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THE LEGAL EFFECTS OF DOBBS IN HOPES OF AN ABORTION-FREE AMERICA

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Following the fall of *Roe v. Wade*, many are wondering how the states and federal government will handle the issue of abortion. The *Dobbs v. Jackson* decision did not outlaw abortion but said that “[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision.”¹ Justice Kavanaugh in his concurrence explains further that “[o]n the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.”² According to the *Dobbs* decision, there is neither a federal right to abortion nor a federal right of life for the fetus found within the Constitution. This has many important implications that Americans need to understand. In stating that the Constitution is neutral on the issue of abortion, the Supreme Court has said the federal government has no power to regulate abortion. To understand how to draw this conclusion, one needs to understand the structure of the American government.

The Founding Fathers of America were terrified of a federal government with too much power. This fear came from the colonists’ relationship with England and their frustration with their lack of representation. As a result of this fear, the Founders wanted the federal government to have severely restricted power so as not to be tyrannical. This led to the ratification of the Articles of Confederation, which ultimately failed because the federal government was given so little power, it was essentially useless.³ The Articles of Confederation were replaced with the Constitution, which delegated specific powers to the federal government. The Constitution represents a compromise between a federal government with too much power and a federal government with no power at all. The Constitution granted the federal government a limited field in which the branches could exercise power. Shortly after the Constitution was ratified, the Founding Fathers amended the Constitution to include what we refer to today as the Bill of Rights. One of the amendments in the Bill of Rights, Amendment X, states, “The powers not delegated

to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁴ This Amendment means that the federal government can act only within the scope of the powers it is given by the Constitution.

The Constitutions limiting the federal government’s powers is important because if an issue is not listed in the Constitution, the federal government has no power to regulate that issue. Since the majority in the *Dobbs* decision states that the Constitution is silent on abortion, the federal government has no power to make *any* laws regulating the legality of abortions, whether pro-life or pro-abortion. This decision binds all branches of the federal government including Congress, the presidency, and the Supreme Court.

Before continuing, it is worth noting that some may doubt whether the Constitution is actually silent on the matter of abortion. They may argue that several of the amendments in the Bill of Rights cannot be protected without the right to life being protected. For example, they may look to the First Amendment, which gives the right to free speech and freedom of religion. Surely everyone can agree these rights cannot possibly be granted if the person is denied life and therefore denied the ability to speak or exercise religion. While this is a tempting argument to make, it may not be the most effective method to guarantee a right to life from the moment of conception. Firstly, this method could take another fifty years to implement. To make this type of change would require a case on abortion to get all the way back to the Supreme Court, a court that is sympathetic to this argument, and a court willing to partially overrule the *Dobbs* decision.⁵ However, the biggest setback with this approach is that even if the Supreme Court did implement a new rationale, stating that life is protected from the moment of conception, such a decision could still be overruled by the Court in the future; there is no guarantee that the decision is permanent. Instead of a change in the Court’s rationale, Americans should work towards a lasting change in the law: an amendment to the United States Constitution.

Constitutional amendments are notoriously hard to achieve and with good reason. Once something is in the Constitution, it is law and assumed it will not change. However, an amendment is ultimately the best way to make America abortion-free. Unlike passing a law that would allow or prohibit abortions, Congress does have the right to make an amendment according to Article V of the Constitution. An Amendment “may be proposed either by the Congress, through a joint resolution passed by a two-thirds vote, or by a convention called by Congress in response to applications from two-thirds of the state legislatures.”⁶ Therefore, the best way to make America abortion-free is to slowly turn each state pro-life until there is enough of a majority to achieve an amendment to the Constitution.⁷

There are movements on both sides of the abortion issue that have misunderstood *Dobbs*’s limitation on the federal government’s

powers. In Congress, members of both the Republican and Democrat parties have proposed new laws on abortion. For instance, some Republican politicians are contemplating an attempt to pass a national limitation on abortion if they gain a majority in the election this fall.⁸ Similarly, Democrat politicians have stated: “This fall, *Roe* is on the ballot.”⁹ Additionally, some progressive Democrats, including Congresswoman Alexandria Ocasio-Cortez and Senator Elizabeth Warren, have demanded abortion clinics be set up on federal land in states that ban or severely limit abortion.¹⁰ All of these politicians have misunderstood the *Dobbs* decision. Each of these politicians are assuming that the federal government still has the power to make laws regulating the legality of abortion. However, as previously stated, the *Dobbs* decision states that the federal government does not have such power, because that power is not found within the Constitution. Therefore, even if Congress does pass a law regulating the legality of abortion, upon challenge, the Supreme Court is very likely to strike down the law regardless of whether the law is restricting or expanding the legality of abortion.

President Biden and his administration have also set forth a plan to expand abortion access. However, to analyze President Biden’s plans, one must first understand abortion access on the state level.

As the states currently stand, there is a wide range of views and approaches to abortion. So far, no state has completely banned abortion. There are many articles written by abortion advocates that label states they deem to have completely banned abortion; this is misleading. The most pro-life states, including states like Oklahoma, have completely outlawed abortion *except* for when the mother’s life is at risk.¹¹ Additionally, some abortion advocates have claimed women are now being prosecuted in states for having an abortion. So far, only one state,¹² Louisiana, has discussed this possibility, and it was ultimately rejected.¹³ On the other side of the spectrum, the most pro-abortion states calling themselves, “abortion sanctuaries,” are currently seeking to expand abortion access. California is currently the most pro-abortion state, having recognized a “right” to abortion in their state constitution. This effectively makes it impossible to outlaw any kind of abortion, at any point in the pregnancy.¹⁴ All other states fall somewhere along this wide spectrum. However, laws on abortions are changing rapidly, and the margins could soon change.

Most of the confusion involving abortions being left up to the states arises when a woman in a state limiting abortion who wants an abortion seeks to get an abortion from another state. There are several different factors that play into interstate access to abortion, including the method of the abortion. For instance, if a woman goes into a clinic to attain an abortion, the relevant laws are different than those relevant if the woman seeks Mifeprex (the abortion pill) in the mail. If the woman travels out of state to attain the abortion, there is nothing her residential state can do to stop her, because she is protected under the right to interstate travel.¹⁵ Since states know interstate commerce is regulated by the federal government, no state has even attempted to make a law disallowing such travel. However, since the start of the Covid-19 pandemic, the FDA has no longer required an in-person visit in order for a woman to be prescribed abortifacients.¹⁶ This allows for a physician to prescribe abortifacients via telehealth to a woman who is out of state. This may raise concerns about women having additional access to abortion; however, in order for the physician to prescribe any kind of

medication via telehealth, the physician must follow the laws of the state where they reside *and* the state where their patient resides.¹⁷ This means that as long as the woman resides in a state that makes it illegal to obtain an abortion, telehealth is not an effective work-around because the physicians could be prosecuted to the full extent of the law for illegally prescribing drugs. However, there are some concerns with how states will try to enforce such laws if the abortifacient pills are accessed through the mail.¹⁸

With telemedicine a seemingly ineffective work-around for the law, the Biden Administration has taken other steps to try to ensure that as many women as possible have access to abortions. One of these steps is “to make sure doctors and pharmacists are trained on how to refer patients for abortions.”¹⁹ While such a practice clearly is not consistent with respecting human life, it may not have a significant impact on abortion rates, as it will still be up to the woman to travel out of state to secure the abortion regardless. Additionally, “the Office of Personnel Management . . . announced that federal workers can use sick leave to cover travel to seek abortion access.”²⁰ Again, this is not by any means supportive of the pro-life agenda, but may not cause significant harm as people have already started moving to states that share their opinions on abortion anyway.²¹ Perhaps a more troubling step the Biden Administration is taking is “to remind Medicaid providers that federal tax dollars may be used to pay for birth control and emergency contraception.”²² One of the main reasons this is so troubling from a legal perspective is that society has started to equate abortions with birth control and “emergency contraception.” This equivocation has already started to cause problems because the United States Supreme Court re-affirmed Americans’ right to contraceptives in stating, “we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”²³ The Court clarified their rationale does not apply to other decisions using privacy rights as a basis, including *Griswold v. Connecticut*²⁴ and *Eisenstadt v. Baird*,²⁵ which establish a constitutional right²⁶ to use contraceptives.²⁷ Abortion advocates have already started embracing this portion of the Court’s rationale, trying to place doubt that abortifacients such as the morning-after pill cannot terminate a pre-existing pregnancy.²⁸ They do this in hopes of keeping the abortion pill as a type of birth control.²⁹ Similarly, President Biden has issued an executive order in which he “directs the secretary of Health and Human Services to issue a report in the next 30 days outlining additional actions to protect medication abortion, expand access on emergency contraception and IUDs, and increase public education around reproductive rights.”³⁰ This is very dangerous, as all IUDs have potential abortifacients effects, despite also having contraceptive effects.³¹ Even though the Catholic Church recognizes that both abortion and contraception violate natural law, a distinction must be made, since while contraception separates the unitive and procreative nature of human sexuality, abortion destroys a human life. Contraception is “[t]he use of mechanical, chemical, or medical procedures to *prevent conception* from taking place as a result of sexual intercourse.” Abortion is the “[d]eliberate termination of pregnancy by killing the unborn child.”³² The distinction is necessary, not because it condones the use of contraceptives, but rather to clarify what an abortion entails. Additionally, society has blurred the line of when a contraceptive actually becomes an abortifacient. For instance, Guttmacher Institute states that “[a]

contraceptive method, by definition, prevents pregnancy by interfering with ovulation, fertilization or implantation. Abortion ends an established pregnancy, after implantation.³³ This is problematic because fertilization and conception, engendering a new human life, occur before implantation.³⁴ Thus, the definition itself is misleading; a pregnancy is not established after implantation, but at fertilization. This vague definition of contraception defines abortion as an act taking place only after implantation, the last of the three methods of action they list under contraception. This is not true. Terminating a pregnancy at any point is an abortion because from the moment of conception, a new life exists. This distinction must be made in order to prevent abortion being defined in the law as another method of contraception.

The last two steps that the Biden Administration have said they will take are “to make sure medical information remains private and patients are not discriminated against for seeking abortions . . . and . . . explor[e] ways to potentially use the Emergency Medical Treatment Act to expand abortions.”³⁵ The latter of these two steps is similar to the mistakes that members of Congress are making; it assumes that the presidency and federal branches have the power to make laws regarding the legality of abortion, which they do not. Instead, the people now have the power to decide.

It is worth noting that the *Dobbs* decision will not automatically render all federal promulgation useless. If the federal government takes action to ensure that the decision of abortion is left up to the states, this is supported by the *Dobbs* decision and will still be binding. For example, the Hyde Amendment states that federal tax dollars cannot be used to pay for abortions.³⁶ The Hyde Amendment is re-enforcing the fact that the issue of abortion is left up to the states by requiring any tax dollars used to help fund abortion to be from the state rather than the federal government. Notably, there have been attempts to overturn the Hyde Amendment, but all of these have been unsuccessful. For instance, the Health and Human Services Department is threatening to deny funding by the Centers for Medicare and Medicaid Services to any hospital which refuses to provide for or allow a physician to perform an abortion pursuant to the Emergency Medical Treatment and Labor Act,³⁷ even if in violation of state law. Regardless of this attempt, the Hyde Amendment currently is binding law, preventing the use of federal tax dollars for abortion.

With the overturning of *Roe v. Wade*, the decision of whether to outlaw abortion goes back to the states, and through the states, the people. It has always been important for Americans to vote for officials who respect the life of the unborn; it is now even more so, as each state is more susceptible to hearing the truth about the evil of abortion. This is especially true on a local level, because that is where the changes will be made. It is only through working at the local level that Americans will reach the end goal of a constitutional amendment guaranteeing the right to life from the moment of conception. Thus, Americans must prepare themselves for the work that lies ahead and must never become discouraged. This is a time of gentleness, peace, humility, perseverance, patience, hope, joy, and gratitude, knowing that truth will always have the final say (Prov. 19:21). Lastly, it is essential to remember that as Catholics, we are meant to be a light to the world. We must never be afraid to profess the truth, no matter what becomes of us. This is because the beauty of the truth and Christ and his Church are worth our blood, sweat, tears, and, if necessary, our life. Being Catholic does not mean we

are anti-American. On the contrary, Catholics should be the best Americans, because we are unapologetically pro-woman, pro-man, pro-family, pro-life, and pro-truth. So go, brothers and sisters, and “make disciples of all nations” (Matt. 28:19–20).

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Endnotes

1. *Dobbs v. Jackson Women's Health Organization*, 597 US ____ (2022), at 7.
2. *Dobbs v. Jackson*, (Kavanaugh concurring), at 61.
3. US Congress, *Articles of Confederation*, reprinted 1952.
4. US Constitution, amend. X.
5. Overruling a case is very difficult under the doctrine of *stare decisis*. The doctrine says that a court is to give significant deference to a prior decision the court made in order to promote stability in the courts. A case is only overruled if the court decides the decision was egregiously wrong. However, a partial overruling of a case, while difficult, is not as difficult to achieve as a complete overruling of a case.
6. John Killian et al., *Constitution of the United States of America: Analysis and Interpretation*, (Washington, DC: US Government Printing Office, 2002), 939–955.
7. Ben Shapiro, “Roe Is Gone and the Left Is Melting Down, Ep. 1523,” *Daily Wire*, June 27, 2022. Shapiro shares this view that an amendment to the Constitution is the best way to guarantee a pro-life America.
8. Emily Brooks, “House Republicans Weigh National Abortion Restrictions,” *The Hill*, June 7, 2022, <https://thehill.com/homenews/house/3548140-house-republicans-weigh-national-abortion-restrictions/>.
9. Jonathan Lemire and Eugene Daniels, “This Fall, Roe Is on The Ballot: President Biden Called on Congress to Restore Abortion Right Protections,” *Politico*, June 24, 2022, <https://www.politico.com/news/2022/06/24/biden-its-a-sad-day-for-the-court-and-for-the-country-00042291>; Kerry Pickett, “Pelosi vows that Roe is on the ballot in November,” *Washington Times*, June 24, 2022, <https://www.washingtontimes.com/news/2022/jun/24/pelosi-trumpian-supreme-court-abortion-ballot-nov/>; and Igor Bobic, “Elizabeth Warren Furious About Roe Decision: ‘Hang On To This Anger’ For Midterms,” *Huffpost*, updated June 24, 2022, <https://sports.yahoo.com/elizabeth-warren-furious-roe-decision-163006191.html>.
10. Jake Johnson, “AOC and Warren Advocate Opening Abortion Clinics on Federal Land in Red States,” *Truthout*, June 28, 2022, <https://truthout.org/articles/aoc-and-warren-advocate-opening-abortion-clinics-on-federal-land-in-red-states/>. In addition to violating the *Dobbs* decision, this movement in particular is prevented by the Hyde Amendment. The Hyde Amendment is explored further later in the article.
11. Dana Branham and Chris Casteel, “End of Roe Makes Abortion a Crime in Oklahoma as State’s Abortion ‘Trigger’ Law Takes Effect,” *Oklahoman*, June 24, 2022, <https://www.oklahoman.com/story/news/2022/06/24/roe-v-wade-scotus-means-oklahoma-abortion-trigger-law/7623055001/>.
12. Kevin McGill and the Associated Press, “Louisiana Debates Bill That Would Charge Women with Murder for Getting An Abortion,” *Fortune*, May 12, 2022, <https://fortune.com/2022/05/12/louisiana-abortion-bill-murder-charges-women/>.
13. Julie O’Donoghue, “Louisiana House Guts Abortion Bill That Could Have Sent Pregnant Patients to Prison,” *Louisiana Illuminator*, May 12, 2022, <https://lailluminator.com/2022/05/12/louisiana-house-guts-abortion-bill-that-would-send-pregnant-patients-to-prison/>.
14. “Where Does Your State Fall on the Life Index,” *Thomas More Society*, accessed June 29, 2022, <https://thomasmoresociety.org/where-your-state-stands-on-abortion/#info>.
15. Established in *Saenz v. Roe*, 526 U.S. 489 (1999).
16. “Questions and Answers on Mifeprex,” *US Food and Drug Administration*, December 16, 2021, <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifeprex>.



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The views expressed here are those of the individual authors and may advance positions that have not yet been doctrinally settled. Ethics & Medics makes every effort to publish articles that are consonant with the magisterial teachings of the Catholic Church.

17. "Cross-State Licensing," *CCHP*, accessed June 29, 2022, <https://www.cchpca.org/topic/cross-state-licensing-professional-requirements/>; See also Leah D'Aurora Richardson et al., "COVID-19: State Law Telehealth Update: State Licensure Requirements Persist, Permissible Telehealth Modalities Generally Expand, and Insurance Parity Laws Ensure Reimbursement," *National Law Review*, accessed June 29, 2022, <https://www.natlawreview.com/article/covid-19-state-law-telehealth-update-state-licensure-requirements-persist>. In particular, the state must give permission for telehealth services across state lines. If such telehealth services require state permission, it seems that states could easily prevent interstate telehealth abortion access by simply not giving permission to those telehealth providers.
18. Micaiah Bilger, "Joe Biden Unveils 5-Step Action Plan to Kill Babies to the 'Fullest Extent Possible,'" *LifeNews*, June 28, 2022, <https://www.lifenews.com/2022/06/28/joe-biden-unveils-5-step-abortion-action-plan-to-kill-babies-to-the-fullest-extent-possible/>.
19. Bilger, "Joe Biden Unveils Plan."
20. Sandhya Raman, "Biden Administration Announces Actions to Protect Abortion Rights," *Roll Call*, June 28, 2022, <https://rollcall.com/2022/06/28/28abortion/>.
21. Azmi Haroun and Lloyd Lee, "Repressive State Laws and The Overturning of Roe v. Wade Are Causing A Mass Migration of Abortion Clinics And Providers, Experts Say," *Insider*, June 24, 2022, <https://www.businessinsider.com/roe-v-wade-decision-causing-migration-of-abortion-clinics-patients-2022-6>.
22. Bilger, "Joe Biden Unveils Plan."
23. *Dobbs v. Jackson*, 37.
24. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
25. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) at 453–454. "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."
26. This does not mean that the constitutional right to contraceptives cannot be revisited by the Court in the future. It only means that in this case, with the Court's rationale, they are not currently overruling the constitutional right to contraceptives.
27. *Dobbs*, (Thomas concurrence), at 58. It is important to note that Justice Thomas disagrees with this rationale in his concurrence. He states, "in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*." However, since his opinion is not the majority opinion, his concurrence is not binding law, though it may be used as persuasive authority.
28. U.S. Food and Drug Administration, "FDA's Decision Regarding Plan B: Questions and Answers," December 7, 2015, <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/fdas-decision-regarding-plan-b-questions-and-answers>. According to the FDA, "Plan B [also known as the morning-after pill] acts primarily by stopping the release of an egg from the ovary (ovulation). It may prevent the union of sperm and egg (fertilization). If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation)." Thus, if fertilization has already occurred, the morning-after pill can terminate an existing pregnancy by preventing implantation which the fertilized egg needs to continue to live. If the morning after pill works to prevent implantation rather than fertilization, it is acting as an abortifacient by terminating an existing pregnancy. Therefore, the morning-after pill has the potential to be an abortifacient.
29. Ian Millhiser, "The End of Roe v. Wade, Explained," *Vox*, June 24, 2022, <https://www.vox.com/2022/6/24/23181720/supreme-court-dobbs-jackson-womens-health-samuel-alito-roe-wade-abortion-marriage-contraception>.
30. Juliana Kim, "A New Executive Order Aims to Preserve Abortion Access, but Its Reach Is Limited," *NPR*, July 8, 2022, <https://www.npr.org/2022/07/08/1110455155/abortion-rights-biden-executive-order>.
31. Couple to Couple League, "The IUD: Facts for an Informed Choice," *EWTVN*, accessed July 14, 2022, <https://www.ewtn.com/catholicism/library/iud-facts-for-an-informed-choice-11229>.
32. *Catechism of the Catholic Church*, 2nd ed (Washington, DC: United States Conference of Catholic Bishops/Libreria Editrice Vaticana, 2016 update), nn. 864, 872, emphasis added.
33. Joerg Dreweke, "Contraception Is Not Abortion: The Strategic Campaign of Antiabortion Groups to Persuade the Public Otherwise," *Guttmacher Institute*, December 9, 2014, <https://www.guttmacher.org/gpr/2014/12/contraception-not-abortion-strategic-campaign-antiabortion-groups-persuade-public>.
34. See footnote 28.
35. Bilger, "Joe Biden Unveils Plan."
36. Hyde Amendment Codification Act, S.142, 113th Cong. (2013).
37. American College of Emergency Physicians, "EMTALA Fact Sheet," Accessed July 17, 2022, <https://www.acep.org/life-as-a-physician/ethics-legal/emtala/emtala-fact-sheet/>. "The Emergency Medical Treatment and Labor Act (EMTALA) is a federal law that requires anyone coming to an emergency department to be stabilized and treated, regardless of their insurance status or ability to pay."

