NATIONAL WOMEN'S LAW CENTER

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The Right to Contraception: Deeply Rooted in our Laws and Society, but in Jeopardy and in Need of Policymakers' Attention

For nearly 60 years, the federal constitutional right to contraception has enabled millions of people in the United States to use birth control without fear of government interference. Having the ability to use birth control has improved people's health, and increased their control over their own reproductive decisions, with resulting educational and professional opportunities that have advanced gender equality.[1]

The right to contraception was first recognized by the U.S. Supreme Court in *Griswold v. Connecticut* in 1965. It has been repeatedly reaffirmed by the Court, relied upon by people across the country for decades to structure their lives, and is central to our society. The right to contraception allows people to choose if and when to become pregnant and allows them to structure many parts of their lives, including their education and career. However, the right to contraception is now under threat. The Court's recent decision in *Dobbs v. Jackson Women's Health Organization*, declaring that the Constitution does not protect the right to abortion, has emboldened efforts to restrict the right to contraception.[2] In the face of threats to the right to contraception, Congress and states should take action to protect it and ensure that everyone has the right and ability to access the birth control they want and need.

The Fundamental Right to Contraception is Deeply Embedded in Our Law and Society

A series of cases, starting with *Griswold*, clarified that the U.S. Constitution guarantees legal access to birth control for everyone, regardless of marital status, gender, or age.

GRISWOLD V. CONNECTICUT (1965)

The Supreme Court first made clear that the U.S. Constitution protects a right to contraception in *Griswold v. Connecticut*.[3] The case centered on a Connecticut law that banned contraception.[4] Estelle Griswold was Executive Director of the Planned Parenthood League of Connecticut, and violated the law by counseling married couples on the use of contraception and providing contraception to them.[5] The Court recognized that the US Constitution contains a right to marital privacy that protects the decision whether to use birth control.[6] The Court found that the use of birth control by married people falls "within the zone of privacy created by several fundamental constitutional guarantees"[7] and as such, laws that banned married people from using contraception were unconstitutional. In describing the fundamental right to privacy, the Court said, "we deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."[8]

EISENSTADT V. BAIRD (1972)

Building on its holding in *Griswold*, the Supreme Court expanded the constitutional right to contraception to unmarried individuals in *Eisenstadt v. Baird*.[9] The Court determined that a Massachusetts law that prohibited dispensing birth control to unmarried people was unconstitutional. The Court clarified that although *Griswold* was decided based on the *marital* right to privacy, a marriage is composed of two people who each individually have a right to privacy and have an individual constitutional right to contraception.[10]

> **"If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."**

The Court held that the Massachusetts law – by treating married and unmarried people differently – violated the Equal Protection Clause of the 14th Amendment, which requires similarly situated people to be treated equally. As the Court explained, the rights of the individual to access contraceptives "must be the same for the unmarried and the married alike."[11]

CAREY V. POPULATION SERVICES (1977)

Several years later, the Supreme Court made clear that minors have a constitutional right to contraception and that restrictions on contraceptive access short of a total prohibition can be unconstitutional.[12] The case concerned a New York law that made it a crime for anyone other than a licensed pharmacist to distribute contraceptives; for anyone – including a licensed pharmacist – to advertise or display contraceptives; and for any person to sell or distribute contraceptives to a person under age 16. The Court struck down all of these provisions as unconstitutional. In its analysis of the restriction on who could distribute contraceptives, the Court clarified that "[r]estrictions on the distribution of contraceptives clearly burden the freedom to make [decisions about childbearing]."[13] The Court explained that "[l]imiting the distribution of nonprescription contraceptives to licensed pharmacists clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so."[14] The Court also reaffirmed that minors have constitutional rights and made clear that those rights include the right to contraception, drawing in part on cases that recognized a constitutional right to abortion for minors.[15] The Court stated firmly that a blanket prohibition on minors' right to contraception was clearly unconstitutional, and rejected all of the state's attempts to justify its law.

In other words, the U.S. Constitution has - for six decades - provided individuals with a fundamental right to contraception. It has enabled people to protect their health, plan whether and when to start families, allowed women in particular to participate more fully in our country's economic and social life, and provided a strong foundation for gender equality.

The Court's *Dobbs* Decision Opens the Door to Attacks on the Right to Contraception

In its 2022 decision in *Dobbs v. Jackson Women's Health Organization*, the Supreme Court held that the Constitution does not protect the right to abortion, overturning *Roe v. Wade*.[16] In *Dobbs*, a majority of the Court asserted that the line of cases preceding *Roe* that established the right to privacy as it relates to reproductive decisions did not actually include a right to abortion.[17] To reach this conclusion, the Court looked at whether certain rights are deeply rooted in American history. However, when it undertook this analysis, the Court used a biased and selective review of history and statutes to conclude that there was no deeply rooted right to abortion, and thus the right was not protected by the Constitution.[18] This was a flawed and cherry-picked analysis designed to enable the majority of the Court to reach the conclusion it was intent on reaching.

The majority opinion goes out of its way to say that the holding in *Dobbs* does not affect the right to contraception, or other rights that stem from the right to privacy. But the dissent calls out the tactics the majority used to ensure it reached the outcome it wanted. The dissent points out that if the majority were to undertake an analysis of the right to contraception and its roots in American history using the same kind of selective and outcome-driven review it used for abortion, "the majority could write just as long an opinion showing, for example, that until the mid-20th century, 'there was no support in American law for a constitutional right to obtain [contraceptives].'"[19] Justice Thomas's concurrence goes even further than the majority opinion. While he asserts that the majority opinion does not in fact touch *Griswold* or its progeny, he says explicitly that, if given the opportunity, the Supreme Court should "correct the error" of *Griswold* and other related cases.[20]

The threats to the constitutional right to birth control are not just hypothetical. Even before *Dobbs*, extremist politicians were questioning and challenging the fundamental right to contraception that is recognized in *Griswold* by trying to ban specific kinds of birth control, incorporating birth control into abortion bans, and asserting that *Griswold* was not soundly decided.[21] The *Dobbs* decision has only emboldened anti-reproductive health advocates, policymakers, and judges.[22]

Congress and States Should Protect the Right to Contraception and Guarantee Access

The constitutional right to contraception is still in place, but Congress and states should ensure that the right is protected in federal and state law as well. And they should make sure that it is not a right in name only; it must guarantee that people can access contraception without discrimination or barriers. This is what voters want. Eighty-four percent of voters agree that everyone should have access to the birth control they want or need, when they want or need it, without any barriers standing in their way.[23]

At the federal level, Members of Congress have introduced the Right to Contraception Act, which would establish a federal statutory right to contraception, protecting both the rights of those who use birth control as well as those who provide birth control services.[24] The Right to Contraception Act would preempt any state law that would restrict access to contraception, such as a state age limit on over-the-counter contraceptives or bans on types of birth control like emergency contraception or IUDs. In the last Congress, the bill passed in the House (228-195) shortly after the Dobbs opinion, but efforts to advance the bill in the Senate were blocked by Senators who oppose the right to birth control. The bill has now been re-introduced in the current Congress. And on June 23, 2023, the Biden Administration issued an executive order making certain that the federal government is doing everything in its power to protect and improve access to contraception.

At the state level, voters are demonstrating their support for birth control. Voters enshrined the right to birth control in state law in three states in the wake of *Dobbs*. Voters in California, Michigan, and Vermont approved ballot measures that established a state right to reproductive freedom or reproductive liberty.[25] The measures in California and Michigan specifically included the right to contraception in the ballot measure text.[26] [27] The measure in Vermont added a state constitutional amendment that protects the right to personal reproductive autonomy, which can be read to include the right to birth control.[28] The voters in these states have ensured that their citizens will continue to have a protected state right to contraception regardless of the fate of the federal constitutional right to contraception in the coming years.

In addition to ballot measures, state legislatures can pass legislation to codify the right to contraception. Although no bills to codify the right to birth control passed in state sessions this year, bills were introduced by legislators in Virginia, North Carolina, and South Carolina in the 2023 state legislative sessions.[29] [30] [31] As opponents continue to levy attacks at the fundamental right to birth control, continued state action to protect both the right to birth control and access to birth control will be critical.

Amidst the chaos created by the Supreme Court's declaration that the Constitution does not protect the right to abortion, it is critical to remember that people continue to have a constitutionally protected right to contraception. This fundamental right stems from the deeply rooted right to privacy and is central to our society. The right to birth control is relied on by millions of people to decide if and when they want to become parents, and to better enable autonomy and participation in society. Policymakers should take action to enshrine this right and access to birth control in law.

To learn more, visit our website at www.nwlc.org.

FOOTNOTES

1 *See, e.g.*, The Economic Impact of Contraception, Joint Economic Committee Democrats, https://www.jec.senate.gov/public/_cache/files/e58933ef-5530-45cf-9ec1-d5e2740e9bec/contraception-fact-sheet.pdf.

2 597 U.S. __(2022).

3 381 U.S. 479 (1965).

4 381 U.S. 480 (1965).

5 381 U.S. 480 (1965).

6 381 U.S. 483 (1965).

7 381 U.S. 485 (1965).

8 381 U.S. 486 (1965).

9 405 U.S. 438 (1972).

10 405 U.S. 453 (1972)l.

11 405 U.S. 453 (1972).

12 431 U.S. 678 (1977).

13 431 U.S. 678 (1977).

14 431 U.S. 689 (1977).

15 431 U.S. 693 (1977).

16 593 U.S. __ (2022).

17 593 U.S. __ (2022)

18 593 U.S. __ (2022).

19 593 U.S. __ (2022).

20 593 U.S. __ (2022).

21 Don't be Fooled: Birth Control is Already at Risk, Nat'l Women's L. Center (Jun. 17, 2022), https://nwlc.org/resource/dont-be-fooled-birth-control-is-already-at-risk/34 C.F.R. § 106.30106.44(a).

22 Deanda v. Becerra (https://cases.justia.com/federal/district-courts/texas/txndce/2:2020cv00092/330752/63/0.pdf?ts=1670691202). This case challenges the Title X family planning program's requirement that minors be able to obtain birth control without parental consent. The judge, Matthew Kacsmaryk, held that this requirement violated Texas state law that protects the right to parents because "the rights of parents to consent to their minor children's use of contraceptives is deeply rooted in this Nation's history and tradition." The judge did not consider the similarly deeply rooted history of the right to contraception. It is important to know that this case was specifically brought in this district in order to get the case before Judge Kacsmaryk, an extremist judge who previously disavowed the holdings of *Griswold and Eisenstadt* before he was appointed to the judiciary by President Trump. *See* Matthew Kacsmaryk, The Abolition of Man…and Woman, The National Catholic Register (June 24, 2015), https://www.ncregister.com/news/the-abolition-of-man-and-woman-tpnrdgjq.

23 Polling on file with National Women's Law Center.

24 Right to Contraception Act, H.R. 8373, 117th Cong. (2022). Right to Contraception Act, S.4557, 117th Cong. (2022).

25 Michelle Long, 2022 State Ballot Initiatives on Abortion Rights, Kaiser Family Foundation (Sept. 20, 2022), https://www.kff.org/policy-watch/2022-state-ballot-initiatives-abortion-rights/.

26 Senate Constitutional Amendment No. 10 (Ca. 2022).

27 Ballot Proposal 3-22 (Mi. 2022).

28 Vt. Const. Art. 22.

29 H.B. 1999, Gen. Assemb., 2023 Sess. (Va. 2023).

30 S539, Gen. Assemb., 2023 Sess. (N.C. 2023).

31 S.B. 29, Gen. Assemb., 125th Sess. (S.C. 2023).