[58] The Court also utilized reasoned judgment, noting that these sodomy laws are demeaning to LGBTQIA+ people and their relationships.[59]

While evolving national values theory is not explicitly named in *Lawrence*, the Court's use of this analytical theory suggests it could be applied in future decisions. After explaining that *Bowers* had relied in part on the number of past laws criminalizing sexual activity between same-sex partners, the Court wrote that more recent laws "are of most relevance."[60] History, the Court wrote, is only the starting point of the substantive due process inquiry,[61] and more recent history suggested that sentiments toward such conduct had changed. State laws historically criminalizing gay citizens for engaging in consensual sex often went ignored and unenforced; many states even repealed them.[62] By addressing how sentiments had shifted regarding sodomy laws of the past, the Court implied that these shifts bear some weight in determining whether an interest deserves substantive due process protection.

While it is not uncommon for the Court to address different constitutional theories over time, having such disparate theories for substantive due process analysis poses a problem. Some of these theories are clearly in conflict: the Court cannot simultaneously have the power to "create" new liberties based on the

52. *See* Conkle, *supra* note 34, at 67.
53. *Id* at 128.
54. Bowers v. Hardwick, 478 U.S. 186, 188 (1986).
55. Lawrence v. Texas, 539 U.S. 558, 563 (2003).
56. *Id.* at 579.
57. *See Bowers*, 478 U.S. at 196.
58. *See Lawrence*, 539 U.S. at 559.
59. *Id.* at 567, 578.
60. *Id.* at 571–72.
61. *Id.* at 572 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 823, 857 (1998) (Kennedy, J., concurring)).
62. *Id.* at 572–73.

moral and political reasoning of its Justices while also being constrained by the text of the Constitution in defining fundamental rights. Thus, our fundamental rights are entirely dependent on which theory, or combination of theories, the Court chooses to employ in each case. The approach the Court adopts moving forward has significant implications for the legal future of the right to access contraception.

III. LOOKING TO *DOBBS*: THE THREAT TO CONTRACEPTIVE ACCESS POST-*ROE*

The Court most recently revisited substantive due process in *Dobbs*.[63] *Dobbs* concerned a constitutional challenge to the Mississippi Gestational Age Act, a state law banning nearly all abortions after fifteen weeks.[64] Respondents, a Mississippi abortion clinic and one of its physicians, argued that upholding such a ban would directly rebut the holdings of *Roe* and *Casey*—precedent that the State argued should be overruled.[65] The Court ultimately sided with Mississippi, overruling *Roe* and *Casey* and returning the ability to regulate abortion to the states.[66] In a majority opinion authored by Justice Alito, the Court wrote, "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including…the Due Process Clause of the Fourteenth Amendment."[67] Much of the opinion was spent heavily criticizing the reasoning of the Court's opinions in both *Roe* and *Casey* for the lack of attention each paid to the Constitution's text.[68] In addressing respondents' argument that the right to an abortion was implicitly protected as a fundamental right under the Due Process Clause, the Court employed historical tradition theory, writing that it had "long" asked whether a right is "'deeply rooted in our history and tradition'" in evaluating substantive due process rights,[69] and has been "reluctant" to express its own views about what liberties due process should encompass.[70] In keeping with its emphasis on "history and tradition," the Court highlighted that abortion was criminalized at common law.[71] The Court pointed to the many states that criminalized abortion at nearly all stages of pregnancy from 1868—the year the Fourteenth Amendment was ratified—until 1973 with the Court's decision in *Roe*.[72] Since no state had

63. *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
64. *Id.* at 232.
65. *Id.* at 230.
66. *Id.* at 292.
67. *Id.* at 231.
68. *See Dobbs,* 597 U.S. at 234–41.
69. *Id.* at 237.
70. *Id.* at 239–40.
71. *See id.* at 240–41.
72. *Id.* at 248–49.

embraced abortion as a right prior to *Roe*, the Court held that abortion could not be construed as such today.[73]

Notably absent from the majority's opinion, however, is any discussion on the number of states that did not have abortion restrictions following *Roe*, nor was there any acknowledgment that state legislatures post-*Roe* may have felt it unnecessary to pass laws to protect abortion as a right. As the dissent points out, it is not clear that early history—especially history that predates the ratification of the Constitution or its amendments—should be relevant in construing constitutional rights, given the Court's precedent.[74] Even if early history were relevant to this inquiry, the result reached by the majority may not have been entirely correct; early common law did not criminalize abortion prior to "quickening," suggesting that early abortions were legally permissible.[75]

This approach is also seen in *Washington v. Glucksberg*,[76] which the Court cited several times in the *Dobbs* opinion.[77] In *Glucksberg*, the Court held that physician-assisted suicide was not a right under substantive due process,[78] citing 700 years of "common-law tradition" where the practice was heavily punished.[79] Despite the fact that states later moved away from the common law's harsh treatment of assisted suicide—with some states even legalizing the practice[80]—the Court reasoned that states' creation of more lenient penalties did not reflect outright "acceptance" of the practice.[81] The fact that most states still prohibited the practice, the Court reasoned, was sufficient to find that physician-assisted suicide was not a liberty interest the Constitution recognizes.[82] The *Dobbs* Court's reliance on *Glucksberg* is especially telling given the Court had not returned to a solely historical tradition-based analysis since *Glucksberg* was decided more than twenty years ago.

Given the Court's criticism of *Roe* and *Casey* for failing to adhere to the text of the Constitution and ignoring abortion's legislative history, the *Dobbs* opinion strongly signals the Court's endorsement of the historical tradition approach to substantive due process. The Court's use of this theory implies that should other rights that were evaluated using reasoned judgment theory—which largely relies

73. *Dobbs,* 597 U.S. at 250.

74. *Id.* at 371 (Breyer, J., dissenting) (arguing that early history may bear less relevance in evaluating rights under substantive due process).

75. *Id.* At common law, many states drew the line between legal and criminalized abortions at "quickening," the first point at which a mother is able to feel fetal movement. *See Quickening in Pregnancy*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/symptoms/22829-quickening-in-pregnancy (last visited Apr. 12, 2024).

76. *See generally* Washington v. Glucksberg*,* 521 U.S. 702 (1997).

77. *See Dobbs*, 597 U.S. at 231, 238–40, 243, 250, 374, 260–61.

78. *Glucksberg,* 521 U.S. at 728.

79. *Id.* at 711–712.

80. *Id.* at 716–17.

81. *Id.* at 713–14.

82. *Id.* at 719.

on the Court's moral and philosophical reasoning to determine what counts as a "fundamental right"—arise in future cases, the *Dobbs* Court will not uphold their status as rights unless there is a sufficient historical basis for doing so.

While the Constitution does not explicitly name access to contraceptives as a right, contraception has a significant legal history in the United States. While most contraceptives in use today were not invented until the mid-twentieth century,[83] condoms have been available in the United States since 1860 when American inventor Charles Goodyear created the first rubber condoms.[84] Following their invention, condoms could be found in most pharmacies,[85] and information about condoms was widely circulated until 1873 when Congress passed the Comstock Act.[86] The Comstock Act made it illegal to mail "obscene, lewd, [or] lascivious" items or to advertise such items to the public,[87] which effectively included contraceptives.[88] Many state legislatures also passed "mini Comstocks" to reflect the view that such articles were immoral.[89] Despite the Comstock Act and its state-level progeny, advancements in medicine led doctors to discover that contraceptives were excellent tools for venereal disease prevention.[90] This discovery led state courts to reinterpret their Comstock laws to allow physicians the right to prescribe contraceptives.[91] In 1936, the Second Circuit recognized contraceptives as a powerful public health tool and held that the Comstock Act could not be interpreted to prevent physicians from prescribing contraceptives to promote patient health in *United States v. One Package*.[92] While state Comstock laws remained in place after *One Package*, many states modified them to, at minimum, create an exception to permit the use

83. *See A Timeline of Contraception*, PBS, https://www.pbs.org/wgbh/americanexperience/features/pill-timeline/ (last visited Mar. 8, 2023).

84. Kahn et al., *The Story of the Condom*, 29 INDIAN J. UROLOGY 12, 14 (2013).

85. *See* Hunter Oatman-Stanford, *Getting It On: The Covert History of the American Condom*, COLLECTORS WEEKLY (Aug. 16, 2012), https://www.collectorsweekly.com/articles/getting-it-on-the-covert-history-of-the-american-condom/.

86. Kahn et al., *supra* note 84, at 14. If this law sounds strangely familiar, it may be because 145 members of Congress—and, in recent oral arguments, at least two Justices—have recently signaled their support for reviving the nearly 150-year-old act. *See* Brief of Amici Curiae of 145 Members of Congress in Support of Respondents and Affirmance at 4, FDA v. All. for Hippocratic Med., Nos. 23-235, 23-236 (Feb. 29, 2024); Joseph Choi & Nathaniel Weixel, *Conservative Justices Express Support for Comstock Act*, THE HILL (Mar. 26, 2024), https://thehill.com/news letters/health-care/4558234-conservative-justices-express-support-for-comstock-act/.

87. Comstock Act, 18 U.S.C. § 1461.

88. Oatman-Stanford, *supra* note 85.

89. Sophie Hayssen, *What are the Comstock Laws? Here's How They've Influenced Sex Ed Debates*, TEEN VOGUE (Feb. 15, 2022), https://www.teenvogue.com/story/what-are-comstock-laws.

90. Joshua Gamson, *Rubber Wars: Struggles Over the Condom in the United States*, 1 J. HIST. SEXUALITY 262, 268–69 (1990).

91. *Id.*

92. United States v. One Package, 86 F.2d 737, 739–40 (2d Cir. 1936).

of contraceptives for medical purposes.[93] While the Comstock Act is still in place today, Congress amended the Act in 1971 to remove all references to contraceptives.[94]

As Professor Khiara Bridges, a reproductive rights scholar at University of California Berkeley School of Law, noted in her testimony before the Senate Judiciary Committee in July 2022, the Court's substantive due process analysis in *Dobbs* could place the right to contraception in jeopardy.[95] In relying on historical tradition theory, the Court in *Dobbs* interpreted due process to only protect a practice as a right if support for such a right was enshrined in law before 1868.[96] Federal law, however, did not support the idea that access to contraception was a right until 1936 at the earliest, when *One Package* was decided.[97] Justice Breyer argued that the legal origin could be much later, dating back only to the "mid-20th century" when *Griswold* and *Eisenstadt* were decided.[98] *Glucksberg*—which the Court relied on significantly in deciding *Dobbs*—further noted that states' failure to pass legislation to "embrace" physician-assisted suicide as a right prior to 1868 implied that it was not a right throughout history.[99] Since state legislation on contraception did not appear until after the Comstock Act, *Dobbs* could be read to find that access to contraception is not a right.

Extending the Court's lens from 1868 until the *One Package*, *Griswold*, or *Eisenstadt* decisions would likely not change this analysis. The passage of the Comstock Act in 1873—and states' subsequent embrace of the law by passing "mini Comstocks"—support the idea that contraceptive use was viewed as immoral in early American history. While the Court would likely also need to consider states' permitting exceptions for prescribing contraceptives to promote patient health after *One Package*, the Court's choice to disregard states' move away from harsh penalties for physician-assisted suicide in *Glucksberg* indicates that states' amendments to permit contraceptive access for patient health would not be persuasive. *Dobbs* also lacked any discussion of state legislation on abortion post-*Roe*, so an extension of *Dobbs* would likely not consider legislation on contraception in states today.[100] An application of reasoned

93. Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-First Century*, 47 CONN. L. REV. 971, 988–89 (2015).

94. *See* H.R. REP. NO. 91-1105, at 3–4 (1970).

95. *See A Post*-Roe *America: The Legal Consequences of the* Dobbs *Decision: Hearing Before the S. Comm. on the Jud.*, 117th Cong. 4–5 (2022) (statement of Khiara M. Bridges, Professor, University of California Berkeley School of Law).

96. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237–40 (2022).

97. United States v. One Package, 86 F.2d 737, 739–40 (2d Cir. 1936).

98. *Dobbs*, 597 U.S. at 262–63 (Breyer J., dissenting).

99. Washington v. Glucksberg, 521 U.S. 702, 754 (1997) (majority opinion), (Souter, J., concurring).

100. This is particularly unfortunate given that fourteen states (and the District of Columbia) have enshrined legal or constitutional protections since the *Dobbs* decision. *See* Mabel Felix et al.,

judgment or evolving national values theory would likely lead to a different result, though it appears unlikely that this Court will stray from historical tradition theory anytime soon.

The historical tradition analysis of the right to contraception is distinguishable from that of abortion in a few respects. For one, prior to the Comstock Act, contraceptives were widely used, and neither state legislatures nor Congress regulated their use or access to them.[101] The Court could construe this in one of two ways: the lack of bans on contraception could demonstrate that using contraceptives was embraced by the public as a de facto right, or the absence of such laws could suggest that state legislatures did not view this as a right, assuming state legislatures had the opportunity to enshrine access to contraception as such. Contraceptives also have support in federal law prior to *Griswold* and *Eisenstadt* via the 1936 *One Package* case, and post-*Griswold* via the Affordable Care Act (ACA) of 2010, which includes contraceptive coverage within its definition of preventative care services, one of the ten essential health benefits that many plans are required to cover.[102] Though federal law would likely be given more weight in the due process analysis, these both occurred well after 1868, and the *Dobbs* Court limited its historical lens to look at laws in place prior to that point. Thus, it is unclear how much weight these considerations would be given under the *Dobbs* Court's emphasis on less recent "history and tradition."

If the Court views the lack of contraceptive legislation prior to 1868 as indicative that access to contraception was not a right, it is also not out of the realm of possibility that, as in *Dobbs*, the Court overturns precedent[103] upon which the right to contraception stands—namely *Griswold* and *Eisenstadt.* In *Casey*, the Court acknowledged that the decision to use contraceptives is "of the same character" as the decision to have an abortion from a substantive due process perspective, given that they involve level of government intrusion.[104] Given that *Dobbs* overturned *Casey* and heavily criticized its lack of historical analysis,[105] *Griswold* and *Eisenstadt*—both of which lack a historical

The Right to Contraception: State and Federal Actions, Misinformation, and the Courts, KFF (Oct. 26, 2023), https://www.kff.org/womens-health-policy/issue-brief/the-right-to-contraception-state-and-federal-actions-misinformation-and-the-courts/#:~:text=In%20addition%20to%20the%20three,protecting%20contraception%20since%20June%202022.

101. PBS, *supra* note 83.

102. *See* Affordable Care Act, 42 U.S.C. § 18022; *see also Preventative Care Benefits for Women,* HEALTHCARE.GOV, https://www.healthcare.gov/preventive-care-women/ (last visited Apr. 21, 2024).

103. *Dobbs*, 597 U.S. at 302.

104. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852–53 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

105. *Dobbs*, 597 U.S. at 292.

justification to support constitutional protection—could similarly be criticized (and potentially overturned) by the *Dobbs* Court.

Justice Thomas' concurrence in *Dobbs* makes clear the uncertain footing on which the right to contraception stands. Thomas stressed that the Due Process Clause should be read only to protect individuals by ensuring they are given the "customary procedures" to challenge the deprivation of their rights,[106] not to *secure* substantive rights.[107] The Court's substantive due process precedent, Thomas wrote, is "demonstrably erroneous,"[108] and demands correction to ensure that future cases "follow the text of the Constitution."[109] *Griswold* is one such case that Thomas highlighted as needing review.[110] This invitation implies that *Dobbs* could eventually be used to decide whether the right to contraception is protected by substantive due process.

Though the majority's opinion explicitly states that *Dobbs* should not be read to "cast doubt on precedents that do not concern abortion,"[111] *Dobbs* has done little to assuage the fears of reproductive health scholars and advocates about the legal future of contraceptive access. Prior to *Dobbs*, many believed overturning *Roe* would have far-reaching implications for birth control and emergency contraception.[112] Returning the power to regulate abortion to the states allows state legislators to define when life begins, which could limit providers' abilities to prescribe certain contraceptive devices that disrupt implantation, like Plan B or intra-uterine devices (IUDs).[113] Additionally, many lawmakers who have been vocal opponents of contraceptive access have falsely claimed that common methods of birth control are abortifacients—medications that induce an abortion in a pregnant person—rather than medications that

106. *Id.* at 331 (Thomas, J., concurring).

107. *Id.* at 332.

108. *Id.*

109. *Id.* at 336.

110. *Dobbs*, 597 U.S. at 295.

111. *Id.*

112. *See* Sarah McCammon, *What Would Overturning* Roe *Mean for Birth Control?*, KQED (May 11, 2022), https://www.kqed.org/arts/13913228/what-would-overturning-roe-mean-for-birth-control.

113. *Id.* Some states have readily jumped at the chance to legally define when life begins. Just months ago, the Alabama Supreme Court ruled that embryos created for implantation via in vitro fertilization are children under the state's Wrongful Death of a Minor Act. LePage v. Center for Reproductive Medicine, No. SC-2022-0515, 2024 WL 6565591, at *1 (Ala. Feb. 16, 2024). The ruling chilled IVF services almost immediately following the ruling. *See* Aria Bendix & Bracey Harris, *Three Alabama clinics pause IVF services after court rules that embryos are children*, NBC News (Mar. 21, 2024), https://www.nbcnews.com/health/health-news/alabama-fertility-clinic-says-will-resume-ivf-services-bill-passes-pro-rcna141682. Though state lawmakers quickly worked to protect IVF services, Alabama must now contend with the complicated legal questions that arise in affording embryos with the legal status of full personhood.

prevent pregnancy.[114] Reproductive health advocates believe that anti-contraception lawmakers are intentionally blurring the lines between the two classes of medication to garner political support for contraceptive bans at the federal and state levels.[115] Members of Congress are using this tactic as well, with several proposing amendments to bills to conflate these two distinct categories of drugs within the past few years.[116] Others, particularly conservative political figures, have used contraceptives as a convenient target to generate public disdain for these medications, masking what amounts to little more than stoking political outrage under the guise of real concern about women's safety.[117] Such sentiments, taken together, threaten to chip away at public support for contraceptives.

The leaked draft of the *Dobbs* opinion[118] provided a glimpse into what passing the regulatory torch to states might look like. A handful of states introduced legislation in the past two years that restricts access to some or all forms of birth control.[119] Part IV considers how post-*Roe* contraceptive legislation could take shape if the *Dobbs* decision were extended to contraception.

IV. CONTRACEPTIVE BANS IN PRACTICE: HOW STATES COULD FRAME CONTRACEPTION REGULATIONS

Even before the *Dobbs* decision, some legislators had already signaled their desire to limit contraceptive access. Several Republican members of Congress have pushed for legislation to limit certain forms of birth control that they incorrectly conflate with "abortifacients."[120] Representative Brent Crane, chair of the House State Affairs Committee, announced in May 2022 that the committee would hold hearings on legislation to ban forms of emergency contraception like Plan B and would consider hearing similar legislation on

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

115. *See id*.

116. *Id.*

117. Turning Point USA founder Charlie Kirk's recent comments on birth control are an illustrative example. At a Turning Point event in April 2024, Kirk made claims that birth control "increases depression, anxiety, [and] suicidal ideation" in women and implored attendees to ensure to "make sure that your loved ones are not on birth control" before claiming that birth control makes women "angry and bitter," leading them to align with the Democratic Party. The Young Turks, *Charlie Kirk Rants About Women in Their 30's, Birth Control*, YOUTUBE (Apr. 3, 2024), https://www.youtube.com/watch?v=NBMdgM3eCtI.

118. *See* Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

119. *See* NATIONAL WOMEN'S LAW CENTER, *supra* note 114.

120. *Id.*

IUDs.[121] Other policymakers have been similarly vocal about their opposition to contraception. In a video statement opposing the nomination of Justice Ketanji Brown Jackson to the Supreme Court, Senator Marsha Blackburn opined that *Griswold* was "wrongly decided,"[122] and several candidates running for various offices at the state level expressed similar sentiments.[123]

In addition to expressing these beliefs, many state legislators had been working to pass legislation to limit contraceptive access well before *Dobbs*. Prior to *Dobbs*, contraception legislation typically fell into one of two categories: amendments to (1) health and military spending bills that conflate birth control with abortion; or (2) legal codes and state constitutions to change the legal definitions of pregnancy and human beings.[124] In 2021, three states considered amendments to existing funding bills that would have prevented clinics and other providers from providing patients with emergency contraception.[125] Idaho was the only state to pass its ban, preventing any clinic at a public school from providing "abortion services," which the bill defines to include emergency contraception.[126] Notably, Texas has banned emergency contraceptives from all state-funded family planning programs for more than a decade,[127] denying these services to approximately 750,000 women in 2022 alone.[128]

States have also attempted to use the law to redefine life and pregnancy. In 2021, Texas passed S.B. 8, a ban on all abortions after six weeks of pregnancy, that defines pregnancy as beginning at fertilization.[129] After the leak of the draft opinion in *Dobbs*, Louisiana attempted to enact an abortion ban which would amend the state code to redefine "person" and "unborn" child to reflect that personhood begins at fertilization.[130] This type of legislation places emergency

121. Michael Ollove, *Some States Are Already Targeting Birth Control*, STATELINE (May 19, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/19/some-states-already-are-targeting-birth-control.

122. Steve Benen, *Blackburn Denounces Supreme Court Contraception Ruling From 1965*, MSNBC (Mar. 21, 2022), https://www.msnbc.com/rachel-maddow-show/maddowblog/blackburn-denounces-supreme-court-contraception-ruling-1965-rcna20862.

123. *See* Dave Boucher, *Michigan GOP AG Candidates Criticize Case That Nixed Law Banning Use of Birth Control*, DETROIT FREE PRESS (Feb. 21, 2022,), https://www.freep.com/story/news/politics/2022/02/21/michigan-gop-ag-hopefuls-criticize-case-nixed-contraception-ban/6877934001/; *see also* Steve Benen, *Asked About Contraception Case, GOP Candidates Give the Wrong Answer*, MSNBC (Feb. 21, 2022), https://www.msnbc.com/rachel-maddow-show/maddowblog/asked-contraception-case-gop-candidates-give-wrong-answer-rcna17053.

124. *See* NATIONAL WOMEN'S LAW CENTER, *supra* note 114.

125. *Id.*

126. *Id.*

127. *Id.*

128. HEALTHY TEXAS WOMEN SECTION 1115 DEMONSTRATION WAIVER APPLICATION 14 (TEX. HEALTH & HUM. SERVS. COMM'N, Draft June 30, 2017).

129. Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

130. H.B. 813, 2022 Leg., Reg. Sess. (La. 2022).

contraception, some of which acts to prevent fertilization, in serious legal jeopardy.

These recent legislative patterns from states suggests that opponents to contraception are not likely to take a "burn it all down" approach to the right to contraception. Legal experts believe blanket bans on all forms of contraception are unlikely to happen, and are instead more likely to challenge specific forms of contraception, like Plan B and IUDs.[131] Post-*Dobbs*, the sense is that state officials could be more emboldened to pass legislation to chip away at the right to contraception, much in the same way that abortion rights were eroded following *Roe*:[132] instead of blanket bans, bans on specific forms of contraceptives will pass in state legislatures and, over time, face legal challenges.[133] Courts will hear those challenges, and with each law that is upheld as a "reasonable" restriction on the right to access contraception, the value of this right and what it effectively protects grows weaker and weaker.

It is still possible that a state passes an outright ban on contraceptives to provoke a constitutionality analysis of the right to contraception. Some believe that Mississippi's Gestational Age Act, the abortion ban challenged in *Dobbs*, was passed for this very reason—a belief reflected in the U.S. District Court for the Southern District of Mississippi's opinion in that case.[134] Such a challenge could take many forms. Some predict that a state prosecutor might sue a physician or reproductive health clinic for violating the state's abortion law by administering emergency contraception,[135] while others predict that more state laws that conflate abortifacients with forms of contraception are more likely.[136] Other legal avenues, like challenging the validity of federal agency decisions relating to contraception, may also be viable paths, as is evidenced by the recent ruling in *Alliance for Hippocratic Medicine v. FDA*.[137] On April 7, 2023, the District Court for the Northern District of Texas issued a preliminary injunction suspending the Food and Drug Administration's (FDA) approval of two

131. Aria Bendix, *Birth Control Restrictions Could Follow Abortion Bans, Experts Say*, NBC NEWS (June 24, 2022), https://www.nbcnews.com/health/health-news/birth-control-restrictions-may-follow-abortion-bans-roe-rcna35289.

132. *See* Strict Scrutiny, *The Originalist Case for Terrorizing Women*, CROOKED MEDIA, at 9:23–9:47, 9:59–11:09 (Feb. 13, 2023), https://open.spotify.com/episode/0lyHZQXO5qAgOkpiECFLjF?si=809596528e244666 (discussing how abortion rights were eroded after *Roe* and how a similar pattern is emerging with the right to contraception).

133. *See id.*

134. Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 542 (S.D. Miss. 2018) ("[t]he real reason we are here is simple. The State chose to pass a law it knew was unconstitutional…to ask the Supreme Court to overturn *Roe v. Wade*.")

135. Bendix, *supra* note 131.

136. *Id.*

137. *See* Alliance for Hippocratic Medicine v. FDA, No. 2:22-cv-00223-Z, 2022 WL 17731380, at *31 (N.D. Tex. Jan. 18, 2022).

common abortifacients, mifepristone and misoprostol.[138] The Fifth Circuit affirmed in part, rolling back recent FDA actions that made mifepristone easier to access.[139] The Supreme Court granted certiorari to hear the case this Term,[140] leaving many legal experts concerned about mifepristone's future availability.[141] Though the Court's questions during oral arguments seem to suggest that they are unwilling to impose the restrictions that plaintiffs are seeking,[142] the decision could still open the floodgates for opportunities to erode the legal foundation on which contraceptive access stands.[143]

Federal law provides some protection regarding access concerns. Under the ACA, insurers must provide certain services without cost-sharing obligations.[144] The federal contraceptive coverage guarantee lies within these provisions, which requires most private health plans to provide coverage for contraceptive methods, counseling, services necessary to begin or discontinue contraception, and related follow-up care.[145] Many states have expanded their own requirements to reflect the coverage guarantee language as well.[146] However, in 2017, the Department of Health and Human Services (HHS) issued regulations that allowed private employers to refuse coverage of contraception based on religious or moral beliefs.[147] In 2020, the Supreme Court upheld those regulations in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, finding that both HHS and the Department of Labor had authority

138. *Id.*

139. Alliance for Hippocratic Medicine v. FDA, 78 F.4th 210, 222–23 (5th Cir. 2023), *cert. granted sub nom.* FDA v. All. for Hippocratic Med., 144 S. Ct. 537 (2023), and *cert. granted sub nom.* Danco Laboratories, L.L.C. v. All. for Hippocratic Med., 144 S. Ct. 537 (2023).

140. Food & Drug Admin. v. All. for Hippocratic Med., 144 S. Ct. 537 (2023).

141. Nina Totenberg & Annie Gersh, *Supreme Court to Hear Abortion Pill Case*, NPR (Dec. 13, 2023), https://www.npr.org/2023/12/13/1218332935/mifepristone-abortion-pill-supreme-court.

142. Amy Howe, *Supreme Court Appears Likely to Allow Abortion Drug to Remain Available*, SCOTUSBLOG (Mar. 26, 2024), https://www.scotusblog.com/2024/03/supreme-court-appears-likely-to-allow-abortion-drug-to-remain-available/.

143. While the Court is not considering whether the FDA overstepped its authority in authorizing mifepristone, Congress could still prevent many from gaining access to the medication via mail by reviving the Comstock Act. *See* Danielle Kurtzleben, *Why Anti-abortion Advocates are Reviving a 19th Century Sexual Purity* Law, NPR (Apr. 10, 2024), https://www.npr.org/2024/04/10/1243802678/abortion-comstock-act. Such a revival could considerably undermine access to contraception via popular telehealth services like Nurx, Hers, and The Pill Club.

144. Affordable Care Act, 42 U.S.C. § 300gg-13.

145. *Id.*; *see also The Federal Contraceptive Coverage Guarantee: An Effective Policy That Should Be Strengthened and Expanded: Fact Sheet*, GUTTMACHER INSTITUTE (June 2021), https://www.guttmacher.org/sites/default/files/factsheet/contraceptive-coverage-guarantee.pdf.

146. GUTTMACHER INSTITUTE, *supra* note 145.

147. Evan Sweeney, *Trump Administration Finalizes Rules Allowing Religious and 'Moral' Objections to Birth Control Coverage*, FIERCE HEALTHCARE (Nov. 7, 2018), https://www.fiercehealthcare.com/regulatory/trump-administration-finalizes-rules-allowing-moral-exemptions-for-birth-control.

under the ACA to create such exemptions.[148] Thus, private employers still have ways to get around providing the free coverage of contraceptives that the ACA requires. States have clearly taken note of these regulations: six states currently allow pharmacists the right to refuse to fill a prescription for birth control for moral or religious reasons.[149] However, in January 2023, the Biden administration released a proposed rule that would end Trump-era moral exemptions,[150] which, if finalized, could preserve access for women across the country.

Given the uncertain future of the right to contraception after *Dobbs*, reproductive health experts have called for swift action to preserve this right under the law. There are several legal avenues that may be worth pursuing to achieve this end. To date, there have been significant successes at the state level to protect access to contraception. Eleven states' supreme courts have held that the state's constitution confers a right to abortion, and three others voted to make these amendments during the 2022 midterm elections.[151] Just last year, Governor Katie Hobbs issued a standing order to make contraception available over the counter without a prescription,[152] which polls suggest that women overwhelmingly support.[153] If states can take this type of action on abortion, similar avenues may be viable to protect contraceptive rights as well.

Action at the federal level would garner even stronger protections for the right to contraception. In July 2022, House lawmakers passed the Right to Contraception Act, which would protect the right to use and purchase contraception at the federal level[154] and protect health care providers who offer

148. Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2273, 2386 (2020).

149. *Refusing to Provide Health Services*, GUTTMACHER INSTITUTE (Jan. 1, 2023), https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services.

150. *See* Coverage of Certain Preventative Services Under the Affordable Care Act, 88 Fed. Reg. 7236 (proposed Jan. 30, 2023).

151. Michelle Long, *2022 State Ballot Initiatives on Abortion Rights*, KFF (Sept. 20, 2022), https://www.kff.org/policy-watch/2022-state-ballot-initiatives-abortion-rights/; *State Constitutions and Abortion Rights*, CENTER FOR REPRODUCTIVE RIGHTS, https://reproductive rights.org/maps/state-constitutions-and-abortion-rights/ (last visited Apr. 21, 2023).

152. *Governor Katie Hobbs Announces Expanded Access to Over the Counter Contraception Available to Arizonans*, OFF. OF THE GOV. KATIE HOBBS (July 6, 2023), https://azgovernor.gov /office-arizona-governor/news/2023/07/governor-katie-hobbs-announces-expanded-access-over-counter.

153. *Most Women are in Favor of Making Birth Control Pills Available over the Counter without a Prescription if Research Shows they are Safe and Effective*, KFF (Nov. 3, 2022), https://www.kff.org/womens-health-policy/press-release/most-women-are-in-favor-of-making-birth-control-pills-available-over-the-counter-without-a-prescription-if-research-shows-they-are-safe-and-effective/ (finding that over seventy-seven percent of women between the ages of eighteen and forty-nine support making birth control available over-the-counter without a prescription).

154. Annie Karni, *House Passes Bill to Ensure Contraception Rights After* Dobbs, N.Y. TIMES (July 21, 2022), https://www.nytimes.com/2022/07/21/us/politics/house-contraception.html.

contraception to their patients.[155] If passed, this would restrict the Court's ability to overturn *Griswold* and *Eisenstadt* if given the opportunity.

V. CONCLUSION

From the moment the draft opinion of *Dobbs* was leaked,[156] it was clear that the Court's ruling would have significant implications for the future of reproductive rights in America. The Court's return to the historical tradition theory of substantive due process—and Justice Thomas' desire to do away with the doctrine altogether—signals that the future of contraceptive access is uncertain. If a case were to come before the Court that provokes a revisitation of *Griswold* and *Eisenstadt*, the *Dobbs*' Court's focus on state legislative history prior to 1868 could prove to be a significant hurdle in preserving the right to contraception. Before the Court can revisit its precedent in *Griswold* and *Eisenstadt*, action must be taken to preserve women's autonomy and ability to exercise choice over their reproductive health and freedom. Whether this comes in the form of strengthening existing protections for contraceptive access or passing new ones, the path we take will shape the reproductive rights of women for years to come.

MADELINE C. TATRO*

155. Sahil Kapur, *House Passes Legislation to Enshrine a Right to Contraception in Federal Law*, NBC NEWS (July 21, 2022), https://www.cnbc.com/2022/07/21/house-passes-legislation-to-enshrine-a-right-to-contraception-in-federal-law.html.

156. *See* Gerstein & Ward, *supra* note 118.

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