

A post-Roe Idaho: the impact of *Dobbs v. Jackson Women's Health Organization* on Idaho's abortion laws

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The views expressed in this presentation are my own; they do not reflect the views of the Attorney General or the Office of the Attorney General

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To know your future, you must know your past.

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1864 to 1973

- Act of Feb. 4, 1864, ch. IV, § 42, 1863-64 Idaho (Terr.) Laws 443, repealed and reenacted by Act of Dec. 21, 1864, ch. III, Pt. IV, § 42, 1864 Idaho (Terr.) Laws 305, reenacted by Act of Jan. 14, 1875, ch. IV, § 42, 1874 Idaho (Terr.) Laws 328
 - Sec. 42. "[E]very person who shall administer or cause to be administered, or taken, any medicinal substance, or shall use or cause to be used, any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the territorial prison for a term not less than two years, nor more than five years: *Provided*, That no physician shall be effected by the last clause of this section, who in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."
- *State v. Alcorn*, 7 Idaho 599, 64 P. 1014 (1901)
 - affirming a conviction for manslaughter resulting from the performance of an abortion and the death of a pregnant woman when there was evidence that the woman believed she had been pregnant for a little over two months, distinguishing Idaho's states from common law, where an abortion could not be committed prior to quickening, and describing abortion as violating "decency, the best interests of society, the divine law, the law of nature[, and] the criminal statutes of this state."
- Idaho Rev. Code §§ 17-1810, 17-1811 (1932), recodified at Idaho Code Ann. §§ 18-601, 18-602 (1947)
 - 17-1810. Abortion-Procurement Of. Every person who provides, supplies or administers to, any pregnant woman, or procures any such woman to take any medicine or drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years.
 - 17-1811. Abortion-Submitting to. Every woman who solicits of any person any medicine, drug or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years.

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Roe v. Wade, 410 U.S. 113 (1973)

- U.S. Supreme Court held that the U.S. Constitution contained a right to abortion that stemmed from a right to privacy, but did not ground the right in any specific constitutional provision
- Created a trimester framework to govern the regulation of abortions
 - **1st trimester:** woman's decision to terminate her pregnancy in the first trimester must be left to the medical judgment of the pregnant woman's attending physician.
 - **2nd trimester:** Between, approximately, the end of the first trimester and the end of the second trimester, the State could regulate abortion in ways that were reasonably related to preserving maternal health.
 - **3rd trimester:** once the fetus reaches the point of viability, the State can proscribe abortions, except when necessary to preserve the life or health of the mother

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Idaho Reacts to Roe

- Act of March 13, 1973, ch. 197, § 2, 1973 Idaho Sess. Laws 443
 - Section 1. The supreme court of the United States having ruled that the several states lack the power to prohibit the practice of abortion or the commission thereof in the fashion previously prescribed by the criminal code of this state, and having specifically stricken down as violative of the constitutional right to privacy of the pregnant mother, criminal and related abortion statutes of the states of Georgia and Texas but reserving to the state the power to provide some standards and restrictions if they deem it appropriate to do so, and it appearing that, in the event of the failure of this state to enact legislation regulating and proscribing abortion under such circumstances as it is within the power of the state so to regulate and proscribe, there is an immediate danger of widespread and undesirable abortion practices within the state, the legislature deems it necessary and in the public interest to provide standards and regulations and to define crimes with respect to the general subject of abortion in the interest of fulfilling voids and resolving the ambiguities generated by the said recent decisions in the Texas and Georgia cases, and in the furtherance and preservation of the public policy of the state in such matters. Without condoning or approving abortion or the liberalization of abortion laws generally, nonetheless by this act the legislature of the state of Idaho does express the policy of the state to regulate and to prescribe the standard with respect to the type of judgment, practice and conduct that is implicit in the performance of the abortions or the submission thereto.
 - Sections 2-11: the underpinnings of our current Idaho Code, which regulated the performance of abortions in a way that was consistent with Roe's trimester framework
 - Sections 14 through 16: trigger laws that would revive the criminal prohibitions on abortion except necessary to preserve the life of the pregnant woman (these trigger laws were repealed in the early 90s)

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Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)

- Upheld *Roe* under the doctrine of *stare decisis*, but replaced the trimester framework
- *Casey's* standard for reviewing abortion regulations
 - prior to viability, the state may regulate abortions, including to promote its profound interest in potential life, as long as it does not impose an undue burden on a woman's ability to choose an abortion
 - Subsequent to viability, the State may proscribe abortion, except where it is necessary to preserve the life or health of the mother

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Idaho Revisits Trigger Laws

- 2020---S. 1385 (now I.C. §18-622)
 - Would criminally prohibit abortion and attempted abortion, with 3 affirmative defenses (life of the mother, reported rape, reported incest)
 - Triggered by: the issuance of the judgment in any decision of the United States supreme court that restores to the states their authority to prohibit abortion or adoption of an amendment to the U.S. Constitution that restores to the states their authority to prohibit abortion.
- 2021—H. 366 (now Chapter 88, Title 18)
 - Would criminally prohibit an abortion and attempted abortion after a fetal heartbeat is detected except in the case of a medical emergency, reported rape, or reported incest
 - Triggered by: the issuance of the judgment in any U.S. appellate court case in which the appellate court upholds a restriction or ban on abortion for a preborn child because a detectable heartbeat is present on the grounds that such restriction or ban does not violate the U.S. Constitution

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Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022)

- Overruled *Roe* and *Casey* as wrongly decided
 - Abortion is not inherent in the nation's concept of ordered liberty
 - At the time the Fourteenth Amendment was adopted, ¼ of the states criminally prohibited abortion
 - No state or federal court had recognized such a right until a few years before *Roe* was handed down
 - No state constitution protected such a right
 - Common law did not endorse abortion-it was criminally prohibited at various stages
 - Abortion cannot be said to be part of a broader privacy or autonomy right because it destroys preborn life
 - The impacts of the absence of an abortion right on women are policy arguments that the Court cannot consider
 - *Stare decisis* did not compel retaining *Roe* and *Casey* because *Roe* and *Casey*'s error was highly damaging, the reasoning was weak, the undue burden test was not workable, the decision distorted other areas of law, and the reliance interests engendered by the decision could not be considered by the Court
- The Equal Protection Clause does not protect a right to abortion
- Applied rational basis review to Mississippi's ban on abortions at 15 weeks gestational age
 - Legitimate state interests:
 - respect for and preservation of prenatal life at all stages of development;
 - the protection of maternal health and safety;
 - the elimination of particularly gruesome or barbaric medical procedures;
 - the preservation of the integrity of the medical profession;
 - the mitigation of fetal pain;
 - and the prevention of discrimination on the basis of race, sex, or disability
 - Accepted the Mississippi legislature's finding that a dilation and evacuation abortion was a dangerous and barbaric practice to conclude that the state's fifteen-week abortion ban, with few exceptions, was rationally supported by a legitimate state interest

The future is now.

Immediate impact of *Dobbs* on Idaho

- Idaho Code § 18-622 goes into effect on 8/25
 - 30 days from the issuance of the judgment in *Dobbs*
- Idaho Code § 18-8805 goes into effect on 8/19
 - Eleventh Circuit's decision in *SisterSong Women of Color Reproductive Justice Collective v. Governor of Georgia*, -- F.4th ---, 2022 WL 2824904 (11th Cir. July 20, 2022) (No. 20-13024), which upheld a Georgia law that restricted the performance of abortions after a fetal heartbeat was detected based on *Dobbs*, triggered Idaho Code § 18-8805
- Idaho Supreme Court is revisiting the stay it entered of Idaho Code § 18-8807 (S. 1309—amended the Fetal Heartbeat Child Protection Act (“Heartbeat Act”) to create a civil action against health care providers for abortions performed after a fetal heartbeat is detected unless the abortion falls within an exception)
- Previously invalidated laws that were invalidated solely on the grounds that they conflicted with *Roe* and *Casey* have sprung back into effect
 - Chapter 5, Title 18—prohibiting abortions (as defined in that chapter) after 20 weeks gestational age except in limited circumstances
 - 18-608(2)—requiring second trimester abortions to be performed in hospitals

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How do the two criminal prohibitions fit together?

Idaho Code § 18-622	Idaho Code § 18-8804
No abortions except (affirmative defenses)	No abortions after a fetal heartbeat is detected (about 6 weeks gestational age) except
Physician determined, in good faith medical judgment, based on the facts known to the physician at the time, abortion was necessary to prevent the death of the mother, except suicide	Medical emergency (condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman so as to necessitate the immediate abortion to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function)
Reported rape with copy to doctor	Reported rape with copy to doctor
Reported incest with copy to doctor	Reported incest with copy to doctor
All exceptions—must be performed by doctor and performed in the manner that in his or her good faith medical judgment based on facts known at the time, provided the best opportunity for the unborn child to survive unless, in his or her good faith medical judgment, would have posed a greater risk of the death of the pregnant woman	I.C. § 18-608A requires abortion to be performed by a physician
	I.C. § 18-8805: (2) and (3) criminal and licensing penalties for violations (4) nothing in this section shall be construed to conflict with the effectiveness of section 18-622, Idaho Code, following the occurrence of the circumstances described in that section. In the event both this section and section 18-622, Idaho Code, are enforceable, section 18-622, Idaho Code, shall supersede this section.

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So what is the law?

- Right now, the law governing abortion in Idaho is largely unchanged EXCEPT
 - abortions are prohibited after 20 weeks gestational age (except if abortion is necessary to avert death or avert death or there is a risk of substantial and irreversible physical impairment of a major bodily function or if necessary to preserve the life of an unborn child)
 - and second trimester abortions must be performed in a hospital
- Barring court action, starting on 8/19, providers must check for a fetal heartbeat before performing an abortion and abortions will be criminally prohibited in Idaho after a fetal heartbeat is detected unless there is a medical emergency or in cases of reported rape or incest where the report is given to the provider
- Barring court action, starting on 8/25, all abortions are criminally prohibited except when necessary in the physician's good faith determination to save the life of the mother, unless the risk of death is suicide, or in cases of reported rape or incest. Abortions within these exception must be performed in the manner that allows the preborn child the best chance to survive in the physician's good faith judgment, unless this would cause a greater risk of death to the mother.

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Stay Tuned

- In three original actions currently pending before the Idaho Supreme Court, the petitioners have asked the Court to first stay, and then strike down as unconstitutional, Idaho Code §§ 18-622, 18-8805, and 18-8807
- In *USA v. Idaho*, the federal government is arguing that the Emergency Treatment and Labor Act, 42 U.S.C. § 1395dd preempts Idaho Code § 18-622. The federal government seeks a declaratory judgment that Idaho Code § 18-622 is preempted to the extent that it conflicts with EMTALA.
 - EMTALA requires a hospital that receives Medicaid funds to provide a person who presents at an emergency department with an emergency medical condition to provide immediate stabilizing treatment before transferring or discharging the patient.
- The Idaho Supreme Court has been asked to find a right to abortion in the Idaho Constitution and has yet to rule on the issue.
- Any laws enacted by the Legislature governing abortion will be scrutinized under rational basis review, not the undue burden standard, unless the Idaho Supreme Court finds a right to abortion under the Idaho Constitution.

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