AT ISSUE

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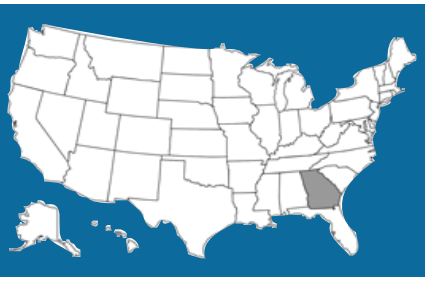

Over the past few months, our country has re-engaged in a conversation about abortion, thanks to a highly publicized and closely scrutinized Supreme Court decision, *Dobbs v. Jackson Women's Health Organization.* The Court in *Dobbs* upheld a Mississippi state ban on abortion, finding that its previous opinions (*Roe v. Wade* most notably among them) were incorrect insofar as they recognized a nebulous right to privacy in the text of the federal Constitution, within which lurked a specific right to abortion.

Our first article in this edition of *At Issue* examines the fallout from *Dobbs* with a specific emphasis on additional cases, such as *Roe v. Wade* and as *Doe v. Bolton,* and the potential impact this new decision may have on Georgians.

Our second article details the regulatory history of "family planning," a relatively new concept from the upheaval of the twentieth century culture wars. Specifically, we review how the Food and Drug Administration, historically, has treated health products related to the concept. The article further analyzes the family planning opportunities available to Georgians following the *Dobbs* decision, including the wide range of birth control, emergency contraception, and assisted reproductive technologies and how the *Dobbs* decision may affect their use.

While the situation regarding abortion, in many ways, remains fluid, (e.g.: Georgia's HB 481, our "heartbeat bill," still awaits adjudication in the federal courts), this edition will hopefully shed some light on the *Dobbs* ruling and its potential impact on Georgia's families. As always, feel free to reach out to my office with any questions, comments or concerns.

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Table of Contents

Health and Human Services

Leaks and Lives in the Balance: Abortion after Dobbs

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United State Supreme Court
Source: USDA

Ever since 1867, when the office was established, the Marshal of the United States Supreme Court has been responsible for policing the Supreme Court building, and protecting the justices, employees and visitors to the Court. While previously the most well-known responsibility of the Marshal was the ubiquitous chant of "Oyez! Oyez! Oyez!" that begins every oral argument day of the Court, the present marshal, Colonel Gail A. Curley, has assumed a much more novel job responsibility, finding the first leaker in Supreme Court history. For the first time in the 233-year history of the Court, some presently unknown person leaked a copy of a draft opinion. In what Chief Justice Roberts described as "a singular and egregious breach of . . . trust," Justice Alito's draft opinion for the case of *Dobbs v. Jackson Women's Health Organization* was leaked. The leak, and the expected reversal of *Roe v. Wade*,[1] left the nation in anticipation of what access to abortion would look in in a post-*Roe* America. While the leaker has not yet been identified, on June 24th, Justice Alito gave the opinion of the Court in *Dobbs*. Largely mirroring the leaked opinion,

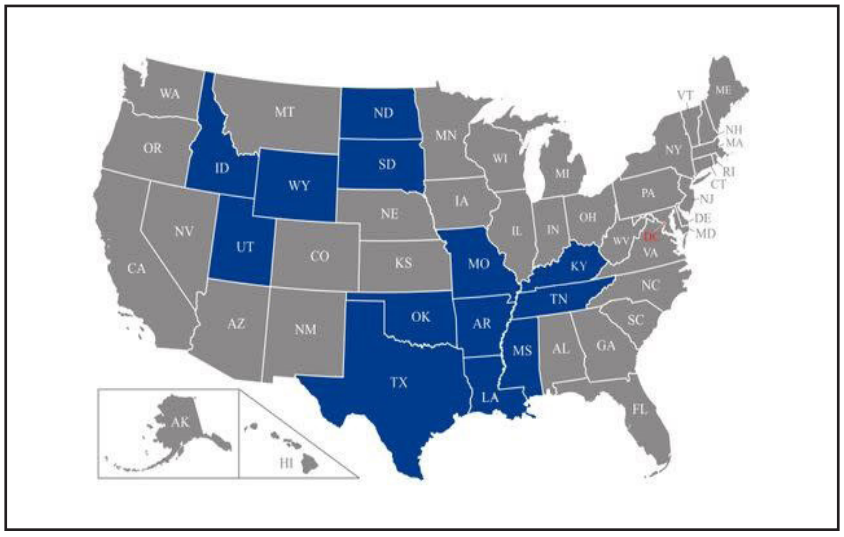
(continued on page 2)

the Court overturned *Roe* and while this opinion does not in and of itself ban abortion, the decision returns the question of abortion to the states.

Following the leak, anticipation swelled among pro-life and pro-choice adherents as *Dobbs* could upset a nearly 60-year-old framework regarding abortion. For nearly two centuries after the founding of our nation, states were allowed to set their own rules for abortion. While the opinion does not ban abortion, it returns this issue to the states. As discussed in Alito's opinion, for most of American history, most states categorically barred abortion. State laws were beginning to liberalize, however, in the middle of the twentieth century. That state-by-state progress came to a screeching halt when *Roe* deemed abortion a constitutional issue. *Roe*, along with a later landmark United States Supreme Court case regarding abortion, *Planned Parenthood v. Casey* [2], both identify a limited constitutional right to have an abortion through the due process clause of the *14th Amendment*. As such, every state law on the books barring abortion was unconstitutional, and states were prohibited from placing any undue burden on abortion before an unborn child was viable outside of its mother. Justice Alito's opinion categorically rejects a woman's constitutional right to an abortion, finding "*Roe* was egregiously wrong from the start" and that instead of settling the abortion debate, *Roe* "enflamed debate and deepened division."

While *Roe* is one of the most widely known and debated cases in American society, far fewer people know of its companion case that was decided on the same day. Where *Roe* targeted a Texas law that categorically banned all abortions except to save the life of the mother, *Doe v. Bolton* [3] challenged Georgia's abortion statute, which permitted an abortion if: (1) the continued pregnancy would endanger a pregnant woman's life or injure her health, (2) the fetus would be likely be born with a serious defect, or (3) the pregnancy resulted from rape. Additionally, the Georgia law required (1) that the abortion be performed in an accredited hospital, (2) that the procedure be approved by an "abortion committee," and (3) that the performing physician's judgment that the pregnancy met the above qualifications be confirmed by two other licensed physicians.

As with *Roe*, the Court's same 7-2 majority in *Doe* recognized that pregnant women do not have an absolute constitutional right to an abortion on demand. The court, however, focused on the latter three procedural requirements which did not exist in the older Texas law. The court found that all three could not withstand constitutional scrutiny and struck all these requirements down. *Doe* provided a floor from which many restrictions would be found to be constitutionally unduly burdensome in future challenges to abortion laws.[4] Notably, however, *Roe* and *Doe* did not address whether or not unborn children have a constitutional right to life. *Dobbs*, however, recognizes the court's previous failure to seriously consider the state's interest in protecting a "potential life" in the former cases, and now empowers states to make their own determinations.



The 13 States with Abortion Trigger Laws
Source: Yahoo Money (via Getty Images)

Dobbs does not outlaw abortion nationwide. Instead, the opinion will return the issue of abortion to the several states, allowing individual state legislatures to determine when and under what circumstances, if any, abortions can be provided in their state. As observed by Justice Alito, voters in some states may want access to abortion in a way that is more expansive than *Roe* and "voters in other states may wish to impose tight restrictions based on their belief that abortion destroys an unborn human being." Thirteen states, however, have already passed so-called "trigger laws" that would either immediately ban most abortions in their state, or would ban most abortions within 30 days of the Court overturning *Roe*. These states are the following: Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming. All of these state laws are nearly total bans on abortion, and most make performing an abortion a felony offense. Most include exemptions to save the life of the mother, but only three provide exemptions in case of rape or incest.

Georgia is among another group of states without "trigger laws" on the books, but which have enacted bans on abortion after around six weeks of pregnancy. Georgia's so-called "heartbeat bill," the Living Infants Fairness and Equality (LIFE) Act has several provisions intended to recognize the life of children once a detectable heartbeat is discovered. The LIFE Act requires unborn children with a detectable heartbeat to be included in population-based determinations and updates Georgia law generally to reflect that an unborn child with a detectable human heartbeat is considered a natural person for such purposes as medical disclosures, taxes, and civil damages. The law provides that no abortion can be performed after a detectable heartbeat is found in the unborn child. The law, however, provides three exemptions: (1) if a medical emergency exists; (2) if the woman has been pregnant for fewer than 21 weeks, and the pregnancy is due to rape or incest (and a police report has been filed alleging such an act occurred); or (3) a physician has determined the pregnancy is medically futile.

While Governor Kemp signed the LIFE Act in 2019, the law has never gone into effect as it was blocked by Judge Steve C. Jones of the Northern District of Georgia.[5] Judge Jones held that banning abortions after a detectable heartbeat violates the constitutional right to privacy and the due process right to an abortion before the viability of the unborn child.

In addition to finding the Act was unconstitutional, Judge Jones granted a permanent injunction to prevent the Act from taking effect. Governor Kemp has appealed this decision to the Eleventh Circuit court of appeals, where the case heard oral arguments in September of last year. Unlike the trigger laws described above, Georgia's law cannot go into effect until the Eleventh Circuit rules on this appeal.

Governor Kemp Signs House Bill 481, the LIFE Act
Source: Office of Governor Brian Kemp

Georgia Democrats have signaled they will challenge the LIFE Act. State Senator Jen Jordan, for example, who won her primary to challenge Attorney General Chris Carr for Georgia's top law job in Georgia in May, announced she would file a lawsuit in Georgia's state courts to challenge an abortion ban based on Georgia's constitution. While overturning *Roe* would clear any hurdles under the federal constitution, states are generally allowed to provide more constitutional protections under their state constitutions. For example, in 1998 in *Powell v. State*, the Supreme Court of Georgia found that laws criminalizing consensual "sodomy" violated the right to privacy found in Georgia's constitution,[6] five years before a sharply divided United States Supreme Court would find the same under the federal constitution in *Lawrence v. Texas*. In deciding *Powell*, Georgia's Supreme Court looked to a 1905 opinion that enshrined Georgia's liberty of privacy.[7] Pro-choice advocates have signaled they will use this same precedent to challenge the LIFE Act. This right, however, only endorses the "right to be left alone so long as one was not interfering with the rights of other individuals or of the public." While that right seems to squarely cover consensual sex acts in one's bedroom, it does raise significant questions related to the rights of the unborn child. Challenging abortion laws under Georgia's constitutional right to privacy would likely require a different analysis than *Roe*, *Doe*, and *Casey* because Georgia's Supreme Court may be required to weigh the mother's right to privacy against the rights of her unborn child.

Finally, it is important to note that *Dobbs* is a limited opinion that does not implicate any other substantive due process rights, such as the right to marriage for all or the right to engage in consensual sex acts, and simply allows the states to find their own balance between the rights of mothers and unborn children. As noted by Justice Alito's opinion, at the time of *Roe*, 30 states still prohibited abortions at all stages, but about a third of states had liberalized their laws through their political processes in the years before the decision. By striking down the abortion laws in every state, *Roe* stopped the laboratories of democracy from finding that balance. Georgia, as well as the other 49 states, will have to get back to work to find that important balance. -*BL*

Health and Human Services

Georgia at a Crossrads: The Effect of Federal Abortion Laws on Family Planning Options for Georgians

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The term *abortion rights* invokes a visceral reaction in most people. And while these Federal rights have been in place for over 49 years, the Supreme Court's majority opinion in *Dobbs v. Jackson Women's Health Organization* removed any abortion rights by overturning *Roe* and *Casey*.[1] *Dobbs* returns the authority to regulate abortion to the people and their elected representatives. In Georgia, abortions will generally still be available until 20 weeks of pregnancy, as was the law prior to *Dobbs*.[2] However, this may not always be the case in Georgia, if the 11th Circuit Court of Appeals allows Georgia's ban on abortions after a detectable heartbeat pursuant to House Bill 481 to go into effect. Federal courts had enjoined HB 481 as, in their view, the bill, violated the rights given by *Roe*.[3] If the 11th Circuit does uphold the restrictions in HB 481,[4] then the question of what family planning options will be available in a post-*Roe* Georgia remains.

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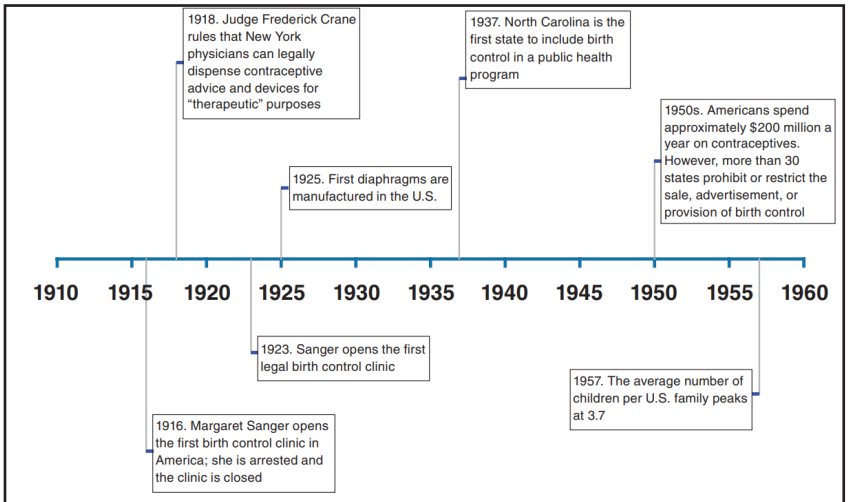


FIGURE 2-7 Milestones in family planning in the United States (Part 1 of 3, continues).
SOURCES: AGI, 2000; AMA, 2000; PBS, 2003.

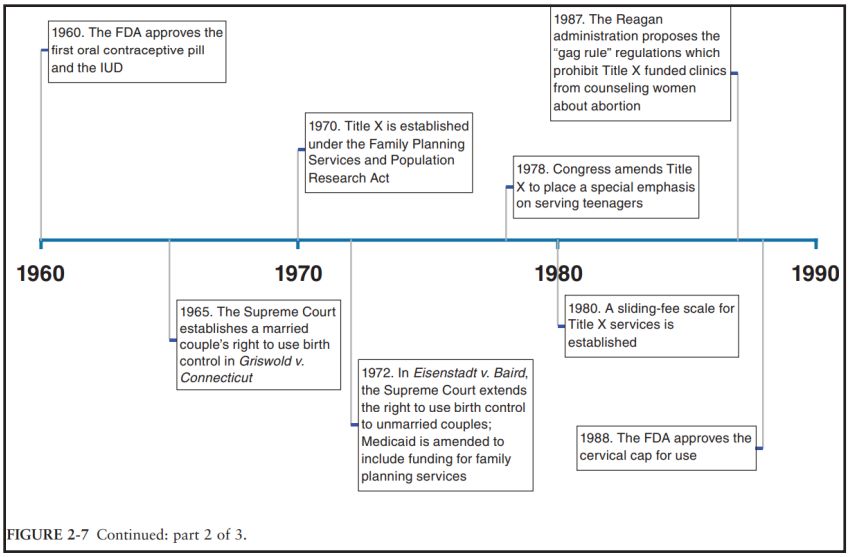


FIGURE 2-7 Continued: part 2 of 3.

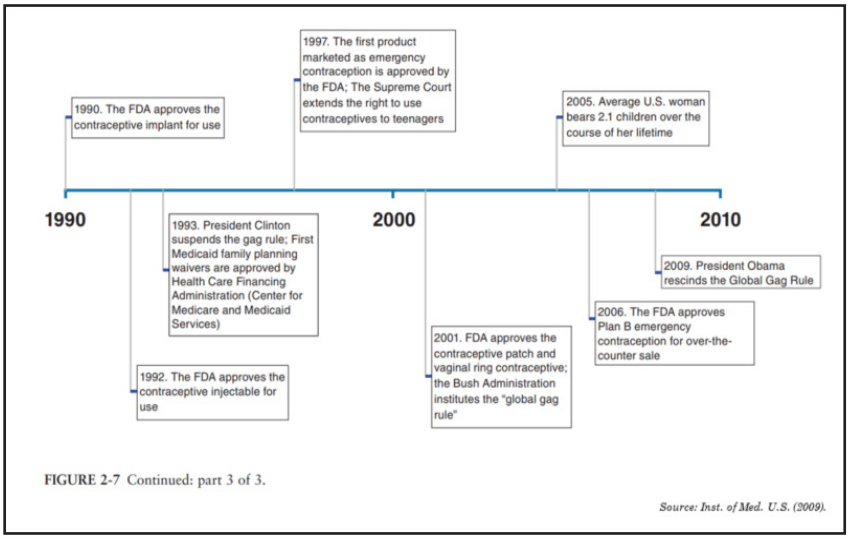


FIGURE 2-7 Continued: part 3 of 3.

Source: Inst. of Med. U.S. (2009).

History of Family Planning in the United States

A brief history of family planning in the U.S. will provide a backdrop to a post-*Roe* Georgia. The idea of family planning by individuals is a rather new concept that grew in popularity in the twentieth century.[5] The topic of birth control was not openly discussed in the U.S. with anti-obscenity laws such as the federal Comstock law which, included among other things, the prohibition on the discussion or distribution of contraceptives.[6] Additionally, the utilization of such family planning options ran contrary to people's moral and/or religious beliefs held by most of the population.

In 1935, Title V was enacted which authorized the creation of Maternal and Child Health programs. These programs were meant to promote and improve the health of mothers and children. In 1943, the Emergency Maternity and Infant Care Program was enacted to provide payment and services for pregnant wives and infants of armed forces families.[7]

In 1960, the U.S. Food and Drug Administration ("FDA") approved the birth control pill. Prior to the pill, individuals had to utilize other methods some more effective than others such as "condoms, diaphragms, withdrawal, and the rhythm method."[8] In 1964, President Lyndon B. Johnson helped fund the first federal family planning grants through the Office of Economic Opportunity. By the 1970s, the pill was adopted by nearly 6 million women in the U.S.[9]

In 1970, Congress enacted Title X under the Public Health Service Act. Title X called for the establishment of a grant program for family planning services, training, research, and informational and educational materials. Additionally, the program further aimed to decrease the adverse health and financial effects on children, women, and their families by encouraging family planning. In 1972, Congress amended Medicaid programs "requir[ing] all state Medicaid programs to cover family planning services and established two additional Medicaid provisions intended to improve access to such services."[10]

After these major pieces of legislation, changes to family planning options have occurred when the FDA approves another birth control medicine or device including emergency contraception.

Family Planning Options Post-*Dobbs* Case

Below are various family planning options, how they work, and whether the *Dobbs* case and HB 481 would affect these options.

Birth Control

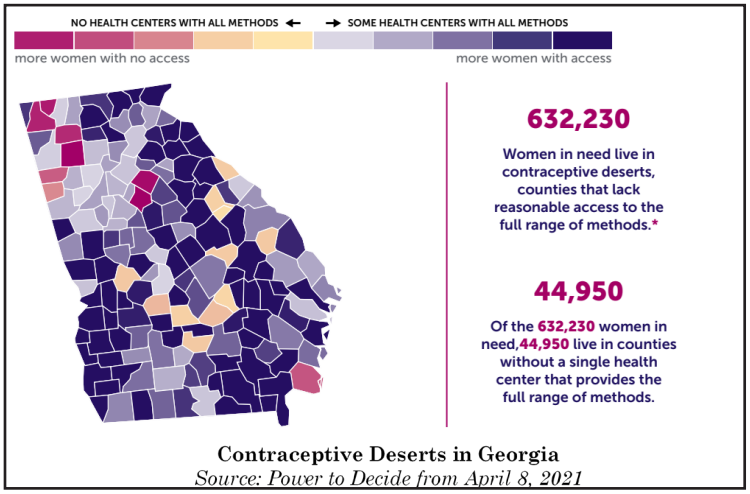
According to the FDA there are five major categories of medicines and devices for birth control. They include permanent sterilization, long-acting reversible contraceptives ("LARC"), contraceptive injections, short-acting hormonal methods, and barrier methods.

Permanent sterilization is available for men in the form of vasectomies and women through trans-abdominal surgical sterilization. Both procedures are intended to render an adult incapable of bearing offspring, but differ in how they achieve that goal. A vasectomy blocks a man's vas deferens and stops sperm from leaving a man's testicles. A trans-abdominal surgical sterilization can be accomplished in different methods including by tying and cutting the fallopian tubes (tubal ligation); sealing the tubes with instruments such as clips, claps, rings, or using an instrument with an electrical current; or removing a piece of the fallopian tubes.

LARC are intrauterine devices, commonly referred to as IUDs, and come in three major types. The copper IUD is a T-shaped device that prevents sperm from reaching the egg, from fertilizing the egg, and may prevent an egg from implanting into the womb. The hormonal IUD includes progestin and is similar to the copper IUD except that it contains progestin which may thicken the mucus of the cervix (this makes it harder for sperm to reach the egg to fertilize) and thins the lining of the uterus. The implantable rod is a thin rod that contains progestin which is placed under the skin on the inside of your upper arm. The rod prevents pregnancies by stopping the ovaries from releasing an egg and thickens the cervical mucus.

The contraception injection, also known as a Depo-Provera, is an injection of progestin given every three months either in the muscle or under the skin. The Depo-Provera is similar to the IUD rod as it stops the ovaries from releasing the egg and thickens the cervical mucus similar to the rod.

Short acting hormonal methods come in the form of birth control pills, patches, or vaginal rings. The pill stops the ovaries from releasing an egg and thickens the cervical mucus. The pill must also be taken on a daily basis. The patch is worn on the skin on or near the lower abdomen, buttocks, upper arm, or upper back. The patch also stops the ovaries from releasing an egg and thickens the cervical mucus. The vaginal contraceptive ring is a flexible ring placed into the vagina for three weeks. The ring, like the patch and pill, also stops the ovaries from releasing an egg and thickens the cervical mucus.



Contraceptive Deserts in Georgia
Source: Power to Decide from April 8, 2021

The barrier method blocks the sperm from reaching the egg. Barrier methods include a diaphragm with spermicide, sponge with spermicide, cervical cap with spermicide, male condom, female condom, and spermicide on its own.

These various birth control options discussed above aim to block the sperm and egg from meeting during the beginning stages of natural conception and thus, resulting in stopping unwanted pregnancies from occurring. As HB 481 only bans abortions after a human heartbeat is detectable, and these methods prevent a fetus from resulting at all, none of these birth control options would be affected by the 11th Circuit upholding HB 481. Nor does the ending of Federal abortion rights affect these birth control options.

Emergency Contraception

Emergency contraception ("EC") may be used if a woman does not use birth control or if their regular birth control fails. There are two categories of EC pills approved by the FDA. They provide a concentrated dose of progestin which inhibits or delays ovulation. However, this pill will not work if a woman is already pregnant. Emergency contraception is not intended to be used as a regular form of birth control, and emergency contraception methods should not be confused with the abortion pill.

Levonorgestrel commonly known as the morning after pill with Brand names such as Plan B One Step, Take Action, My Way, Option 2, Preventeza, AfterPill, My Choice, Aftera, EContra, and others. Levonorgestrel stops the release of an egg from the ovary. It may also prevent fertilization of the egg or prevent the egg from implantation in the uterus. There are two options for Levonorgestrel: option 1 is a one pill version over the counter ("OTC") and option 2 is a two pill version OTC for those who are 17 years old or older. Levonorgestrel is most effective when taken as soon as possible within 72 hours after unprotected sex or birth control failure. According to the FDA, both the 1-pill and 2-pill options are equally safe and effective. However, the morning-after pills do not end a pregnancy that has implanted.

Ulipristal Acetate as known as Ella is a prescription only emergency contraception pill that blocks the hormone progesterone. Ella stops or delays the ovaries from releasing an egg. Ella may also change the lining of the uterus to affect an egg's ability to implant. Ella is most effective when taken as soon as possible within 120 hours after unprotected sex or birth control failure.

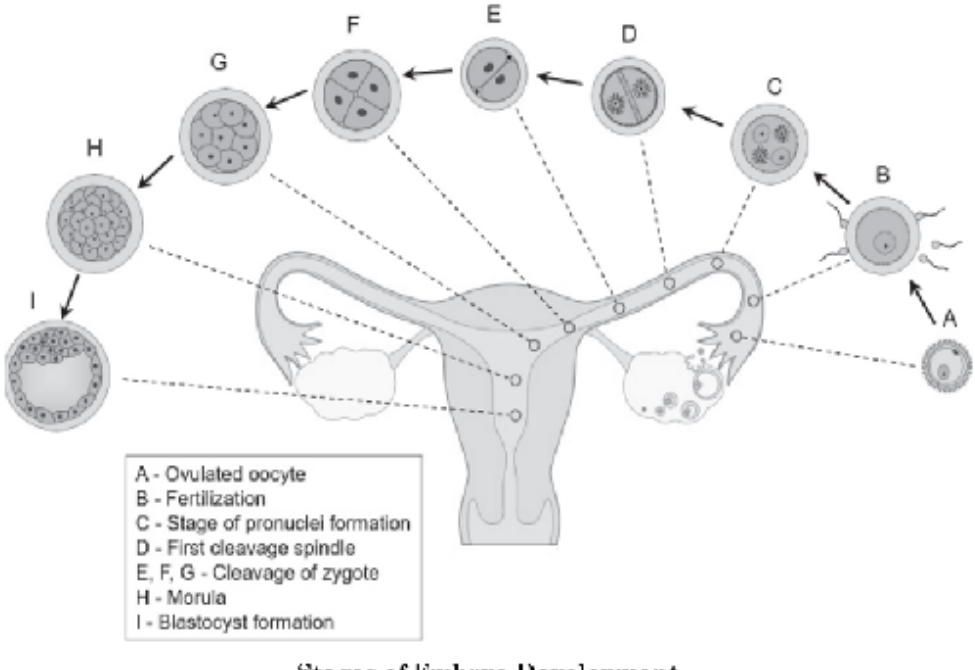
ECs work similarly to birth control in the sense that they try to stop an egg and sperm from meeting. Additionally, ECs further prevent a fertilized egg from implanting in the womb. However, if an egg is already implemented, then an EC will not be effective to stop a pregnancy. Similar to birth control, as these methods must be employed before there would be a chance of a human heartbeat, it is unlikely HB 481 would affect a woman's access to these options. Nor does the ending of Federal abortion rights affect ECs.

Assisted Reproductive Technologies

According to the Centers for Disease Control and Preventions, ART refers to fertility treatments and procedures where either eggs or embryos are handled. ART techniques involve the manipulation of eggs, sperm, or embryos to increase the likelihood of a successful pregnancy. There are several types of ART producers such as vitro fertilization-embryo transfer ("IVF"), gamete intrafallopian transfer ("GIFT"), zygote intrafallopian transfer ("ZIFT"), pronuclear stage tubal transfer ("PROST"), and frozen embryo transfer ("FET").

These techniques also apply to oocyte donation (commonly known as the process of egg donation) and gestational carriers (refers to a woman who carries and delivers a child for another couple or individual when the woman does not have any biological connection to the child, not to be confused with a surrogate which is where the woman who carries and delivers a child has a biological connection to the child).[11] ART procedures generally involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman.[12]

IVF happens when a man's sperm and a woman's eggs are combined outside of the body in a laboratory dish. One or more fertilized eggs ("embryos") may be transferred into the woman's uterus, where they may implant in the uterine lining and develop. Excess embryos may be cryopreserved (frozen) for future use. IVF is used to treat many causes of infertility, such as endometriosis and male factor, or when a couple's infertility is unexplained. The basic steps in an IVF treatment cycle are ovarian stimulation, egg retrieval, fertilization, embryo culture, and embryo transfer. IVF may be performed with a couple's own eggs and sperm or with donor eggs and sperm, or both.



Stages of Embryo Development
Source: American Society for Reproductive Medicine

GIFT is similar to IVF except the gametes (egg and sperm) are transferred to the woman's fallopian tubes rather than her uterus, and fertilization takes place in the tubes rather than in the lab. Another difference between the two is that laparoscopy surgery is used for the GIFT process which transfers the gametes to the fallopian tubes. The GIFT procedure is only an option for women who have normal fallopian tubes. One limitation of GIFT is that fertilization cannot be confirmed as with IVF. As there is no IVF procedure, a person does not have to choose which embryo to transfer.

ZIFT is a combination of IVF and GIFT. Specialists stimulate and collect the eggs using IVF methods and mix the eggs with sperm in the lab before returning fertilized eggs or zygotes to the fallopian tubes.[13] The ZIFT procedure also requires a laparoscopy surgery.

PROST is similar to ZIFT but involves the transfer of a fertilized egg to the fallopian tube before cell division occurs.

FET involves thawing previously IVF frozen embryos and inserting them into a person's uterus. Under this procedure, a woman undergoes the standard IVF procedure, but instead of transferring "fresh" embryos into the uterus they use frozen embryos from a previous cycle. FET is often done to help the woman recover from her current IVF cycle and reduce the effect of desynchronization.

Under most ART processes the fertilization of the sperm and egg occurs outside the womb. These embryos remain outside the body until intentionally placed within the female reproductive system. Similar to the birth control options and ECs, ART processes occur before there would be a detectable human heartbeat; thus, it is unlikely that HB 481 would affect a woman's access to these options. Nor does the annulment of Federal abortion rights affect ART processes.

Conclusion

The *Dobbs* case overturning *Roe* and *Casey* may appear to change family planning options. However, this change in Federal abortion laws will not have the same immediate effect on common family planning options such as birth control, emergency contraception, or assisted reproductive technologies. Similarly, if the 11th Circuit decides to uphold HB 481, these same options will still be available for Georgians. *-JH*

Endnotes

Leaks and Lives in the Balance: Abortion after Dobbs

1 *Roe v. Wade,* 93 S.Ct. 705 (1973).
2 *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 112 S.Ct. 2791 (1992).
3 *Doe v. Bolton,* 93 S.Ct. 739 (1973).
4 *See e.g. June Medical Services L.L.C. v. Russo*, ___ U.S. ___, 140 S.Ct. 2103, 2120 (2020) (citing *Doe* as precedent to strike down abortion requirements allegedly passed as health and safety regulations as unduly burdensome).
5 *Sistersong Women of Color Reproductive Justice Collective v. Kemp,* 472 F.Supp.3d. 1297 (2020).
6 *Powell v. State*, 270 Ga. 327 (1998).
7 *See Pavesich v. State*, 122 Ga. 190 (1905).

Georgia at a Crossrads: The Effect of Federal Abortion Laws on Family Planning Options for Georgians

1 *See generally Dobbs v. Jackson Women's Health Organization,* No. 19-1392, slip op. (U.S. June 24, 2022); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa., v. Casey*, 50 U.S. 833 (1992).
2 *See* O.C.G.A. § 16-12-141.
3 *See generally Sistersong Women of Color Reproductive Justice Collective v. Kemp,* 472 F.Supp.3d. 1297 (2020).
4 HB 481 amends O.C.G.A. § 1-2-1, to define a natural person as any human being including an unborn child. The bill further defines an unborn child is a member of the species Homo sapiens at any stage of development who is carried in the womb. Additionally, any natural person, including an unborn child with a detectable human heartbeat, must be included in population based determinations unless otherwise provided by law. HB 481 further defines a detectable human heartbeat to mean an embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac.
5 Inst. of Med. U.S. Comm. on a Comprehensive Rev. of the HHS Office of Fam. Plan. Title X Program, A REVIEW OF THE HHS FAMILY PLANNING PROGRAM: MISSION, MANAGEMENT, AND MEASUREMENT OF RESULTS 29 (Adrienne Stith Butler et al. eds., 2009), https://www.ncbi.nlm.nih.gov/books/NBK215219/.
6 In *Eisenstadt v. Baird,* 405 U.S. 438 (1972), the Supreme Court found these laws to be unconstitutional.
7 Ins. of Med. U.S., at 42.
8 *Id.* at 42.
9 *Id.* at 43.
10 *Id.* at 44.
11 ART may be utilized when other treatments (*e.g.,* intrauterine insemination) have not been successful or when there is severe male factor infertility, severe endometriosis or tubal obstruction.
12 ART does not include treatments in which only sperm are handled such as intrauterine or artificial insemination. Additionally, ART does not include procedures where a woman takes medicine only to stimulate egg production without the intention of having eggs retrieved.
13 ZIFT is a technique that differs from GIFT in that fertilization takes place in the lab rather than the fallopian tube. However, ZIFT is similar to GIFT in that the fertilized egg is transferred to the tube rather than the uterus.

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