Call Me, Beep Me, If You Want to Reach Me: Utilizing Telemedicine to Expand Abortion Access

In June 2022, the Supreme Court handed down its decision in Dobbs v. Jackson Women's Health Organization. *The decision confirmed what the public already knew. An anonymously leaked draft version of what ultimately became Justice Samuel Alito's majority opinion had braced the country for* Dobbs's *key holding. Overturning decades of precedent, the Court found that there is no right to abortion in the United States Constitution. Shortly thereafter, states began implementing restrictions and near-total bans on abortion. These laws had an immediate effect on the safety of pregnant people. In Tennessee, a state where abortion is now outlawed, one woman had to brave a six-hour ambulance drive, with rising blood pressure and signs of kidney failure, to North Carolina to abort a nonviable fetus. The abortion landscape post* Dobbs *is riddled with inequitable access to reproductive healthcare—healthcare which is vital to patients' health and survival. But even in states where abortion is legal, a gap remains: without meaningful access to abortion service providers, a right to abortion is in name only.*

Those seeking an abortion face two critical problems: validating their right to an abortion and finding meaningful access to effectuate that right. Addressing the former problem, several states have successfully passed state constitutional amendments protecting abortion since Dobbs. *A checkerboard, state-centric approach to abortion protection, however, only amplifies accessibility issues for those in abortion-restricted states or in remote areas without access to abortion providers. Addressing the latter problem, some administrative action has attempted to curb the abortion access issue. The Biden Administration has authorized the use of telemedicine to conduct abortion consultations and prescriptions for abortion pills. While this administrative action does work for patients of today, the impact is only temporary. Administrative solutions are conducted at the behest of political power. Any antiabortion president could direct the agency to reverse course. A permanent solution that addresses both problems is needed.*

This Note suggests that federal legislation codifying telemedicine abortion procedures into statutory law solves both the problem of legitimizing a right to abortion and finding meaningful access to the procedure. Telemedicine is one of the easiest ways to reach patients in parts of the country, like Guam,

with limited access to in-person abortion providers. By grounding the right to abortion in federal, statutory law, Congress sets a mandatory "floor" for abortion rights that states may not overly restrict. This solution, by nature of being a legislative, rather than a judicial, proposal, will ensure consistent access to abortion. Ultimately, federal codification is the most practical way to protect a vital aspect of reproductive healthcare in the United States.

INTRODUCTION

Since the 1970s, abortion has been a highly public—and highly politicized—issue in the United States. While the passage of the Comstock Act of 1873,[1] along with several federal regulations, catalyzed a focus on abortion policy, individual states and the Supreme Court have ultimately shouldered much of the burden in carving abortion

1. Comstock Act, ch. 258, § 2, 17 Stat. 598 (1873) (repealed 1994).

protections, restrictions, and policies.[2] Even though monumental court decisions like *Roe v. Wade*[3] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[4] previously cemented the right to previability abortion into case law, the lack of federal legislation meant abortion legislation was largely left to the states. In recent years, abortion protections have consistently been under fire as conservative-majority states attempt to chip away at these safeguards.[5] Most notably is the recent decision in *Dobbs v. Jackson Women's Health Organization*.[6] This decision overturned the constitutional right to an abortion provided by *Roe* and *Casey*,[7] giving states free reign to enact severe—in some cases, total—bans on abortion procedures.

Pro-choice advocates are increasingly concerned about these recent cases. The Supreme Court, which has historically been tasked with determining constitutional protections and limitations for abortion rights, now boasts a conservative majority.[8] That majority overturned the constitutional protection to previability abortions with their *Dobbs* ruling.[9] This result has had immediate, far-reaching consequences. According to the Guttmacher Institute, thirteen states had trigger laws in place—laws that were written before the decision in *Dobbs* that would go into effect immediately after the favorable case outcome—which either completely prohibited or significantly restricted access to abortion.[10] For example, Tennessee had a trigger law in place that bans abortions after six weeks, which meant that, post-*Dobbs*, all abortions

2. Several historic cases have carved the delicate path of abortion access in the United States. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 479–86 (1965); Eisenstadt v. Baird, 405 U.S. 438, 438–55 (1972); Roe v. Wade, 410 U.S. 113, 162–63 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2234 (2022); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 833–901 (1992), *overruled by Dobbs*, 142 S. Ct. at 2234.

3. 410 U.S. at 162–63.

4. 505 U.S. at 833–901.

5. For an overview of state policies that restrict or eliminate abortion procedures, see *An Overview of Abortion Laws*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/overview-abortion-laws (last visited Sept. 30, 2022) [https://perma.cc/N672-9SHB].

6. *Dobbs*, 142 S. Ct. at 2234.

7. *Id.* at 2242.

8. Adam Liptak, *A Supreme Court Term Marked by a Conservative Majority in Flux*, N.Y. TIMES, https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html (last updated Sept. 30, 2021) [https://perma.cc/4L4P-TUJV].

9. Mark Joseph Stern, *During Arguments over the Fate of* Roe*, Kavanaugh and Barrett Finally Showed Their Cards*, SLATE (Dec. 1, 2021, 1:37 PM), https://slate.com/news-and-politics/2021/12/dobbs-supreme-court-abortion-kavanaugh-barrett.html [https://perma.cc/LXH8-HPX3] ("[Kavanaugh] later suggested that the court should not hesitate to overrule *Roe* . . . .").

10. *Abortion Policy in the Absence of* Roe, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe# (last updated Aug. 1, 2022) [https://perma.cc/T8FX-FEMR].

in Tennessee would be prohibited.[11] These laws have had a devastating impact for those seeking an abortion throughout the country, especially those in poor, marginalized communities.[12]

There are several potential approaches to rectifying issues with accessing abortion in a post-*Dobbs* landscape. Existing federal regulations provide some access to abortion through telemedicine, though these regulations are subject to changing political whims. Similarly, allowing states to continue regulating abortion, a maintenance of the status quo, is another policy approach. But entrusting abortion access to states only deepens the divide that underscores accessibility problems.

In the wake of the *Dobbs* decision, this Note advocates for federal legislation that would guarantee access to medication abortion through telemedicine clinical care. Grounding the solution in federal statutory law would preclude states from restricting abortion access below the federal limitation. Furthermore, this solution would work to solve many of the existing abortion access issues. Those individuals in regions of the United States with limited access to abortion can confer with a doctor via online consultations, and that doctor can prescribe the medication which safely induces the abortion. Now that losing the right to abortion has become a reality for many, rather than simply an abstraction, momentum for federal legislation may be more realistic than in previous legislative cycles. The Democratic party, which categorically supports abortion access, controls the Senate and has the potential to regain control of the House in the next election cycle, which would represent a unified congressional front on the issue.[13] Similarly, President Joe Biden has signaled his willingness to sign a law granting a federal statutory right to abortion.[14] These factors, in conjunction with the fact that a majority of the United States public disapproves of the decision to overturn *Roe*, presents an opportunity for this kind of legislation to succeed.[15]

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11. *Tennessee's Heartbeat Law Now in Effect: Attorney General Slatery Responds to Sixth Circuit's Ruling*, TENN. OFF. OF ATT'Y GEN. (June 28, 2022, 2:20 PM), https://www.tn.gov/attorneygeneral/news/2022/6/28/pr22-21.html [https://perma.cc/UXN7-KF4U] [hereinafter *Tennessee's Heartbeat Law*].

12. GUTTMACHER INST., *supra* note 10.

13. *See Democrats Keep the Senate,* POLITCO, https://www.politico.com/news/2022/11/12/senate-control-midterm-elections-results-2022-00066547 (last updated Dec. 29, 2022, 11:21 a.m.) [https://perma.cc/6DPQ-VGR4].

14. *See generally* Michael D. Shear & Sheryl Gay Stolberg, *Under Pressure, Biden Issues Executive Order on Abortion*, N.Y. TIMES (July 8, 2022), https://www.nytimes.com/2022/07/08/us/politics/biden-abortion-executive-order.html [https://perma.cc/99VS-LEPY].

15. *Majority of Public Disapproves of Supreme Court's Decision to Overturn* Roe v. Wade, PEW RSCH. CTR. (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-

The first Section of this Note outlines the history of abortion access in the United States. This Section begins with the Comstock Act of 1873,[16] analyzing pinnacle abortion-protection cases of *Roe* and *Casey* and then shifting into modern era cases such as *June Medical*.[17] A walk through case law pinpoints the issues resulting from relying on the judiciary and on state action to legislate abortion policy in the United States. The first Section also includes a detailed discussion of the *Dobbs* case, which tore open the national abortion landscape.[18]

The second Section of this Note analyzes the potential solutions available to increase access to abortions post-*Dobbs*.[19] Finally, the third Section introduces a blended solution, combining the need for federal preemption and telemedicine.

I. BACKGROUND

A. Back to Basics: The Comstock Act and Framing Abortion Issues Under a Right to Privacy

Reproductive health in the United States was not broadly regulated until the nineteenth century, when Congress passed the Comstock Act of 1873 ("The Act").[20] The Act made it illegal to distribute materials that promoted contraception or abortion and prohibited dissemination of informational materials related to abortion.[21] Although the Act primarily impacted access to contraception, with abortion as a secondary feature, it was monumental in shaping the backdrop of reproductive rights in the United States.[22] Most notably, the Act is responsible for tying reproductive healthcare—namely contraception—to societal conduct considered lewd or salacious.[23] By

disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/ [https://perma.cc/447H-EK9Y] (discussing how every demographic breakdown shows that each demographic group polled, except white Evangelicals, disapproves of the decision).

16. Comstock Act, ch. 258, § 2, 17 Stat. 598 (1873) (repealed 1994).

17. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2103–33 (2020), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2273–75 (2022); *see also* Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016), *abrogated by Dobbs*, 142 S. Ct. at 2273–75.

18. *See Dobbs*, 142 S. Ct. 2228.

19. *See* Matthew Perrone, *FDA Says Patients Can Get Abortion Pill via Telemedicine*, PBS (Apr. 13, 2021, 12:33 PM), https://www.pbs.org/newshour/health/fda-says-patients-can-get-abortion-pill-via-telemedicine [https://perma.cc/GKB2-YR86] ("Patients seeking an abortion pill will not be required to visit a doctor's office or clinic during the COVID-19 pandemic . . . .").

20. § 2, 17 Stat. 598.

21. *Id.*

22. *See id.*

23. *Id.*

branding contraception as sexual in nature, rather than as related to healthcare, the Comstock Act successfully made the topics surrounding reproductive care culturally suspect.[24] The impact of the Act is still felt—even today, reproductive care is often tethered to morality and propriety, concepts that were not largely entwined until the Act.[25] By conflating contraception and reproductive care with conduct considered morally impermissible, the Act positioned access to reproductive care as a debate of social and religious probity, rather than as a right to bodily autonomy and medical privacy. This morality framework is still utilized in the modern era to uphold restrictions to contraception and abortion access.[26]

In 1957, the FDA approved the first oral contraceptive for sale to the general population.[27] At the time, the drug was marketed only for menstruation purposes.[28] In 1960, the drug was then marketed specifically for contraception.[29] At that point, the Act had been in place for nearly a century, restricting access to oral contraceptives and other reproductive healthcare. Coordinately, the Act and its consequences kickstarted a pro-choice strategy: advocating for reproductive care as an essential part of constitutional privacy rights.[30] This strategy was adopted when the Act was passed and expanded when contraception use increased.

Utilizing the Act as a backstop, several states—including Connecticut—passed statutes prohibiting the use of all contraceptives,

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24. *See id.*

25. The Comstock Act itself was named for Anthony Comstock, who personally believed that making contraceptives available would promote "lust and lewdness." His advocacy for so-called "anti-obscenity" laws like the Comstock Act are responsible for labeling birth control as obscene, thus tying it to morality. *See generally Anthony Comstock's "Chastity Laws*, PUBLIC BROADCAST SERVICE, (https://www.pbs.org/wgbh/americanexperience/features/pill-anthony-comstocks-chastity-laws/#:~:text=Comstock%20was%20certain%20that%20the,alone%20promoted%20lust%20and%20lewdness.&text=In%201872%20Comstock%20set%20off,known%20as%20the%20Comstock%20Act) (last visited Jan. 2, 2023) [https://perma.cc/SEG4-2NVB].

26. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 726–36 (2014) (holding that the ACA mandate requiring certain employers to provide contraception to employees via employer-provided health insurance violated Hobby Lobby's free exercise of religion).

27. *Birth Control Pill: A History*, PLANNED PARENTHOOD FED'N OF AM. 4 (2015), https://www.plannedparenthood.org/files/1514/3518/7100/Pill_History_FactSheet.pdf [https://perma.cc/D58G-GBND].

28. *See id.*

29. *Id.*

30. *See* § 2, 17 Stat. 598. The Comstock Law limited the reproductive rights of those seeking contraception, which violated the right to privacy, and more specifically, the right to private healthcare. This same argument was adopted in legal battles pertaining to abortion. *See* Sheraden Seward, *The Comstock Law (1873)*, THE EMBRYO PROJECT ENCYCLOPEDIA, https://embryo.asu.edu/pages/comstock-law-1873#:~:text=The%20Comstock%20Law%20was%20a,which%20is%20still%20being%20waged (last modified July 4, 2018, 4:40 AM) [https://perma.cc/PZ3L-JCY2].

including FDA-approved oral contraceptives.[31] The resulting litigation in response to these statutes kickstarted a series of landmark reproductive freedom cases. The first of these cases, *Griswold v. Connecticut*, overturned the Act.[32] Grounded in a constitutionally protected right to privacy free from governmental intrusion, *Griswold* held that married couples could legally access contraception and abortion procedures.[33] A later decision, *Eisenstadt v. Baird*, extended those rights to unmarried persons.[34] These early laws and cases paved the way for the larger legal battlefield that has marked the past fifty years in abortion care. Although *Griswold* and *Eisenstadt* overturned the Act and introduced a constitutionally protected right to privacy for reproductive care,[35] these cases by no means settled the debate amongst the public—or among state legislatures—about how to legislate and restrict access to abortion.

B. Defining the Relationship: Viability and Permissible Restrictions on Abortion Rights

Perhaps the most famous cases throughout the history of abortion advocacy are *Roe v. Wade*[36] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[37] Both cases served as seminal caselaw for solidifying a constitutional right to abortion until June 2022.[38]

Roe v. Wade established the viability standard that was, until recently, the benchmark for modern abortion cases.[39] At issue in *Roe* were a series of Texas state laws which banned and criminalized abortion in all cases, except when medically necessary "to save the life of the mother."[40] An anonymous plaintiff, known as Jane Roe, sued the Dallas County District Attorney for attempting to enforce the laws,

31. *See Connecticut and the Comstock Law*, CONNECTICUTHISTORY.ORG (Mar. 28, 2021), https://connecticuthistory.org/connecticut-and-the-comstock-law/ [https://perma.cc/TW4U-GQWC] ("While Connecticut was just one of 24 states that ultimately passed obscenity and contraception statutes mirroring the Comstock Law, its legislation proved to be the most restrictive."); *see also* Griswold v. Connecticut, 381 U.S. 479, 480–82 (1965).

32. *Id.* at 485–86; Seward, *supra* note 30.

33. *Griswold*, 381 U.S. at 485–86.

34. 405 U.S. 438, 453–55 (1972).

35. *Id.*; *Griswold*, 381 U.S. at 485–86.

36. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

37. 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

38. *See Dobbs*, 142 S. Ct. 2228, 2240–42.

39. 410 U.S. at 164–65.

40. *Id.* at 117–18.

claiming the statutes were unconstitutional and violated her protected right to privacy when accessing medical care.[41] In delivering the opinion on behalf of a divided Court, Justice Blackmun explained that, prior to the first trimester, states could not infringe on the right to abortion.[42] More specifically, the decision explicitly banned government intrusion on the right to abortion before viability, meaning before the point at which the fetus could survive outside the womb on its own.[43] At the time *Roe* was decided, the Court accepted the medical opinion that viability began after the first trimester of pregnancy.[44] After the point of viability, the Court reasoned, the State had a sufficient compelling interest in protecting the fetus and could regulate and restrict abortion except where necessary to preserve the health and life of the mother.[45]

While the viability framework set up from *Roe* was overturned by *Casey*,[46] the constitutional protections afforded to previability abortions remained good law.[47] This protection for previability procedures has been challenged by various abortion cut-off laws and heartbeat bills (which restrict abortion before 16-24 weeks—the range typically considered for viability) and was the primary issue in the *Dobbs* case.[48]

Planned Parenthood of Southeastern Pennsylvania v. Casey cemented the right to abortion for those living in the United States.[49] As the first major abortion case heard before the Supreme Court post-*Roe*, *Casey* marked a complicated and imperfect victory for abortion activists due to its abortion restriction carveouts. *Casey* involved a series of statutes enacted in Pennsylvania that were designed to restrict abortion access.[50] The statute mandated (i) a twenty-four hour waiting period for those wishing to access an abortion in Pennsylvania, (ii) that

41. *Id.* at 113, 120.

42. *Id.* at 162–64.

43. *Id.*

44. *Id.*

45. *Id.* at 163–64.

46. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 837 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

47. *Roe*, 410 U.S. at 162–63. *Casey* upheld these viability protections. 505 U.S. at 837.

48. *Dobbs*, 142 S. Ct. at 2243 (addressing the constitutionality of Mississippi's Gestational Age Act, which prevents abortions after fifteen weeks of pregnancy, unless there is a medical emergency or "severe fetal abnormality"); *see, e.g.*, *Tennessee's Heartbeat Law*, *supra* note 11; *see generally* Maya Manian, Dobbs *and the Undue Burdens of Pre-viability Abortion Bans*, SCOTUSBLOG (Nov. 30, 2021), https://www.scotusblog.com/2021/11/dobbs-and-the-undue-burdens-of-pre-viability-abortion-bans/ [https://perma.cc/M9QT-SN22] ("Since the 1973 decision in *Roe v. Wade*, the court has repeatedly reaffirmed that states cannot ban abortion before fetal viability, which is typically around 24 weeks of pregnancy.").

49. *See* 505 U.S. at 833–34 (reaffirming "a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State").

50. *Id.* at 833.

antiabortion materials be distributed to potential abortion patients and that the patient sign informed consent forms, (iii) that married women needed signed spousal consent forms indicating their husbands agreed to the abortion, and (iv) that minors needed parental consent for abortion procedures.[51]

The Supreme Court, in an opinion delivered by Justice O'Connor, upheld all the restrictions except spousal consent.[52] In striking down the spousal consent requirement, Justice O'Connor noted that upholding that provision would place an "undue burden" on a significant amount of people who need access to abortion care.[53] This undue burden standard, which operated in conjunction with *Roe*'s viability framework, remained the cornerstone test for courts determining whether an abortion law was unconstitutionally restrictive for many decades.[54] For example, post-*Casey*, states could legally restrict abortion access if there was a compelling government interest or good purpose for the law.[55] But, states could not restrict abortions in a manner which constituted an "undue burden" on those seeking abortions.[56]

In determining what qualifies as an undue burden, the Court established that restrictions creating substantial obstacles—obstacles that go further than simply making abortion access expensive or slightly difficult—were impermissible.[57] Invoking the undue burden test in *Casey*, Justice O'Connor reasoned that many women in abusive or hostile relationships may need access to abortion care without spousal consent.[58] To require this consent would place a massive number of women at risk of losing their right to abortion care.[59] In applying the undue burden test to the statute at issue, the Court reasoned that the spousal consent requirement served no good purpose and would create a substantial obstacle for a large portion of women seeking abortions.[60]

While *Roe*'s precedent definitively established the basis for *Casey*'s holding, *Roe* also served to constrain *Casey*'s impact. In

51. *Id.* at 844.
52. *Id.* at 898.
53. *Id.* at 889–95.
54. *See id.* at 876–78; Roe v. Wade, 410 U.S. 113, 162–63 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
55. *See Casey*, 505 U.S. at 871–73.
56. *Id.* at 874.
57. *Id.* at 874–75.
58. *Id.* at 889–95.
59. *Id.*
60. *Id.*

establishing the undue burden test, the Court made it clear that undue burdens were only impermissible previability.[61] While *Casey* did effectively replace *Roe*'s trimester framework, the viability framework still represents a significant constraint on the right to abortion care. Primarily, after viability, states can freely place restrictions on abortion access and procedures. Given that the viability standard is somewhat flexible and is currently up for debate,[62] this time constraint serves as a serious access limitation for those seeking abortion care.

C. From Comstock to Current: Abortion Challenges in the Modern Era, and a Constitutional Threat to Roe *and* Casey

In the wake of *Casey*, several states continued to enact restrictions on abortion.[63] Examples range from procedural restrictions[64], minor consent requirements[65], and timeline constraints.[66] As of August 2022, thirty-two states require individuals seeking abortions to receive counseling prior to undergoing the procedure.[67] In U.S. territories, access is restricted even further. For example, the Guamanian legislature in 2012 passed the Women's Reproductive Health Information Act.[68] This Act enforces, among a number of other requirements, a mandatory waiting period for those seeking abortions, and an in-person consultation with a physician, at a separate appointment, for all potential patients prior to their procedure.[69] Since *Casey*'s ruling upheld a similar waiting period, these

61. *Id.* at 837.

62. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2238 (2022).

63. For a comprehensive view of which states restrict accessibility to abortion, see *Is Abortion Still Accessible in My State Now That Roe v. Wade Was Overturned?*, PLANNED PARENTHOOD ACTION FUND, https://www.plannedparenthoodaction.org/abortion-access-tool/US (last visited Oct. 1, 2022) [https://perma.cc/UB8H-KW4J].

64. Montana, for example, passed a law eliminating a physician assistant's right to perform an abortion. *See* Armstrong v. Mazurek, 520 U.S. 968 (1997).

65. Post-Casey, several states, including Kansas, Mississippi, and North Dakota, implemented minor consent requirements. *See* "Abortion and Parental Involvement Laws", ADVOCATES FOR YOUTH, https://www.advocatesforyouth.org/resources/fact-sheets/abortion-and-parental-involvement-laws/#:~:text=Twenty%2Done%20states%20require%20parental,require%20both%20parents%20to%20consent (last visited Jan. 2, 2023) [https://perma.cc/L8H7-XB7D].

66. Timeline restrictions were notably the subject matter in *Dobbs*, where Mississippi banned abortions after 15 weeks. *See* Dobbs, *supra* note 6.

67. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion (last updated Aug. 1, 2022) [https://perma.cc/NY45-G8PJ].

68. 10 GUAM CODE ANN. § 3218.1 (2012).

69. *Id.*

restrictions are not considered unduly burdensome.[70] In effect, states capitalized on the opaque boundaries of *Casey*'s undue burden framework to enact restrictive abortion policies. And, due to congressional inaction on abortion policy, states have largely received an unfettered ability to place limitations on state-level abortion policies.

Of course, not all state policies receive the unbridled support of the judiciary. Several landmark cases pertaining to abortion restrictions have made their way to the Supreme Court. One such notable case is *Gonzales v. Carhart*.[71] *Carhart* represented a unique threat to abortion rights because, rather than restricting access to abortion, it restricted the use of a specific abortion procedure.[72] This challenge stemmed from a congressional act, the Partial-Birth Abortion Ban Act of 2003, banning intact dilation and evacuation ("D&E") of nonviable fetuses.[73]

D&E procedures are the most common—and safest—option for second-trimester abortions.[74] The procedure involves dilating the cervix and evacuating the fetus.[75] A variation of this procedure, referred to as "intact" D&E, involves evacuating the fetus in lesser time, thus posing less risk to the patient.[76] *Carhart* is a critical case because it deals with second-trimester abortions of nonviable fetuses, rather than first-trimester abortion procedures[77]—leading many antiabortion advocates to vigorously pursue the argument that the procedure poses a grave threat to the "unborn" life of the fetus because development is further along.[78] This resistance was the driver behind both the Partial-Birth ban statute barring the procedure and Justice Kennedy's majority opinion, which upheld the ban.[79]

The Supreme Court first decided that the government had a legitimate interest in protecting the unborn life of a fetus, and thus a

70. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 838–39 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

71. 550 U.S. 124 (2007).

72. *Id.* at 124.

73. *Id.*

74. Megan K. Donovan, *D&E Abortion Bans: The Implications of Banning the Most Common Second-Trimester Procedure*, GUTTMACHER INST. (Feb. 21, 2017), https://www.guttmacher.org/gpr/2017/02/de-abortion-bans-implications-banning-most-common-second-trimester-procedure [https://perma.cc/87RF-4X98].

75. *Id.*

76. *Carhart*, 550 U.S. at 176–79 (Ginsburg, J., dissenting).

77. *Id.* at 124–68 (majority opinion).

78. *See* Donovan, *supra* note 74.

79. *See Carhart*, 550 U.S. at 136–38, 140 (discussing how bans on "partial birth abortions" increased after the procedure received public attention).

resulting parallel interest in banning intact D&E procedures.[80] In voicing his support for this government interest, Justice Kennedy cited testimony that remarked on how medical assistants were upset while watching the procedures.[81] Additionally, much of Justice Kennedy's reasoning centered on the controversial concept of abortion regret: that the government had an interest in limiting this procedure because women would regret having second-trimester abortions.[82] Additionally, Justice Kennedy posited that Congress may legislate in areas of "medical uncertainty."[83] These statements are significant because they mirrored antiabortion talking points: that pregnant people would always regret this medically uninformed decision, meaning the government should step in and make the decision on their behalf. This romantic paternalistic view of the government's role in regulating individual healthcare decisions remains a key issue within the larger abortion debate.

Furthermore, the Court reasoned that banning intact D&E procedures was not an obstacle substantial enough to constitute an undue burden under *Casey* because alternative abortion procedures still existed, including standardized D&E procedure.[84] The statute only banned intact D&E, and since no further restrictions on other D&E procedures existed, neither did an undue burden.[85] *Carhart* was a marked win for antiabortion advocates, because it significantly limited second-trimester abortions that originally fell under *Roe* and *Casey*'s purview protecting the right to abort non-viable fetuses. Also notable is the fact that Justice Kennedy's opinion represented the first abortion restriction that the Court upheld without including any exceptions for women's safety.[86] *Carhart* signaled the Supreme Court's willingness to allow restrictions to abortion procedures that risk the lives of patients—a signal that states have subsequently followed.

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80. *Id.* at 125–26.

81. *Id.* at 138–39.

82. *Id.* at 159–60.

83. *Id.* at 129. There is significant debate about whether the efficacy and safety of D&E procedures are issues of medical uncertainty. In hearing the initial case, the district court relied on medical testimony to reach the conclusion that intact D&E was a medically safe procedure, and did not hold this was an area of medical uncertainty needing congressional intervention. Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 436, 480–83 (S.D.N.Y. 2004), *rev'd sub nom. Carhart*, 550 U.S. 124.

84. *Carhart*, 550 U.S. at 129.

85. *Id. But see id.* at 170–78 (Ginsburg, J., dissenting) (explaining how this total ban on a procedure, without an exception for women's health, is dangerous because intact D&E can be the safest abortion procedure for women at this stage of pregnancy).

86. *Carhart*, 550 U.S. at 168 (majority opinion).

Since *Carhart*, there have been a series of challenges brought regarding more severe restrictions to abortion access and procedures.[87] These statutes have largely been struck down, representing a series of wins for abortion advocates.[88] In 2016, the Supreme Court struck down a Texas law requiring physicians who wished to perform abortions to have "admitting privileges" at a local hospital.[89] To obtain privileges, doctors typically need to admit a certain quota of patients to a local hospital. Doctors who regularly perform abortions do so safely and without complication, meaning that they are often unable to admit enough patients to local hospitals to satisfy necessary quotas in qualifying for admitting privileges.[90] Since these doctors could not meet this requirement, their respective abortion clinics were forced to close.[91] The Texas law subsequently led to the permanent closure of over half the abortion clinics in the state.[92]

That restriction, the Supreme Court held, was far too great under the requirements laid out in *Casey*.[93] A requirement that unilaterally closed an extensive number of clinics in a state did create a substantial obstacle to abortion access, and therefore constituted an undue burden under *Casey*. The opinion in *Whole Woman's Health v. Hellerstedt*, 679 U.S. 582 (2016) also clarified *Casey's* breadth.[94] According to the Court, *Casey's* test not *only* required an isolated showing of an undue burden.[95] Instead, it also "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[96] This balancing test, according to the majority, formulates the basis for determining what constitutes a burden that is "undue."[97]

87. *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S.Ct. 2103 (2020), abrogated by Dobbs v. Jackson's Women's Health Org., 142 S. Ct. 2228 (2022) (challenging the enforcement of a Louisiana law which required doctors to have admitting privileges at local hospitals to perform abortions).

88. *Id.*

89. Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 590–91 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

90. *Id.* at 612–13.

91. *Id.* at 613.

92. *Id.*

93. *Id.* at 614.

94. *Id.* at 607.

95. *Id.*

96. *Id.*

97. *Id.*

D. Dobbs *and the End to Abortion Protections*

The outcome in *Dobbs v. Jackson Women's Health Organization* has greatly impacted the abortion landscape in the United States.[98] At issue in *Dobbs* was an abortion "cutoff" law.[99] Jackson Women's Health Organization provided abortions up to sixteen weeks, which, under *Roe* and *Casey*, was considered a safe previability period for abortions.[100] The Mississippi legislature passed a law banning abortion procedures at the fifteen-week mark, which meant Jackson Women's Health Organization could no longer provide abortions under its current policy.[101] A closely divided panel in the Fifth Circuit Court of Appeals held for Jackson Women's Health, claiming their ruling was constrained by the viability standard set forth in *Roe* and *Casey*.[102] The Supreme Court granted certiorari to hear the case.[103] A unique element of the *Dobbs* case was that the arguments made by the state sought to invalidate any constitutional right to abortion.[104] Mississippi directly questioned the constitutionality of *Roe*, asking the Court to overturn the decision on the grounds that the Constitution, read in its original intent, does not include the right to abortion.[105] By grounding its argument in increased access to abortion alternatives like contraception and childcare, the State of Mississippi argued that abortion is not necessary, and since it is not protected by the Constitution, abortion is open to state restrictions.[106]

On June 24, 2022, the Supreme Court handed down its decision: there is no constitutional right to abortion in the United States.

98. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2234 (2022) (overruling *Roe* and *Casey*, and thus giving states the authority to regulate abortion).

99. *Id.* at 2243.

100. *Id.* at 2234*; see also Dobbs v. Jackson Women's Health Organization*, AM. BAR ASS'N (May 6, 2022), https://www.americanbar.org/groups/public_education/publications/preview_home/dobbs-v-jackson-women-s-health-organization/ [https://perma.cc/EMU9-JBGZ] ("JWHO is the only abortion provider in Mississippi; it performs abortions up to the 16th week of a woman's pregnancy.").

101. *Id.*

102. Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 265–77 (5th Cir. 2019), *rev'd*, 142 S. Ct. 2228 (2022).

103. Amy Howe, *Court to Weigh in on Mississippi Abortion Ban Intended to Challenge* Roe v. Wade, SCOTUSBLOG (May 17, 2021, 11:55 AM), https://www.scotusblog.com/2021/05/court-to-weigh-in-on-mississippi-abortion-ban-intended-to-challenge-roe-v-wade/ [https://perma.cc/QV9P-Q6UY].

104. *Dobbs*, 142 S. Ct. at 2234.

105. Brief for Petitioners at 15–16, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

106. *Id.* at 29–31.

Following *Dobbs*, *Roe* and *Casey* are no longer good law.[107] The Court, in refusing to abide by their own principle of *stare decisis*, criticized the twin abortion cases for never directly answering the question of whether the Constitution conferred a right to abortion, and stated that "*Casey's* controlling opinion skipped over that question and reaffirmed *Roe* solely on the basis of stare decisis."[108] In determining whether abortion was grounded in the Constitution, the Court turned to the Fourteenth Amendment's Due Process Clause—a clause often used to justify the constitutional protection for abortion.[109]

The Due Process Clause typically protects two types of substantive rights, the first being those specifically enumerated in the Constitution's first eight Amendments, and the second being those rights not mentioned but which are deemed "fundamental."[110] Whether a right is fundamental is decided by whether it is "deeply rooted" in the nation's "history and tradition," and whether it is essential to the nation's "scheme of ordered liberty."[111] It has also been argued that there is a procedural due process protection for liberty, a protection the Court in *Dobbs* deemed controversial and unhelpful.[112] The Court ultimately held that abortion was not "deeply rooted" in our nation's history and, therefore, it did not constitute a fundamental right.[113] And, since it was not enumerated in the first eight amendments, the right to abortion could not be protected under the Fourteenth Amendment's Due Process Clause.[114] Because the Court did not find a constitutional right to abortion, states may restrict or ban abortion freely.

Pro-choice advocates were gearing up for the *Dobbs* outcome. On May 2, 2022, a month and a half before the final decision was released, a draft *Dobbs* opinion authored by Justice Alito was leaked to the public.[115] The draft, which turned out to be an accurate reflection of the

107. *Dobbs*, 142 S. Ct. at 2234–35.

108. *Id.* at 2234. The Supreme Court typically does follow stare decisis, as it is commonly believed that decisions of previous courts have binding authority over current courts. For an example of stare decisis in action, one might consider Chief Justice Robert's concurrence in *June Medical Services, L.L.C. v. Russo*, where he voted to strike down—based on respecting court precedent—abortion restrictions in Texas. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133–43 (2020) (Roberts, J., concurring), *abrogated by Dobbs*, 142 S. Ct. 2228.

109. *Dobbs*, 142 S. Ct. at 2234–35.

110. *Id.* at 2235.

111. Timbs v. Indiana, 139 S. Ct. 682, 689 (2019).

112. *Dobbs*, 142 S. Ct. at 2235.

113. *Id.* at 2260.

114. *Id.* at 2260–61.

115. Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO, https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 (last updated May 3, 2022, 2:14 PM) [https://perma.cc/9L6H-

final opinion, boasted much of the same rationale regarding substantive due process and the lack of a constitutional right to abortion.[116] While this gave abortion advocates time and warning to prepare for the outcome, the draft caused confusion about individuals' rights.[117] In the post-*Dobbs* landscape, that confusion has increased. Trigger laws have been the source of a great deal of uncertainty.[118] Despite the *Dobbs* decision's June release, many trigger laws did not go into effect until July.[119] This meant abortion was still legal in many of these states, but with the publicization of the bans on abortion, it may have discouraged patients from obtaining them. Still more confounding was the number of lawsuits immediately filed challenging those trigger laws, which further stalled their implementation.[120] This complexity was further compounded by some abortion providers' decisions to cease abortion procedures before the trigger laws went into effect.[121] Of course, those suffering the consequences of this confusion are pregnant people in states with trigger laws who do not know the status of their right to abortion and are thus discouraged from attempting to obtain one, despite the fact that it may actually be legal where they live.

E. Zooming into Action: An Overview of Telemedicine in the United States

An overview of telemedicine history is necessary to examine the possible utilization of the technology in expanding abortion access, as proposed by this Note's solution. This Section discusses the origins of telemedicine, its prevalence in modern medicine, and relevant

8T3V]; *Leaked Draft of US Supreme Court Opinion Would Overturn* Roe v. Wade *Outright*, GUTTMACHER INST. (May 3, 2022), https://www.guttmacher.org/news-release/2022/leaked-draft-us-supreme-court-opinion-would-overturn-roe-v-wade-outright [https://perma.cc/497N-2ZKF].

116. *See* Gerstein & Ward, *supra* note 115.

117. *See generally* Karen Brooks Harper, *Abortion Remains Legal in Texas, but Confusion Reigns After Supreme Court Document Leak*, TEX. TRIB. (May 3, 2022, 7:00 PM), https://www.texastribune.org/2022/05/03/texas-abortion-providers-legal/ [https://perma.cc/4WY7-MPM3] (citing abortion clinic staff member concern that people would believe the draft opinion meant abortion was now illegal).

118. *Id.*

119. For example, Tennessee's trigger law was set to go into effect in July. *See Tennessee's Heartbeat Law*, *supra* note 11.

120. *See* Chris Kenning, *Legal Battles over Abortion 'Trigger Laws' Continue Across US: What to Know, State by State*, https://www.usatoday.com/story/news/nation/2022/06/29/abortion-trigger-laws-challenged-court/7767228001/ (last updated July 26, 2022, 6:09 PM) [https://perma.cc/4ULZ-J3JB].

121. *See* Laura Testino, *Planned Parenthood in Tennessee Halts Abortions, CHOICES Memphis Continues Under State Ban*, COM. APPEAL, https://www.commercialappeal.com/story/news/health/2022/06/28/planned-parenthood-tennessee-halts-abortions-choices-memphis-continues-under-state-ban/7756780001/ (last updated June 28, 2022, 3:46 PM) [https://perma.cc/V36M-XFCS].

regulations and laws. The next Part will look at how telemedicine has been adapted for remote abortion prescriptions and consultations.

Telemedicine uses technology to deliver clinical medical care at a distance. A physician uses telecommunications technology to consult with and deliver care to patients remotely.[122] Telemedicine is a more specific, clinical term than telehealth, which refers more broadly to "electronic and telecommunications technologies and services used to provide care and services" remotely.[123] Unlike telemedicine, which only pertains to clinical care services, telehealth may also refer to and include nonclinical services like public health. Telemedicine was first used in the 1960s as a method of delivering remote healthcare for NASA projects.[124] It quickly rose as a favored method for administering healthcare to people in distant areas of the country, like Alaska.[125] Even today, telemedicine is a "connective tissue" used to expand healthcare networks and operations.[126]

Even though telemedicine is a preferred method for administering clinical care to applicable patients, its authorization and regulatory process have not been simple. For decades, there has been a significant debate over whether telemedicine—and telehealth more broadly—is appropriate to assess and meet the needs of patients.[127] Namely, there is a lingering ethical concern about whether telemedicine allows physicians to effectively provide quality patient care.[128] There have also been several practical barriers to widespread implementation of telemedicine, including licensure questions and broadband gaps.[129]

There are federal and state limitations on not only who can practice medicine, but also where physicians can practice medicine. Policies often vary on a state-by-state basis. Limits on licenses mean that patients are bound to physicians who are authorized to practice in

122. *What's the Difference Between Telemedicine and Telehealth?*, AM. ACAD. OF FAM. PHYSICIANS, https://www.aafp.org/news/media-center/kits/telemedicine-and-telehealth.html (last visited Oct. 1, 2022) [https://perma.cc/X4MD-T5MF].

123. *Id.*

124. Cynthia LeRouge & Monica J. Garfield, *Crossing the Telemedicine Chasm: Have the U.S. Barriers to Widespread Adoption of Telemedicine Been Significantly Reduced?*, 10 INT'L J. OF ENV'T RSCH. & PUB. HEALTH 6472, 6480 (2013).

125. *Id.*

126. *Id.* at 6472.

127. *See* Nicol Turner Lee, Jack Karsten & Jordan Roberts, *Removing Regulatory Barriers to Telehealth Before and After COVID-19*, BROOKINGS INST. (May 6, 2020), https://www.brookings.edu/research/removing-regulatory-barriers-to-telehealth-before-and-after-covid-19/ [https://perma.cc/G6SE-DQBU] (highlighting concerns that telehealth gives physicians limited opportunity to provide quality clinical care via online consultations).

128. *See id.*

129. *Id.*

their geographic region, and doctors are bound to patients within their region of practice.[130] This, at first glance, seems only to perpetuate the problems of access in rural areas; however, states are increasingly drafting policies more amenable to telemedicine.[131] For example, states which join the Interstate Medical Licensure Compact increase the geographical areas where their physicians can practice.[132] Another barrier to telemedicine access is broadband, or the use of internet connection to transmit data.[133] There are large swaths of populations in the United States who are without access to broadband.[134] Essentially all forms of telemedicine and telehealth require a stable internet connection.[135] So, successful implementation of telemedicine is stalled without widespread expansion of broadband connection. As a result of the pandemic, there has been a general push to increase broadband access to remote parts of the country, which would then allow for more effective, nationwide telemedicine practice.[136]

Much of this debate about broadband inaccessibility and telemedicine changed, however, during the outbreak of COVID-19. The Trump Administration and the U.S. Department of Health and Human Services "sweepingly approved" telemedicine services during the pandemic, creating an extensive expansion of the option that allowed patients to meet with their doctors remotely.[137] The Executive Branch has primarily regulated telemedicine rules, although states also play an important role in crafting telehealth policy.[138] As the pandemic lingers and as the healthcare landscape continues to evolve, there is opportunity for more state and federal regulation of telemedicine. Increased attention to telemedicine could help improve access to various healthcare procedures, including abortion.

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130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *See generally* Linda Poon, *There Are Far More Americans Without Broadband Access than Previously Thought*, BLOOMBERG (Feb. 19, 2020, 8:09 PM), https://www.bloomberg.com/news/articles/2020-02-19/where-the-u-s-underestimates-the-digital-divide [https://perma.cc/46KS-TJDJ] ("The United States grapples with a deep digital divide in which those who need broadband access the most—the poor in rural areas—are the least likely to be connected.").

135. *See* Lee et al., *supra* note 127.

136. *See* Dean DeChiaro, *One Year in, Broadband Access and Telehealth Are Two Big Winners Under COVID-19*, ROLL CALL (Mar. 9, 2021), https://rollcall.com/2021/03/09/one-year-in-broadband-access-and-telehealth-are-two-big-winners-under-covid-19/ [https://perma.cc/7DU5-B6H9] ("[O]nce the pandemic hit . . . [s]uddenly, expanding broadband and telehealth became key priorities.").

137. *See* Lee et al., *supra* note 127.

138. *Id.*

II. ANALYSIS

A. Issues of Meaningful Access to Abortion

The *Dobbs* decision undoubtedly created additional barriers to obtaining abortions—allowing many states to enforce complete bans on abortions beginning at fertilization. Even in states where abortion remains legal, another issue arises: meaningful *access* to abortions.

There is a major discrepancy between the right to abortion (which, post-*Dobbs*, is a state level issue[139]) and having meaningful access to that right. Most scholars agree that guaranteeing a right does not guarantee access.[140] So, even in states where abortion is grounded in some constitutional guarantee, there remains the issue of how to turn that right into a tangible solution that provides access to those most in need of abortion care.[141] This question of access becomes increasingly imperative when considering the state checkerboarded landscape. For example, if California guarantees a state constitutional right to abortion to *anyone* who wishes to seek one in California, presumably a pregnant person in Tennessee is guaranteed a right to abortion under the California constitution once they land in California. Nonetheless, the sacrifices involved in accessing that right—travel expenses, consequences of missing work, and a potentially hostile state upon their return[142]—create stark inequities between people who can afford to access this right and people who cannot. People throughout the country suffer from a lack of meaningful access to abortion.[143] A survey found that "barriers related to distance, gestation limits, costs and

139. In a post-*Dobbs* landscape, whether someone has a right to an abortion now depends on which state that individual lives in. Californians, for example, still have a constitutional right to abortion under the California state constitution. *See California*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/state/california/ (last visited Oct. 1, 2022) [https://perma.cc/8628-B4L2] ("Abortion will remain legal in California. The state's highest court recognized abortion rights under the California Constitution in 1969, four years before *Roe*.").

140. *See* Jessica Clarke, Professor of L., Vanderbilt Univ. L. Sch., Lecture for Gender and the Law (Fall 2021).

141. *See* Stanley K. Henshaw, *Factors Hindering Access to Abortion Services*, 27 FAM. PLAN. PERSPS. 54, 54 (1995) ("Access to [abortion] service is still problematic for many women because of barriers related to distance, gestation limits, costs and harassment.").

142. Some hostile states, like Texas, are attempting to make it a crime for state residents to access abortions in a different state. The federal government is taking measures to prevent these actions by protecting an individual's right to travel across state lines for abortion procedures, but the threat does remain. *See* Eric Neugeboren, *U.S. House Approves Rep. Lizzie Fletcher's Bill to Protect the Right to Seek an Abortion out of State*, TEX. TRIB., https://www.texastribune.org/2022/07/15/lizzie-fletcher-out-of-state-abortions-texas/ (last updated July 15, 2022, 1:00 PM) [https://perma.cc/D447-3SDT] ("Fletcher's bill comes as some state Republicans in Texas are trying to make it harder for Texans to travel outside the state to receive an abortion.").

143. Henshaw, *supra* note 141, at 54.

harassment" all contribute to preventing adequate access to abortion services for women in the United States.[144] While these issues exist throughout the country, the problem is exacerbated in rural areas with a higher density of marginalized communities.[145]

One country facing this issue is Guam, a U.S. territory that will be utilized as a case study below to explain how U.S. citizens have inequitable and unequal access to abortion. Guam is historically conservative, given the strong military presence on the island and the fact that the island's residents are predominantly Catholic.[146] As a result, the territory conforms to more traditional values including abortion restriction.[147] This makes obtaining abortions especially difficult for the island's residents. Guam's antiabortion sentiment is so strong that, in the 1990s, the island attempted to ban all abortions unless carrying the pregnancy to term would "gravely impair" or endanger the mother's life.[148] Additionally, in 2012, the Guamanian legislature passed the Women's Reproductive Health Information Act, which, among other requirements, enforces a mandatory waiting period and an in-person physician requirement.[149] In fact, from 2000–2018, only two Guamanian medical providers performed abortions.[150]

By 2018, both of those providers retired from their practices, and their successors subsequently refused to perform abortions.[151] Aside from the lack of physicians willing to perform abortions, there is evidence suggesting that island hospitals and medical centers are refusing to provide women with referrals for abortions, creating an added barrier to safe abortion access.[152] This means that, since 2018, no

144. *Id.*

145. *Id.*

146. *See* David Goldman & Michael Biesecker, *Catholicism Ingrained in Daily Life on US Island of Guam*, AP NEWS (Aug. 9, 2019), https://apnews.com/article/the-reckoning-us-news-ap-top-news-international-news-asia-pacific-9348b0908a4043b4bcc927609ff29403 [https://perma.cc/ZCL7-LLE2] ("More than 85% of Guam's 165,000 residents identify as Catholic.").

147. Traditionally, communities which are more conservative are more likely to oppose pro-choice policies. Similarly, conservative, Catholic-based communities traditionally oppose abortion as the Catholic church promotes the idea that life begins at conception. *See id.*

148. Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1368 (9th Cir. 1992).

149. 10 GUAM CODE ANN. § 3218.1 (2012).

150. *See* Michelle Broder Van Dyke, *Getting an Abortion on Guam Requires a $1000, Eight-Hour Flight. A Lawsuit Could Change That*, THE GUARDIAN (Feb. 22, 2021, 6:00 AM), https://www.theguardian.com/world/2021/feb/22/guam-abortions-aclu-lawsuit [https://perma.cc/D58N-V8BZ] ("[T]he closest US abortion clinic is now in Hawai'i.").

151. *See* Jasmine Stole Weiss, *No Abortion Providers on Guam*, PAC. DAILY NEWS (June 30, 2018), https://www.guampdn.com/news/local/no-abortion-providers-on-guam/article_ced546be-47a7-5a32-8ac0-e6a7a7e4af36.html [https://perma.cc/RF5J-GQXP] (stating that both Guam Memorial Hospital and Guam Regional Medical City doctors do not conduct abortions or refer clients to other facilities for abortions).

152. *Id.*

Guam resident has been able to access legal abortion anywhere on the island. The closest access point for abortions is the state of Hawaii, meaning that residents in need of care must fly approximately seven hours to have the procedure.[153] This creates substantial obstacles for many on the island, where poverty rates are already high. A procedure that requires a flight, rooming accommodations, and the requisite money necessary for the actual procedure proves prohibitively expensive for many people.[154]

This problem is not specific to Guam, although the exacerbated circumstances, such as the lack of federal resources, make the issue of abortion access particularly salient there. People across the country in rural communities, who cannot afford to take time off to travel to the lone abortion clinics in their states or who cannot foot the cost of an in-person clinical procedure, are faced with the impossible dilemma of carrying an unwanted pregnancy to term, finding funds, and forgoing basic needs to secure abortion, or partaking in unsafe, unregulated abortion practices. Rural states like Alaska often deal with resource issues.[155] Alaska has four abortion clinics in the state, and six total facilities that will perform abortions.[156] Given the state's geographical mass and its relative inaccessibility to other parts of the United States, this leaves pregnant people within the State lacking easy access to abortion care. To contextualize this problem, consider the fact that nearly one-third of pregnant people in Alaska must travel an intrastate distance equivalent to the mileage between Chicago to New York to get an abortion.[157] The trip requires multiple forms of transit (including a flight), which makes the procedure completely inaccessible for many Alaskans.[158] Given the populations affected by this access issue, it is imperative to find a workable solution that increases access and decreases costs for those seeking abortion care.

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153. *Id.*

154. *See* Van Dyke, *supra* note 150.

155. *See State Facts About Abortion: Alaska*, GUTTMACHER INST. (June 2022), https://www.guttmacher.org/fact-sheet/2015/state-facts-about-abortion-alaska [https://perma.cc/PGH8-GM2M] ("In 2017, some 86% of Alaska counties had no clinics that provided abortions, and 32% of Alaska women lived in those counties.").

156. *Id.*

157. *See* Schuyler Reid, *Alaska Issues Covid-19 Abortion Ban*, HUM. RTS. WATCH (Apr. 16, 2020, 7:47 AM), https://www.hrw.org/news/2020/04/16/alaska-issues-covid-19-abortion-ban [https://perma.cc/V4HP-FUD2] (detailing the distance and travel required for pregnant people who need abortions in rural portions of Alaska).

158. *Id.*

B. Maintaining State Regulation

One approach, supported by profederalism and anti-choice advocates, is to maintain the status quo post-*Dobbs*.[159] That is, to allow state legislatures, elected by their local populations, to continue their control over abortion policies.[160] Proponents of this approach note that states best understand the needs of their local populations and are thus best suited to make comprehensive, state-specific laws pertaining to abortion.[161] This is the current landscape post-*Dobbs*, which makes state legislative authority paramount.[162] This approach balances abortion access with federalism by creating space for state-specific interests and policies that a standardized federal approach would limit.[163]

But while the status quo offers that theoretical balance, it simultaneously produces overreliance on an increasingly political backstop. In effect, the status quo perpetuates the same access issues this Note attempts to resolve.

C. Telemedicine Abortion Administration

One possible avenue for ensuring easier access to abortions in the United States is executive action.[164] The President of the United States could either issue an executive order or direct an agency to act. Most recently, abortion access has been expanded using telemedicine. The United States Food and Drug Administration ("FDA") recently announced a policy change that allowed doctors to administer

159. *See* Richard A. Epstein, *In Defense of Abortion's Messy Status Quo*, HOOVER INST. (May 20, 2019), https://www.hoover.org/research/defense-abortions-messy-status-quo [https://perma.cc/JA9L-U8Y6].

160. *Id.*

161. *See* Bob Packwood, *The Role of the Federal Government*, 14 CLINICAL OBSTETRICS & GYNECOLOGY 1212, 1213 (1971) (reviewing the role of the federal government in abortion legislation against liberalized policies in various state legislatures).

162. *See* Epstein, *supra* note 159 (advocating in favor of a state-regulated approach to abortion law).

163. *Id.*

164. At the time this Note was heading to print, the FDA announced that Mifepristone, one of the two drugs used in medication abortions, will now be available in retail pharmacies and drugstores. See Pam Belluck, *Abortion Pills Can Now Be Offered at Retail Pharmacies, F.D.A. Says*, N.Y. TIMES (Jan. 3. 2023), https://www.nytimes.com/2023/01/03/health/abortion-pill-cvs-walgreens-pharmacies.html [https://perma.cc/SJV8-Z5VS]. While this regulatory change makes it easier to get abortion medication, it does not make it easier to obtain the necessary prescription required to purchase the drug. *Id.* Thus, all the issues this Note seeks to address still persist. This change is effectively meaningless for a patient who does not have access to a healthcare provider able or willing to prescribe the medication. Similarly, because the FDA left the choice to stock Mifepristone to the discretion of pharmacies, it is possible that pharmacies in rural or antiabortion areas will fail to keep the drug in stock, furthering the access gap. *Id.*

mifepristone and misoprostol, two pills that induce medical abortions.[165] The FDA's policy change is largely linked to the COVID-19 pandemic.[166] Due to the pandemic, many doctor's offices have moved to remote or hybrid-type visits to reduce contact with nonemergent patients.[167] Among these patients are those individuals seeking abortion care. To increase abortion access, the FDA greenlit the telemedicine administration of abortion pills, negating the need for an in-person office visit in states that allow telemedicine abortion services.[168]

While the FDA regulation allowing for telemedicine abortion consultations and abortion medicine administration does not necessarily change in the wake of the *Dobbs* decision, its implementation has been severely curtailed. During the pandemic, the Department of Drug Enforcement Administration made it easier for doctors to prescribe medications across state lines.[169] But now, states are working to implement laws which would disallow certain items—like abortion pills—from being shipped to addresses in states where the procedure is illegal.[170]

Even with these obstacles, there is a road to telemedicine abortion access. Expansion of programs that allow online consultations and mailed abortion medication could take two routes: through agency administrative discretion or as part of a more comprehensive legislative scheme. This Note analyzes the potentiality of both options.

D. FDA Regulation and Administrative Action

One legal mechanism for telemedicine abortions is through an expansion of the status quo—utilizing administrative agencies to

165. Perrone, *supra* note 19.

166. *Id.*

167. Lee et al., *supra* note 127.

168. Perrone, *supra* note 19.

169. *Telehealth Expansion Means Doctors Can Prescribe Across State Lines*, CHADD (Jan. 21, 2021), https://chadd.org/adhd-weekly/telehealth-expansion-means-doctors-can-prescribe-across-state-lines/#:~:text=Telehealth%20Expansion%20Means%20Doctors%20Can%20Prescribe%20Across%20State%20Lines,-ADHD%20Weekly%2C%20January&text=Getting%20a%20stimulant%20prescription%20filled,was%20prescribed%20can%20be%20confusing [https://perma.cc/JE2J-786W] ("New regulations allow that if doctors have a state license and DEA license in one state, they are not required to get another DEA license in another state.").

170. *See* Ava Sasani, *Are Abortion Medications Delivered by Mail Illegal?*, N.Y. TIMES, https://www.nytimes.com/article/medical-abortions-mifepristone-misoprostol-illegal.html (last updated June 24, 2022, 5:56 PM) [https://perma.cc/66YN-GBK2] ("There are 19 states that had already prohibited the use of telehealth to prescribe abortion medication by requiring prescribers to be present when the drugs are administered.").

promulgate rules and policies that states must follow. In December 2021, the federal government cemented access to telemedicine abortion consultations.[171] The FDA's new policy allows patients to meet with an abortion provider through a telemedicine appointment.[172] It further allows the provider to remotely prescribe and mail the prescription abortion pill to the patient.[173] This increases access to abortion for patients in rural or remote areas, where accessing abortion services through traditional brick-and-mortar clinics otherwise proves difficult.[174] This option also expands the network of abortion options for patients in these remote areas, which explains why telemedicine abortion is quickly becoming the preferred choice for those seeking access to the procedure.[175]

Although the FDA's regulation offers these benefits toward increasing meaningful access to abortion, its potential for success is limited. The FDA is an administrative agency, meaning it operates under the purview of the U.S. Department of Health and Human Services and the Executive Branch.[176] The FDA Commissioner is always appointed by the President, which means the agency's policies are influenced by the political leanings of the sitting presidential administration.[177] The FDA is currently operating under Dr. Robert Califf.[178] Dr. Califf supports abortion rights, and, since he is serving under a pro-choice, Democratic president, his policies protect these new FDA regulations.[179]

The danger with this solution is its temporary nature and vulnerability to changing administrations. FDA policies can be modified when administrations turn over, meaning that if an antiabortion president wins the next election and nominates a commissioner who is

171. Pam Belluck, *F.D.A. Will Permanently Allow Abortion Pills by Mail*, N.Y. TIMES (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/health/abortion-pills-fda.html [https://perma.cc/94LP-T4MK].

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *FDA Fundamentals*, FDA, https://www.fda.gov/about-fda/fda-basics/fda-fundamentals (last updated Jan. 8, 2021) [https://perma.cc/CY2D-N6V4].

177. *See Robert M. Califf M.D., MACC*, FDA, https://www.fda.gov/about-fda/fda-organization/robert-califf (last updated Feb. 17, 2022) [https://perma.cc/3EGL-9TJK] (stating President Biden appointed Commissioner Califf).

178. *Id.*

179. In fact, Dr. Califf faced opposition at his confirmation hearing due to his support for abortion (and telemedicine abortion procedures specifically). *See* Celine Castronuovo, *Biden's FDA Chief Confirmed by Senate with Republicans' Help*, BLOOMBERG L., https://news.bloomberglaw.com/health-law-and-business/bidens-fda- (last updated Feb. 15, 2022, 2:19 PM) [https://perma.cc/QG45-XEE3] (stating that "the FDA relaxed regulations on the abortion-inducing pill mifepristone during [Califf's] previous tenure in 2016").

similarly antiabortion, the telemedicine policies would likely be discontinued.[180] Additionally, even though the FDA has expanded access to abortion pills by mail, a prescription for abortion pills is still hard to access.[181] In fact, since approving the pills in 2000, the FDA has "tightly regulated the drug, making it much harder to access than other prescriptions."[182] This serves as a critical example between possessing a right and enjoying meaningful access to that right. Allowing telemedicine abortion means little if the prescriptions are difficult to obtain. Compounding these concerns, an administration led by an antiabortion president could direct the agency's commissioner to make abortion prescription criteria so difficult to meet that the option becomes obsolete.[183] Leaving an important healthcare right to the discretion of a politically accountable agency risks instability that mirrors the inconsistency found in the status quo.

Another potential pitfall of this avenue is that it may or may not solve access issues specifically in states with restrictive abortion policies. Even though the FDA now allows telemedicine appointments and prescriptions for abortion services, the policy does not include any mandate on states to facilitate these services.[184] States are currently rolling out implementation on their trigger laws, which limit telemedicine abortion procedures and, more generally, limit who may use abortion pills.[185] In 2021 alone, four states placed limitations on patients seeking abortions through medical abortion pills, and those laws would remain unaffected by the FDA regulation.[186] In a similar fashion, states that bar providers from utilizing telemedicine for abortion procedures within a particular state would be unaffected by the rule.[187] So, rather than solve for the issue of access, the FDA

180. *See generally* Alice Miranda Ollstein & Lauren Gardner, *Abortion Pill Fight Could Ensnare Biden's FDA Pick*, POLITICO (Jan. 19, 2022, 4:30 AM), https://www.politico.com/news/2022/01/19/abortion-pill-robert-califf-fda-527326 [https://perma.cc/K696-KPX9] (discussing the confirmation process for FDA leadership).

181. *See* Rachel Rebouché, Greer Donley & David S. Cohen, *The FDA's Telehealth Safety Net for Abortion Only Stretches So Far*, THE HILL (Dec. 18, 2021, 11:01 AM), https://thehill.com/opinion/healthcare/586329-the-fdas-telehealth-safety-net-for-abortion-only-stretches-so-far [https://perma.cc/HE9X-SZYE] ("[T]he benefits of this decision are not for everyone.").

182. *Id.*

183. *See id.*

184. *Id.*

185. *Id.*

186. *State Legislation Tracker*, GUTTMACHER INST., https://www.guttmacher.org/state-policy (last visited Sept. 8, 2022) [https://perma.cc/874Q-N3TM].

187. *See id.* (observing that in 2021, eight states enacted laws prohibiting telemedicine for medication abortion).

regulation risks compounding it, so long as states maintain primary control over abortion laws.

E. Federal Legislation

Federal legislation would ground telemedicine abortion access in statutory law and federal preemption, removing it from state-by-state decisions and supplementing judicially enforced protections. This solution works to remove the delicate position of abortion advocacy from judicial sway, instead grounding the protections in federal statutory law. Moreover, a new federal law prevents states from restricting abortion access below the federal limits.[188] It also removes discretion from fickle branches of government, like the Executive branch. Currently, the FDA does allow telemedicine abortions.[189] Changing administrations, however, will always pose a threat to the reliability of that option if only under FDA regulation. Legislation proves more difficult to overturn since it is grounded in statute, creating greater reliability and consistency for those seeking abortion procedures.[190]

Federal legislation posits certain advantages and disadvantages. For its advantages, a comprehensive federal solution eliminates the uncertainty which exists within the status quo. Rather than leaving abortion regulation to the mercy of state governments, which inevitably vary in their abortion-care protections along partisan lines, federal regulation introduces consistency to patients and healthcare providers. An example of this federal legislation passed the House in 2021. The Women's Health Protection Act , or H.R. 3755, is a sweeping attempt at comprehensive abortion regulation.[191] Among its provisions is a stipulation that governments may not limit a "provider's ability to provide abortion services via telemedicine."[192] The legislation also bars governments from requiring "medically unnecessary in-person visits" before receiving abortion services.[193]

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188. *See* Women's Health Protection Act, H.R. 3755, 117th Cong. (2021).

189. Perrone, *supra* note 19.

190. Unlike administrative agency regulations, which can be immediately reversed by future administrations, to repeal legislation, Congress must pass a new law containing repeal language, the law must be defunded or allowed to sunset, or the Supreme Court must invalidate the law. *See generally When Does Congress Repeal Legislation?*, LEGBRANCH.ORG (Oct. 19, 2015), https://www.legbranch.org/2015-10-19-when-does-congress-repeal-legislation-a-new-dataset-of-major-repeals-from-1877-2012-provides-answers/ [https://perma.cc/S53P-BK7R] [hereinafter *When Does Congress Repeal Legislation?*].

191. H.R. 3755.

192. *Id.*

193. *Id.*

Certainly, a law of this magnitude would secure access to telemedicine abortions in all states and territories. It would also help solve for inequitable access; however, the pitfall of this approach is its reliance on Congress. Congress, even when both chambers boast a Democratic majority, faces immense gridlock that stalls legislation.[194] As a case in point, the Senate recently decided not to take up a vote on this legislation, which indicates that a broad, sweeping abortion care bill faces steep political challenges.[195] Even when the *Dobbs* decision leaked a month before its actual announcement, Congress took no steps to codify *Roe*.[196] Facing a slow, arduous legislative process post-*Dobbs* means thousands of people seeking abortion care are currently left without recourse while Congress waits to act.[197] Similarly, compromises are a natural part of the legislative process, and it might be difficult for the legislature to pass a comprehensive abortion package that ensures meaningful access for the most vulnerable communities.[198]

Even with these limitations, federal legislation is the best way to ensure that access to abortion care is grounded in the statutory framework and, therefore, protected from undue political influence.[199] By passing a federal floor for abortion policy, Congress signals to states

194. *See* Alex Cameron, *Women's Health Protection Act Narrowly Passes in the House, Senate Vote Unlikely*, NEWS ON 6 (Sept. 24, 2021, 6:18 PM), https://www.newson6.com/story/614e0c28763bcf0bf44cbb2f/womens-health-protection-act-narrowly-passes-in-the-house-senate-vote-unlikely [https://perma.cc/9ZNP-V8CZ].

195. Li Zhou, *Why the Senate Took a Doomed Vote on Abortion Rights*, VOX https://www.vox.com/2022/2/28/22946299/womens-health-protection-act-senate-vote-abortion-rights (last updated Mar. 1, 2022, 10:52 AM) [https://perma.cc/QJ5V-6K5Q].

196. *See* Sahil Kapur, *Democrats Push to Codify Roe After Leaked Opinion. But They Don't Have the Votes*, NBC NEWS (May 3, 2022, 3:01 PM), https://www.nbcnews.com/politics/congress/democrats-are-pushing-codify-roe-leaked-opinion-dont-votes-rcna27082 [https://perma.cc/2WUM-C5UN] ("A leaked draft of a Supreme Court opinion that would overrule *Roe v. Wade* has prompted new calls from Democrats to codify abortion rights protections into federal law. But even though they control the White House and both chambers of Congress, they don't have the votes . . . .").

197. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277 (2022) (encouraging people––women, in particular—to use the legislative process to advocate for their preferred abortion policy).

198. *See What the Build Back Better Compromise Means for Children and Families*, CHILD.'S DEF. FUND, https://www.childrensdefense.org/blog/build-back-better-compromise/ (last updated Dec. 2, 2021) [https://perma.cc/5LQN-MW2M] (praising the bill's chief accomplishments, highlighting its shortcomings, and urging voters to lobby their senators to ensure more protections for vulnerable communities).

199. Although political decisions play a role in the legislative process, because legislation is difficult to overturn once enacted, federal law better protects abortion from political whims of states or future antiabortion presidential administrations. *See When Does Congress Repeal Legislation?*, *supra* note 190.

what the minimal standard for abortion access must be, guaranteeing standardized, baseline protections throughout the country.[200]

III. SOLUTION

Obstacles to creating meaningful access to abortion, coupled with the uncertainty about previability restrictions on abortions in the wake of the *Dobbs* decision,[201] highlight the need for a solution implemented at the federal level. The most pragmatic solution is federal legislation, passed by Congress, that protects access to telemedicine abortions. Passing federal legislation is the foremost way to ensure meaningful access to abortion. This solution is the most workable for the following reasons: current political viability, increased access for people in antiabortion states, and stability and consistency for abortion providers and patients. Despite its challenges and potential drawbacks, limited federal legislation mandating access to telemedicine abortion services represents an opportunity to ensure people in all U.S. states and territories have safe, legal access to abortion.

A. Important Tenets of the Legislation

For federal legislation to meaningfully increase access to abortion, it needs to include several key features. First, the legislation needs to guarantee a statutory right to abortion. Legislators could assure this feature utilizing one of two methods. The first method, which this Note endorses, is to adopt the *Roe* and *Casey* constitutional framework.[202] This method has the advantage of familiarity—abortion providers have been working with this framework for decades.[203] Similarly, since the framework already exists, it would be straightforward to codify in statute.

The second method is to devise new parameters for the right to abortion. This method has its own advantages, including that the legislation could ensure abortion access beyond that protected by *Roe* and *Casey*.[204] Successfully developing a new framework, however, would take significant time and resources and could lead to legislation

200. *Id.*

201. *Dobbs*, 142 S. Ct. 2228.

202. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

203. *Id.*

204. *See id.*

that is poorly crafted or incomplete. As such, the legislation should adopt the *Casey* framework for consistency and feasibility purposes.[205]

Another important feature is ensuring access to telemedicine services, including both telehealth appointments and mailed abortion pills. This was an important feature of H.R. 3755.[206] The Women's Health Protection Act would have barred a state from limiting a provider's ability to prescribe abortion medications or offer abortion services through telemedicine.[207] The framing of that language is critical. By creating a bar on state action that would curb abortion access, the federal government sets a floor for permissible conduct. States may enact legislation which affects abortion rights, but it cannot bar these types of procedures.[208]

Finally, the legislation should be limited to telemedicine abortion access. As recently seen with the failure of the Women's Health Protection Act, attempting to pass sweeping and comprehensive legislation often leads to the loss of key Senate votes. By limiting the law to lifting restrictions on telemedicine abortion by medication, the law would face an easier path forward. Notably, medication abortions are only an option in the first ten to eleven weeks of pregnancy.[209] This means that the application of the law would only apply to pregnant people within that early spectrum. This is integral for preserving long-term, sustainable access to telemedical abortion services and should therefore be adopted.

B. Political Viability

Telemedicine abortion access grounded in a federal statute has the best chance at being enacted within the current political landscape, where momentum for reproductive protection has become a central issue. Left-leaning politicians are more amenable to pro-choice legislative packages.[210] The Democratic Party currently the Senate, and it only narrowly lost control of the House.[211] President Joe Biden has

205. *See id.*

206. *See* Women's Health Protection Act, H.R. 3755, 117th Cong. (2021).

207. *Id.*

208. *Id.*

209. *The Abortion Pill*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/abortion/the-abortion-pill (last visited Oct. 3, 2022) [https://perma.cc/BK6S-5J2G].

210. *See* Michele McKeegan, *The Politics of Abortion: A Historical Perspective*, 3 WOMEN'S HEALTH ISSUES 127 (1993) (tracing the antiabortion movement's capture of the Republican Party).

211. JENNIFER E. MANNING, CONG. RSCH. SERV., R46705, MEMBERSHIP OF THE 117TH CONGRESS: A PROFILE 1 (2022).

also signaled his support for abortion legislation, making a presidential signature all but guaranteed.[212] If Democrats regain control of the House in the next election cycle, Congress will have the momentum necessary to pass this type of legislation. In a research survey conducted just after the *Dobbs* decision was announced, most Americans indicated support for abortion in some form and disapproval of the decision's complete elimination of the constitutional right solidified by *Roe* and *Casey*.[213]

Conversely, there are legislative compromises necessarily inserted into bill packages. Federal legislation almost universally means accepting that the bills which make their way to the White House for final signature will have significant compromises, some of which threaten the substance and integrity of the legislation. One salient example is the compromises at issue in the Build Back Better Act.[214] The Build Back Better Act touted several progressive reforms, including significant strides for paid parental leave.[215] In order to get the bill passed in Congress, however, (even with a Democratic majority in both chambers) those progressive provisions were gutted.[216] Policies like paid family leave are more politically palatable than hot-button issues like abortion and yet family leave policy still failed to make its way through Congress. Coupling these two facts, it is evident that a comprehensive package of abortion rights legislation, like that promised in the Women's Health Protection Act, faces a significant uphill battle.[217] Even with this limitation, if the public perception matches the political will, passage is still viable.[218]

As mentioned above, limiting the legislation to only regulating medication abortions administered via telemedicine might improve the chances of political viability. Because the law would only cover people in their first several weeks of pregnancy, there may be less resistance than there was with the Women's Health Protection Act,[219] which would have broadly preempted *any* state regulation of abortion. This legislation—in its more limited format and traditional *Roe* viability

212. Sam Levin & Gloria Oladipo, *Biden 'Concerned' over Supreme Court's Texas Abortion Ruling, Says White House – as It Happened*, GUARDIAN, https://www.theguardian.com/us-news/live/2021/dec/10/joe-biden-democracy-summit-supreme-court-abortion-texas-us-politics-live (last updated Dec. 10, 2021) [https://perma.cc/4SSE-QZ7S].

213. *See* PEW RSCH. CTR., *supra* note 15.

214. CHILD.'S DEF. FUND, *supra* note 198.

215. *See* Build Back Better Act, H.R. 5376, 117th Cong. (2021) (granting the Secretary of Labor discretion to give grants to employers to provide childcare for employees).

216. *See* CHILD.'S DEF. FUND, *supra* note 198.

217. Women's Health Protection Act, H.R. 3755, 117th Cong. (2021).

218. *See* PEW RSCH. CTR., *supra* note 15 (statistically detailing political division on abortion).

219. *See* Zhou, *supra* note 195.

timeline—may be more appealing to critical swing votes like Alaska's Senator Murkowski.[220] Additionally, framing the legislation as an expansion of healthcare to people in rural portions of the country may be appealing, especially considering the direct benefits the law would have on constituents in rural states like Alaska.[221]

It is inevitable that states will take issue with such a firm federal bill. The legislation effectively preempts states from banning and restricting abortion in any meaningful way within the first trimester. This is a large step to curtail state legislative authority. Lawsuit(s) challenging the legislation on the basis that it is an overstep of congressional power should be expected.

One of these lawsuits will likely claim that Congress overstepped its constitutional powers under the Commerce Clause of the Constitution. The Commerce Clause is a critical litigation tool because it parses out the sources of power to legislate between the federal government and the states.[222] The Commerce Clause reserves inherent legislative authority for the states and grants only enumerated powers to the federal government.[223] As such, states with an interest in restricting abortion access will argue that Congress usurped the states' own power to regulate abortion, representing a constitutional violation.[224] This is a formidable avenue for state success. Recently, the Supreme Court agreed to hear four related cases that raise Commerce Clause violations, indicating their willingness to preserve state power to regulate.[225] Even so, a win for states is not a foregone conclusion. Given that the *Dobbs* decision parsed out the difference between a constitutional right to abortion and the power to enact abortion policy through legislation, the Court seems to entertain that this kind of policymaking is within congressional power.[226]

Historically, however, the Supreme Court is deferential to the federal government and has repeatedly held the Commerce Clause to

220. *See id.*

221. *See id.* (identifying potential concerns for senators otherwise supportive of abortion rights).

222. *See* James Blumstein, Professor of L., Vanderbilt Univ. L. Sch., Lecture for Constitutional Law I (Mar. 15, 2021).

223. *Id.*

224. *Id.*

225. Ian Millhiser, *How a New Supreme Court Case Endangers the New Deal, the Great Society, and Obamacare*, VOX (Mar. 2, 2022, 9:10 AM), https://www.vox.com/22956346/supreme-court-commerce-clause-native-american-indian-child-welfare-act-haaland-brackeen-texas [https://perma.cc/4BGU-ZRAV] (highlighting how the upcoming Supreme Court docket implicates the Commerce Clause).

226. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2305–10 (2022) (Kavanaugh, J., concurring).

grant broad Congressional authority to legislate contentious social issues.[227] Abortion is precisely this type of issue, as federal legislation will generate certainty, placate the public, and keep the Court from public scrutiny. Additionally, the legislation at issue here only impacts pregnant people in the first trimester.[228] Given the limited scope of the legislation, the Supreme Court may not find that Congress overstepped its role in crafting the law. Federal legislation is the *baseline* for lawmaking in this country.[229] This Court is also deferential to the democratic process: if people elected these leaders to represent them at a federal level, it is entirely possible that the Court, if following its own trends, will find such people's choice compelling.[230] If the Court's other abortion decisions are a hint, it is clear the Court believes that Congress does in fact have a role to play in abortion regulation.[231]

Another possible challenge is whether the law will survive rational basis review, assuming the Supreme Court decides (via *Dobbs*) that abortion policies revert to rational basis. Since rational basis is the most deferential standard to laws, it is extremely likely it would survive.[232] Rational basis review requires that there is a legitimate government interest in passing the legislation, and that the law itself is rationally related to those interests.[233] Even though the Supreme Court generally assumes that Congress has a legitimate interest, in this case the interest is clear: the federal government wants to expand safe access to abortion to protect reproductive rights. Passing a law which generates that expansion by providing remote consultations and mailed prescriptions is rationally related to that goal. Thus, there is a very strong chance that the law would survive these challenges.[234]

C. Increased Access Across the State

Another benefit of federal legislation is that it categorically increases access to abortion. An issue with allowing the status quo to

227. *See, e.g.*, United States v. Darby, 312 U.S. 100, 121–23 (1941) (holding that the Commerce Clause allowed Congress to regulate labor standards, an important social issue of the time).

228. *See* PLANNED PARENTHOOD, *supra* note 209 (explaining that the abortion pill can only be taken up to eleven weeks into suspected pregnancy).

229. The Supremacy Clause of the U.S. Constitution establishes that federal law supplants state laws. U.S. CONST. art. VI § 2.

230. *See Kavanaugh*, *supra* note 226.

231. *See generally* Gonzales v. Carhart, 550 U.S. 124 (2007) (indicating that Congress should legislate abortion in times of medical uncertainty).

232. *See* Clarke, *supra* note 140.

233. *See id.*

234. There is a chance that a subsequent congress could repeal this type of legislation. But those challenges are intentionally more difficult. *See When Does Congress Repeal Legislation?*, *supra* note 190.

continue, and with relying on federal agencies to take the helm of generating nationwide abortion policies and procedures, is that states can easily pass laws that limit the effectiveness of proabortion policies.[235] Federal legislation steps in to resolve this problem by effectively preempting state restrictions on abortion. Since federal legislation enacts a baseline standard for abortion policies, states are precluded from developing legislative policies that would restrict abortion below that standard. This is an essential step in generating meaningful access to abortion for people in places like Guam where local legislatures have placed restrictions on access.[236] Similarly, by codifying the *Roe* and *Casey* framework into statutory law, heartbeat bills in states like Texas would be outlawed.[237]

There are open questions surrounding how this legislation will interact with a post-*Dobbs* landscape. There is a tension between the federal government enacting legislation to increase abortion access and states' ability—if the Court remands previability policies to rational basis review—to regulate abortion policies. For example, certain states require patients to obtain an ultrasound before getting an abortion.[238] Would this requirement conflict with federal legislation allowing telemedicine abortion consultations and prescriptions? As it turns out, these concepts are not necessarily in tension.

While it is true that patients would still have to get an in-person ultrasound, the option for a mailed prescription and continued consultation through telemedical appointments still reduces the need for repeated office visits. This benefits citizens of remote areas where there are waiting periods between consultations and procedures. This will also expand access in states that do not offer a state avenue for abortion access. Rather than make multiple trips over several days, patients can go in person for the ultrasound and then receive the prescription once the waiting period is over.

There are also lingering questions that relate to telemedicine more broadly, such as licensure issues for doctors in other states, like Hawaii, who want to administer abortions to people in remote areas,

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235. *See* Rebouché et al., *supra* note 181 (discussing the restrictions that states can put on abortion procedures).

236. *See* Van Dyke, *supra* note 150.

237. TEX. HEALTH & SAFETY CODE ANN. § 171.204 (West 2021).

238. *State Ultrasound Requirements in Abortion Procedures*, KFF, https://www.kff.org/womens-health-policy/state-indicator/ultrasound-requirements/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last updated May 1, 2022) [https://perma.cc/4UM5-FYCK].

like Guam.[239] This problem is only resolved by federal preemption. This is because, in the status quo, there are doctors willing and able to practice via telemedicine in Hawaii who are otherwise barred from doing so because of Guam's restrictive policies.[240] If federal legislation creates a baseline statutory right to telemedicine abortion procedures, then that right is expanded interstate. Additionally, while this legislative solution is limited in scope to telemedicine abortion access, it presents a wider opportunity for additional legislation or riders that would increase broadband access for those in remote communities who need healthcare.

Utilizing federal legislation to codify *Roe* and *Casey* and solidify access to telemedicine procedures is not a rubber stamp ensuring that everyone in need of abortion services can access the procedure. A significant barrier that remains is the cost of those services. For people in a privileged position with health insurance, the cost for abortion pills and the accompanying telemedicine appointments might be low or costless.[241] For those without insurance or with subquality insurance, the cost to obtain an abortion can be prohibitively expensive, considering the average cost for an abortion is $580.[242] In many cases, insurance does not offer coverage for abortion procedures and related telehealth appointments.[243] This is unlikely to change given the Supreme Court's hesitancy to force employers to offer comprehensive insurance covering reproductive health.[244] This means patients pay the costs for the appointment, the prescription, the delivery, and the recovery completely out of pocket, which collectively can range from $250-800.[245]

Organizations like Planned Parenthood set up programs to help patients pay for these procedures.[246] Of course, relying on third-party

239. *See* Lee et al., *supra* note 127 (detailing the issues that need resolution as telemedicine becomes more utilized).

240. *See* Weiss, *supra* note 151 (describing the restrictions on abortion in Guam).

241. *See How Do I Get the Abortion Pill?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/abortion/the-abortion-pill/how-do-i-get-the-abortion-pill (last visited Nov. 10, 2022) [https://perma.cc/WU3Z-FLR7] [hereinafter *How Do I Get the Abortion Pill?*] ("You may be able to get the abortion pill for free or low cost.").

242. *See How Much Does an Abortion Cost?*, PLANNED PARENTHOOD https://www.plannedparenthood.org/learn/abortion/the-abortion-pill/how-much-does-abortion-pill-cost (last visited Nov. 10, 2022) [https://perma.cc/7DMU-BJHG] ("A medication abortion can cost up to around $800, but it's often less. The average cost at Planned Parenthood is around $580.").

243. *Id.*

244. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690–93 (2014) (holding that Hobby Lobby under the RFRA is not required to cover contraceptive care in employee health insurance).

245. *See How Much Does the Abortion Pill Cost?*, CARAFEM, https://carafem.org/how-much-does-the-abortion-pill-cost/ (last visited Dec. 5, 2022) [https://perma.cc/J4AT-TEFY].

246. *How Do I Get the Abortion Pill?*, *supra* note 241.

nonprofit organizations to subsidize healthcare costs is a reality that is far from ideal. Even so, certain cost barriers should not stall passage of this legislation. Increasing access might need to happen incrementally. At this stage, an important step is passing legislation at the federal level to protect access to abortion. The legislation should represent a starting point, not an ending point. Further work beyond the scope of this Note can, and should, work toward eliminating the cost-prohibitive difficulties for accessing abortion.

Many advocates also worry that the widespread introduction of telemedicine abortions will cause massive job loss in brick-and-mortar abortion clinics, which are traditionally less convenient and more expensive for patients.[247] But this speculation need not materialize. Second trimester abortions cannot be performed with the medical pills and would still require in-person visits and procedures.[248] Similarly, the risk posed by failing to increase access (namely, leaving residents in antiabortion states without any resources) far outweighs the risk of undermining brick-and-mortar clinics. More to the point, these clinics are already under attack in conservative states, and the telemedicine option serves as a backstop to ensure there is always a safe abortion option for those who need it, even if a state passes severe restrictions on state-run clinics.[249] Creating federal legislation that affirms the right to access abortion means brick-and-mortar clinics will no longer be at the precarious and constant risk of shut down due to state laws. [250] Creating a path to consistent, protected access to abortion will strengthen reproductive healthcare for patients throughout the country.

D. Increasing Stability

Finally, and perhaps most integral, is the important notion that federal legislation generates a stable landscape for abortion providers

247. *See* Amy Littlefield, *Telemedicine Abortions Offer Cheaper Options but May Also Undermine Critical Clinics*, KHN (Sept. 3, 2021), https://khn.org/news/article/telemedicine-abortions-offer-cheaper-options-but-may-also-undermine-critical-clinics/ [https://perma.cc/J7PZ-WHNR] (explaining how the popularity of using telemedicine to prescribe and deliver abortions risks undermining the value of in-person abortion clinics).

248. *See* CARAFEM, *supra* note 245 (detailing that the abortion pill may only be used in the first trimester).

249. *See, e.g.*, Neelam Bohra, *Abortion Providers and Distraught Patients Confront Stark Realities of Texas' New Law*, TEX. TRIB. (Sept. 1, 2021), https://www.texastribune.org/2021/09/01/texas-abortion-law-clinics-patients/ [https://perma.cc/ZQ5X-823D] ("[S]taffers at the Whole Woman's Health clinic in Fort Worth had worked up until the midnight deadline to see as many patients as possible.").

250. *See id.*

and for patients and potential patients. Since *Casey* was handed down, there have been a myriad of state legislative initiatives, Supreme Court cases, and regulations that have caused constant insecurity and changes for pro-choice advocates. For example, brick-and-mortar clinics have rushed through their pending abortion patient lists in anticipation of heartbeat bills stalling operations.[251] Some clinics in states with trigger laws have already ceased their abortion procedures entirely, widening the interstate access gap and leaving patients across the country without any in-state abortion access.[252] Abortion providers have refused federal funds that would restrict their ability to perform abortion procedures.[253] Moreover, patients have resorted to extreme measures to end their forced pregnancies in the wake of laws barring them from safe abortion procedures.[254] Federal legislation will end this instability and inconsistency. Abortion providers will have clear guidelines for permissible conduct. State legislatures will operate against a clearly defined federal backdrop. Patients who need abortions will have safe, guaranteed access.

A lingering dilemma among abortion policies, cases, and scholars is the discrepancy between the constitutional right to abortion and meaningful access to exercise that right. This solution, while imperfect, best serves the dual purposes of both grounding the right to abortion in federal statutory law and providing more meaningful, broader access to abortion procedures. As such, this Note sees the federal passage of telemedicine abortion legislation as the best possible solution given abortion policy's current judicial uncertainty.

CONCLUSION

Generating meaningful access to abortion in the United States presents a series of challenges, as played out in the political landscape over the last several decades. The trigger laws in place meant to curb or eliminate access to abortion preview the future of abortion rights in this country.

Given the current tides, the question of how to generate substantive, meaningful access to abortion is increasingly salient.

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251. *Id.*

252. *See* Testino, *supra* note 121 (detailing restrictions that caused abortion providers in Tennessee to stop providing procedures).

253. *See* Pam Belluck, *Planned Parenthood Refuses Federal Funds over Abortion Restrictions*, N.Y. TIMES (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/health/planned-parenthood-title-x.html [https://perma.cc/DLV8-7XC5] (explaining how some clinics refused Title X funds).

254. *See* Lisa B. Haddad, *Unsafe Abortion: Unnecessary Maternal Mortality*, 2 REVS. IN OBSTETRICS & GYNECOLOGY 122–26 (2009) (listing unsafe ways in which abortion can be performed).

Allowing state legislatures to sit at the helm of abortion legislation is no longer a tenable solution because doing so will further restrict abortion access, outright ban abortions, and possibly create criminal liability for individuals accessing abortions.[255] The FDA posits a short-term solution by increasing abortion access to more people through telemedicine and mailed abortion procedures, but the impact is temporary. As a result, it is necessary for Congress to step in and enact legislation which codifies *Casey*'s protections and allows for access to telemedicine abortion access. Telemedicine abortion is the best way to ensure meaningful access because it provides an avenue for patients to obtain the procedure, even if they live in remote areas like Guam, far removed from accessible brick-and-mortar clinics.[256] Additionally, with the current Democratic majority in the Senate and the possibility to retake the House in the next election cycle, the public sentiment rallying behind abortion protection, and the stability that comes with national legislation, Congress is best positioned to enact this imperative legislation.

While issues of cost and additional barriers to access remain, crafting legislation solidifying a statutory right to telemedical abortion is a key step toward ensuring people in the United States have adequate reproductive healthcare.

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255. *See* PLANNED PARENTHOOD ACTION FUND, *supra* note 63 (listing states with abortion restrictions in place).

256. *See* Van Dyke, *supra* note 150.

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