



2023

Fracture: Abortion Law and Politics After *Dobbs*

Rachel Rebouché
Temple University, Beasley School of Law

Mary Ziegler
University of California, Davis, School of Law

Recommended Citation

Rachel Rebouché & Mary Ziegler, *Fracture: Abortion Law and Politics After Dobbs*, 76 SMU L. REV. 27 (2023)

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FRACTURE: ABORTION LAW AND POLITICS AFTER *DOBBS*

Rachel Rebouché & Mary Ziegler*

ABSTRACT

Before Dobbs v. Jackson Women’s Health Organization—the case that overturned Roe v. Wade—almost everyone assumed that polarization would continue to define the abortion debate: once states could ban abortion before viability, half the country would criminalize it and half the country would not. The assumption has been that states would prohibit or permit abortion in ways that correspond to political beliefs. This Article demonstrates the limitations of that narrative both as a matter of history and in the current political moment. The future of abortion law and politics is one of fracture. Particularly for the anti-abortion movement, once-foundational priorities will come under pressure, shifting legislative and litigation strategies at the state and federal levels.

We map fracture along three critical fault lines: the legal recognition of fetal personhood, the definition of abortion, and the movement for reproductive justice. First, the majority opinion in Dobbs wields the rhetoric of neutrality to advance a singular understanding of history and tradition, defined by efforts to overturn Roe. We show how Dobbs charts a course for recognizing fetal personhood but with the costs of contestation and undermining the majority opinion’s purported neutrality. Significantly, Dobbs has exposed divisions in the anti-abortion movement, which has refashioned its support for fetal personhood in new state laws, raising questions about enforcement inside and outside state borders. Second, Dobbs incited a new struggle over what abortion entails, and both abortion supporters and opponents will contend with whether recent bans include fertility services or specific contraceptives as well as how bans apply when patients face medical emergencies. At the same time, because the nature of early abortion care has changed—available through mailed pills taken at home—abortion will be harder to police and stop. Third and finally, fracture within the abortion-rights movement will become more pronounced as the call for reproductive justice takes on different importance. The end of Roe will realign priorities in litigation, policymaking, and resource allocation around broader issues of social justice.

<https://doi.org/10.25172/smulr.76.1.8>

* Dean and James E. Beasley Professor of Law, Temple University School of Law; Martin Luther King, Jr. Professor of Law, UC Davis School of Law. The authors would like to thank Isabelle Aubrun and Emily Lawson for excellent research assistance.

The coming era will be defined by divergent views about who may speak on behalf of those neglected by the law and what it means to recognize the basic humanity of the most marginalized in the country. But as those views are tested for their political and practical feasibility, we should expect abortion antipathy as well as abortion support to be less tethered to party affiliation and more reflective of abortion care on the ground.

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I. INTRODUCTION

THE fate of *Roe v. Wade*—the landmark constitutional abortion decision—has long dominated the discussion of reproduction in the United States.¹ *Roe* loomed large during presidential elections and Supreme Court confirmations, consistently ranking as the best-recognized Supreme Court opinion.²

The contours of a country without *Roe* have been hard to imagine.³ *Roe*'s critics have suggested that the case's reversal might significantly de-escalate conflicts over abortion by allowing each state to reach a compro-

1. In *Roe v. Wade*, the Supreme Court struck down criminal laws prohibiting abortion as a violation of the right to privacy under the Fourteenth Amendment. See 410 U.S. 113, 164 (1973). In *Planned Parenthood v. Casey*, the Court upheld *Roe* but gave states greater discretion to restrict access to abortion so long as state restrictions did not place an "undue burden" on the right to an abortion. See 505 U.S. 833, 873–74 (1992). On June 24, 2022, the Court overturned both cases. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

2. See generally, MARY ZIEGLER, *Roe: The History of a National Obsession* ix–x (2023).

3. See Rachel Rebouché & Mary Ziegler, *There's No Knowing What Will Happen When Roe Falls*, ATLANTIC (Apr. 25, 2022), <https://www.theatlantic.com/ideas/archive/2022/04/abortion-access-states-scotus-roe-casey-reverse/629579> [https://perma.cc/JMU8-LXJY].

mise that suits its citizens.⁴ Since *Roe* imposed a single rule on a diverse nation, the theory went, allowing each state to find its own solution might undercut the sense of alienation fueling the anti-abortion movement. Some argued that reversing *Roe* would empower the Democratic Party, convincing voters to prioritize other interests over abortion.⁵

Others far more pessimistic seemed equally sure about where the nation's battles over reproduction are headed. They point to roughly half the states, which have pre-*Roe* bans or so-called trigger laws that criminalize most abortions.⁶ At the same time, over a dozen progressive states have codified a right to choose in their state constitutions and statutes,⁷ authorized non-physicians to offer the procedure,⁸ and pledged to offer financial support to people seeking terminations from out of state.⁹ These commentators suggest there will be two Americas after *Roe*: one where abortion is banned and punished and another where it is funded, accessible, and accepted.¹⁰

These arguments all share one feature: an assumption that eliminating *Roe*, for better or worse, would stabilize positions at the extremes and clarify the stakes for both sides of the abortion debate. It is easy to as-

4. See, e.g., Editorial Board, *Who's a Threat to Democracy?*, WALL ST. J. (May 6, 2022, 6:47 PM), <https://www.wsj.com/articles/whos-a-threat-to-democracy-supreme-court-abortion-roe-v-wade-ruth-sent-us-11651875512> [<https://perma.cc/68AD-KJXG>]; see also Dan McLaughlin, *Abortion and the Restoration of Democracy*, NAT'L REV. (Jun. 24, 2022, 8:52 PM), <https://www.nationalreview.com/corner/abortion-and-the-restoration-of-democracy> [<https://perma.cc/9A3X-E7Q6>]; Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 NYU L. REV. 1185, 1208 (1992) ("*Roe* . . . halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue.").

5. See Joan Williams, *The Case for Accepting Defeat on Roe*, N.Y. TIMES (Sept. 29, 2020), <https://www.nytimes.com/2020/09/29/opinion/sunday/abortion-ro-supreme-court.html> [<https://perma.cc/9X57-Z3VN>] (noting that centrist pro-life voters may vote Democrat when abortion isn't implicitly included in presidential ballots).

6. See Michael Ollove, *Critics Fear Abortion Bans Could Jeopardize Health of Pregnant Women*, STATELINE (June 22, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/06/22/critics-fear-abortion-bans-could-jeopardize-health-of-pregnant-women> [<https://perma.cc/W695-VRSS>] (citing Elizabeth Nash & Lauren Cross, *26 States are Certain or Likely to Ban Abortion Without Roe: Here's Which Ones and Why*, GUTTMACHER INST. (Apr. 19, 2021), <https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why> [<https://perma.cc/3LVF-LEXJ>], which lists the twenty-two states that had pre-*Roe* laws or constitutional amendments poised to ban abortion); Whitney Arey, Klaira Lerma, Anitra Beasley, Lorie Harper, Ghazaleh Moayed & Kari White, *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, 387 NEW ENGL. J. MED. 388, 388 (2022).

7. See *Abortion Policy in the Absence of Roe*, GUTTMACHER INST. (Jan. 1, 2023), <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-ro> [<https://perma.cc/AJY5-UHJG>].

8. See *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state> [<https://perma.cc/ESH6-ZYAB>].

9. See Claire Rush & Adam Beam, *Democrats Vow to Help Women Who Must Travel for Abortions*, A.P. NEWS (June 24, 2022), <https://apnews.com/article/abortion-us-supreme-court-health-oregon-california-5d1f758157dc463a407ec1b995be4844> [<https://perma.cc/6EJU-J3TH>].

10. See *20 Ways the Supreme Court Just Changed America*, POLITICO (June 25, 2022, 2:23 PM), <https://www.politico.com/news/magazine/2022/06/25/post-roe-america-roundup-00042377> [<https://perma.cc/35T8-2FBN>].

sume that *Roe* created the nation's divide on abortion. After its reversal, people across the political spectrum imagined that the course of the conflict would be more predictable, if not more polarized.¹¹

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe*, likewise assumes an end to the constitutional politics of abortion.¹² The majority opinion not only rejected the constitutional foundation for abortion rights laid out in *Roe* (and *Casey*), but also sought to foreclose future claims for constitutional protection.¹³

By illuminating the social-movement history of *Dobbs*, this Article argues that the future is much more fluid than anyone previously imagined, forcing both sides of the abortion debate to shift their approaches. *Dobbs* claims to adopt a neutral approach to constitutional interpretation, one that is "neither pro-life nor pro-choice," a pure method unsullied by popular opinion or movement-counter-movement mobilization.¹⁴ Understood against the history of movement struggles, however, *Dobbs* does not reject popular constitutional politics but remakes them. The opinion rejects any compromise, all while repackaging the anti-abortion movement's rhetoric and demands as the only legitimate, neutral interpretation of the constitutional past.¹⁵

We have little chance of stabilizing the abortion conflict. The anti-abortion movement, which views fetal personhood as the human rights issue of our era, does not want each state to set its own policies on abortion; instead, abortion opponents have long demanded a nationwide abortion ban.¹⁶ Abortion-rights supporters, on the other hand, influenced by the reproductive justice movement, see access to abortion and other reproductive health services as central to the equality, dignity, autonomy, and liberty of people who can get pregnant.¹⁷ They connect accessible abortion to a broader health-justice agenda that seeks to redistribute resources from the haves to the have-nots.¹⁸

The post-*Roe* era will be an age of fracture defined by different views—*within* the movements for and against abortion—about who may speak

11. *See id.*

12. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

13. *See id.* at 2284.

14. *Id.* at 2305 (Kavanaugh, J., concurring).

15. *See infra* Sections II.A–B.

16. *See, e.g.*, Protecting Pain-Capable Unborn Children from Late-Term Abortions Act, S. 4840 117th Cong. (2022) (proposing to criminalize abortions after fifteen weeks nationwide); Darragh Roche, *GOP Push for Nationwide Abortion Ban*, NEWSWEEK (July 15, 2022, 6:42 AM), <https://www.newsweek.com/gop-push-nationwide-abortion-ban-3-weeks-after-calling-it-state-issue-republicans-1724909> [<https://perma.cc/GZR8-L3PU>].

17. For an example of a reproductive justice response to *Dobbs*, see If/When/How Staff, *We Dissent: A Statement from If/When/How on Dobbs v. Jackson Women's Health Organization*, IF/WHEN/HOW (June 24, 2022), <https://www.ifwhenhow.org/statement-scotus-dobbs-jackson-abortion> [<https://perma.cc/GX8P-8AAP>].

18. Access to abortion is a major factor in a family's economic well-being. *See Abortion Rights Are Inextricably Tied to Social and Economic Justice Movements*, NAT'L WOMEN'S L. CTR. (May 23, 2022), <https://nwlc.org/resource/abortion-rights-are-inextricably-tied-to-social-and-economic-justice-movements> [<https://perma.cc/35U6-ENGF>].

on behalf of those neglected by the law and what it means to recognize the basic humanity of the most marginalized in the country.¹⁹ But as these positions come under pressure, tested for their political and practical feasibility in a post-*Roe* context, we should expect abortion antipathy to be less tethered to party affiliation and more dependent on the politics of place, reflecting abortion care on the ground. And we might expect the abortion-rights movement to align more closely with broader social justice advocacy. Drawing on contemporary data and extensive historical research, this Article offers a comprehensive treatment of the struggle over reproduction in our post-*Roe* country and an indispensable guide for those seeking to make sense of what happens next.

Part II begins with an analysis of *Dobbs* and demonstrates how the Court's majority opinion embodies the evolving strategies of the anti-abortion movement in the United States. Eliminating the floor of constitutional protection set by *Roe* will not reassure those who already felt disenfranchised by the Supreme Court and will galvanize a new generation of abortion-rights supporters. Erasing a constitutional right to choose will touch off a series of consequential battles between and within states and competing social movements. It will reconfigure the delivery of abortion and contraceptive services and raise novel questions about the definition of both birth control and human personhood. Courts will inevitably mediate these competing definitions and reshape the conflicts that arise when movements help enact policies to either expand or eliminate abortion care.

Part III focuses on the movement that has arguably set the agenda over reproduction over the past fifty years—the anti-abortion movement. The anti-abortion movement began as a struggle to recognize fetal personhood under the Fourteenth Amendment—and to write a particular vision of equality into constitutional law.²⁰ In the decades before *Roe*, anti-abortion activists argued that the Equal Protection Clause should focus not on a history of subordination or an immutable trait but instead on an individual's physical vulnerability or dependence on others. At first, some anti-abortion leaders suggested that this articulation of Equal Protection covered both people of color and the unborn.²¹ But over time, a different perspective won out. In this analysis, the anti-abortion movement argued that discrimination against innocent persons, especially in

19. See *infra* Part IV. In this way, the abortion-rights movement is increasingly aligned with scholarship and advocacy on the deep inequalities foundational to modern U.S. law. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784, 1786 (2020) (“In the United States and across the world, income inequality has returned to the levels of the Gilded Age.”).

20. See *infra* Section III.A.

21. See LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING* 87 (2012).

the womb, was worse than most forms of bias.²²

This idea of equality, which has only sharpened over time, limits power for persons not perceived to be fully innocent. And while many ideas of constitutional and political equality can be used to shrink the carceral state, the anti-abortion movement's vision of equality underwrote an expansion of state regulation and surveillance.²³ This history helps makes sense of contemporary struggles to write personhood into law—through wrongful death suits, fetal homicide laws, or a decision by the current Supreme Court. In this Article, we show why the movement, up to this point, failed to enshrine fetal personhood into law, but how anti-abortion advocates' post-*Roe* strategy will approach the project with renewed vigor, even while facing obstacles of political will and practical enforcement.²⁴

Part III then explores fractures *within* the anti-abortion movement.²⁵ Historically, in the decades before *Roe*, the near-total ban on abortion across the country made interstate travel or conduct less important, though people certainly traveled outside the United States or to more permissive jurisdictions domestically.²⁶ Leading up to *Casey*, anti-abortion groups focused on strategies to overturn *Roe* but not on model laws limiting out-of-state travel. National anti-abortion leaders argued that more lasting change would come if abortion foes lobbied each state to implement the strongest possible restrictions, pushing the limits of constitutionality and hoping courts would uphold them. But as the fight to reverse *Roe* stalled in the 2000s, anti-abortion leaders grew anxious that the courts would remain an obstacle and looked for ways to keep abortion providers out of federal court. First came laws allowing former patients to sue abortion providers, which allowed anti-abortion leaders to contend that providers lacked standing to bring suit in federal court.²⁷ This strategy reappeared in the passage of Texas's SB8 and laws like it.²⁸

With new restrictions came new enthusiasm to criminalize out-of-state conduct, reflecting changes to the anti-abortion movement in recent decades—especially in the wake of the destruction of an anti-abortion establishment that had centralized and disciplined the movement's

22. See generally, SARA DUBOW, *OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA* (2010) (discussing the anti-abortion movement's stance in favor of fetal rights).

23. See MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 15, 62–63 (2015) (detailing the arguments of the early anti-abortion movement).

24. See *infra* Section III.B.

25. *Id.*

26. See generally, JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* 120–46 (1978); see also LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973*, at 23 (1997) (discussing the prevalence of abortion pre-*Roe* and the areas like Chicago, Illinois, where abortions were especially common).

27. See Charles Rhodes & Howard Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187, 204–05, 222 (2022).

28. See *id.* at 190.

activities. The rise of so-called abortion abolitionists, once fringe players in a handful of states, will make possible the turn to criminalization.²⁹ Abolitionists, who argue that true equal treatment for fetal life requires the punishment of those who have abortions, have developed model legislation and made inroads in several states.³⁰

The push for criminal approaches and out-of-state bans reflects the changing nature of abortion access, at least in the first trimester of pregnancy.³¹ Over the decades since *Roe* was decided, abortion has been isolated to standalone clinics. Beginning in 2000, the U.S. Food and Drug Administration (FDA) approved the drug mifepristone to end a pregnancy.³² Clinics began offering medication abortion, a two-drug regimen of mifepristone and misoprostol. The FDA has revisited its regulation of medication abortion over the years, but until recently, it required medication abortion to be dispensed in person even though a patient could take the pills at home.³³ This requirement subjected medication abortion to the same barriers associated with in-clinic care. During the COVID-19 pandemic, however, a federal district court lifted that requirement in order to reduce patient-provider contact,³⁴ and the Agency ultimately removed the rule in December 2021.³⁵ Approved to end a pregnancy before ten weeks' gestation, abortion pills can now be mailed to patients directly, prompting the proliferation of virtual clinics that offer telehealth for medication abortion. Anti-abortion forces have turned their attention to medication abortion, but controlling the transit of pills across borders or in the mail is difficult.³⁶ Nevertheless, the anti-abortion movement is now focused on policing the distribution and use of abortion pills with implications for patients and providers alike. At the same time, abortion-supportive states are seeking to shield in-state abortion services from out-of-

29. See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 3–7 (1997) (providing an example of criminalization imposed on women in the context of combining birth and drugs); see also Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CAL. L. REV. 781, 830–32 (2014).

30. See *infra* Section III.A.

31. See *infra* Section III.B.

32. See Rachel Rebouché, David S. Cohen & Greer Donley, *The Coming Legal Battles Over Abortion Pills*, POLITICO (May 24, 2022, 2:45 PM), <https://www.politico.com/news/magazine/2022/05/24/coming-legal-battles-abortion-pills-00034558> [<https://perma.cc/2SW5-7XRP>].

33. See *id.*

34. *Am. Coll. of Obstetricians & Gynecologists v. FDA*, 472 F. Supp. 3d 183 (D. Md. 2020).

35. *Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, U.S. FOOD & DRUG ADMIN. (March 23, 2023), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation> [<https://perma.cc/8ULG-ZNWY>]; Rachel Rebouché, *Remote Reproductive Rights*, 100 AM. J.L. MED. 244, 244–45 (2022).

36. See David Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. (forthcoming 2024); Greer Donley, Rachel Rebouché & David Cohen, *Abortion Pills Will Change a Post-Roe World*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/opinion/abortion-pills-online-roe-v-wade.html> [<https://perma.cc/W6MF-EMW2>].

state attacks and to increase access to telehealth services.³⁷

Reflecting on evolving laws and access, Part IV examines the next frontier of abortion organizing on the back of *Dobbs*—namely, debates over the definition of abortion. The meaning of abortion, and its relationship to contraception, has been contested since the 1970s. At the time, the Catholic Church maintained its longstanding opposition to contraception, but the most powerful anti-abortion organizations distanced themselves from this stance to attract a more diverse group of supporters. Thus emerged an uneasy consensus about contraception—while religious leaders sometimes denounced it, it seemed far less contentious than abortion, even for the participants of the abortion wars.³⁸ In the five decades that followed, the anti-abortion movement redirected attention to what an abortion includes.³⁹ In the 1980s and 1990s, questions about access to mifepristone and new-to-market emergency contraceptives (ECs) exposed clashing definitions of abortion. At first, anti-abortion advocates argued that ECs and medication abortion would be “misused” as methods of birth control; abortion-rights supporters fired back with evidence to the contrary, both on the effect of ECs and the use of medication abortion.⁴⁰ By the late 1990s and early 2000s, anti-abortion groups adopted a different tack. Insisting that there was genuine uncertainty about which drugs caused abortion, anti-abortion leaders argued that everyone should resolve this question according to their own faith and beliefs rather than relying on scientific experts.⁴¹ Now, *Dobbs* will provide the permission for state definitions of abortion, and whether it includes ECs or IUDs, to inevitably expand.

Post-*Dobbs* conflicts will extend to infertility treatment or other drugs beyond abortion, regardless of whether states openly target birth control. Again, a recurring site of contestation will be what an abortion includes. Part IV discusses what previously ignored practices may attract the attention of zealous state ban enforcers. Embryos are routinely discarded in IVF for anomalies; moreover, patients undergoing IVF “selectively reduce” a pregnancy if more than one or two embryos attach to the uterine wall.⁴² Banning these procedures will upend fertility treatment and impinge on the profits of a billion-dollar industry. We briefly consider prac-

37. See Rebouché, Cohen & Donley, *supra* note 32.

38. See generally, LARA V. MARKS, *SEXUAL CHEMISTRY: A HISTORY OF THE CONTRACEPTIVE PILL* xiii–xvii (2011) (providing historical context surrounding the introduction of the contraceptive pill in the 1900s); SUSAN E. KLEPP, *REVOLUTIONARY CONCEPTIONS: WOMEN, FERTILITY, AND FAMILY LIMITATION IN AMERICA, 1760–1820*, at 13 (2009); Linda Gordon, *The Politics of Population: Birth Control and the Eugenics Movement*, 8 *RADICAL AM.* 61, 79–82 (1974) (discussing the changing perception around birth control).

39. See *infra* Section IV.A.

40. See Marlene Gerber Fried, *Reproductive Rights Activism in the Post-Roe Era*, 103 *AM. J. OF PUB. HEALTH* 10, 10–12 (2013).

41. See Gina Kolata, *U.S. Approves Abortion Pill; Drug Offers More Privacy, and Could Reshape Debate*, *N.Y. TIMES* (Sept. 29, 2000), <https://www.nytimes.com/2000/09/29/us/us-approves-abortion-pill-drug-offers-more-privacy-and-could-reshape-debate.html> [<https://perma.cc/XZM3-RKSV>].

42. See *infra* Section IV.A.

tices that will soon test the definitions of abortion and how those definitions are applied, such as the advance provision of abortion pills before a pregnancy is confirmed.⁴³ Similar questions will set the terms of the abortion debate and create both conflicts and unexpected alliances.

Part IV then surveys changes to clinical care and politics that will determine what anti-abortion or pro-abortion activists can accomplish. We explore the shifting market for abortion services, one defined not only by the absence of constitutional regulation but also by the commercialization of abortion medication and the increasing proportion of pill-based abortions. Changes to constitutional law have always shaped the delivery of abortion services: *Roe* sparked interest in a system that could quickly expand access, even as hospitals and providers remained reluctant to offer the procedure.⁴⁴ In the 1970s, this led to the proliferation of freestanding clinics; later developments in constitutional doctrine discouraged providers from offering procedures near the date of viability.⁴⁵ *Roe*'s reversal will encourage care by telehealth and the market for self-managed abortion. Without *Roe*, providers will have even more incentive to extend their reach; unlike the pre-*Roe* era, self-managed abortion with medication will increase.⁴⁶

The final Part concludes with the prospects for a future movement to restore a right to abortion. This Part begins by looking at the troubled history of the relationship between the movements for reproductive rights and justice. The pro-choice movement, which clung to a single-issue framing, argued from the 1970s onward that its fortunes would rise and fall depending on how large the “pro-choice majority” proved to be.⁴⁷ To create such a majority, the movement catered to the wishes of large donors and sought to appeal to ambivalent voters, often downplaying messages and strategies that would energize those already committed to abortion rights—or those most affected by abortion bans.⁴⁸ At the same time, disenchantment with the courts led larger pro-choice organizations to invest less in Supreme Court confirmations—particularly, in convincing voters to prioritize Supreme Court selections—and in pushing sympa-

43. Cohen, Donley & Rebouché, *supra* note 36.

44. See MARY ZIEGLER, *ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT* 83–87 (2020).

45. See Johanna Schoen, *Living Through Some Giant Change: The Establishment of Abortion Services*, 103 *AM. J. PUB. HEALTH* 416, 416–25 (2013).

46. See Yvonne Lindgren, *When Patients Are Their Own Doctors: Roe v. Wade in An Era of Self-Managed Care*, 107 *CORNELL L. REV.* 151, 223–28 (2022); Rachel Rebouché, *The Public Health Turn in Reproductive Rights*, 78 *WASH. & LEE L. REV.* 1355, 1383–86 (2021).

47. See generally, Iris Hampsink, *The Pro-Choice Movement: A Brief Ideological History of Abortion*, *DIGGIT MAG.* (Nov. 23, 2021), <https://www.diggmagazine.com/articles/pro-choice-movement-brief-ideological-history-abortion> [https://perma.cc/93T5-SHYR] (providing context about the evolution of the pro-choice movement in the 1970s).

48. See *infra* notes 350–351 and accompanying text; see generally, ALEXANDER SANGER, *BEYOND CHOICE: REPRODUCTIVE FREEDOM IN THE 21ST CENTURY* 45–46 (2005) (discussing how advancement in the medical field was a boon to the pro-choice movement in the 1970s).

thetic presidents to select more ideologically pure nominees.⁴⁹ These strategic choices distanced mainstream pro-choice groups from the people of color who founded the reproductive justice movement.⁵⁰

The divisions within the coalition supporting access to abortion have cast a shadow on its political and constitutional strategies. As such, we conclude by examining the possible priorities of a movement supportive of abortion in light of *Dobbs* and how those priorities are increasingly aligned with larger social and racial justice projects. We also explore the relationship of abortion care to messaging and strategies that address not only the political polarization of so-called culture-war issues but also reimagine collective values and investment that can root out causes of persistent inequality, such as maternal mortality or pregnancy discrimination. In other words, we examine the policies, laws, and actions that can fill the cracks in the coming age of fracture.

II. POPULAR CONSTITUTIONALISM IN AND AFTER *DOBBS*

In a decision long awaited by some but feared by many, *Dobbs* eliminated the constitutional right to choose abortion.⁵¹ *Dobbs* also previewed the approach to unenumerated rights taken by the Court's new majority; one, the majority claims, that is yoked to tradition and history.⁵² Some commentators describe *Dobbs* as a sign that, in the current Court, "[o]riginalism [r]ules";⁵³ others praise the Court for resisting the "political pressure, [and] even the legal pressure, to cave to certain segments of public opinion."⁵⁴ Others see *Dobbs* as a fundamentally political project, an opinion that "ignores and distorts historical evidence to emphasize continuity in state control over reproduction."⁵⁵ Still others suggest that

49. See *infra* notes 350–351 and accompanying text; see generally, Deepa Shivaram, *The Movement Against Abortion Rights is Nearing Its Apex. But It Began Way Before Roe*, NPR (May 4, 2022), <https://www.npr.org/2022/05/04/1096154028/the-movement-against-abortion-rights-is-nearing-its-apex-but-it-began-way-before> [<https://perma.cc/NB2K-SG35>] (explaining how the pro-life movement, in contrast, successfully invested in judicial nominees).

50. See *infra* Part V. See also Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 327–52 (2013); Kimala Price, *What Is Reproductive Justice? How Women of Color Activists Are Redefining the Pro-Choice Paradigm*, 10 MERIDIANS 42, 46–47 (2010); Jael Silliman, Marlene Gerber Fried, Loretta Ross & Elena Gutiérrez, *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZING FOR REPRODUCTIVE JUSTICE* 1, 7–8 (2d ed. 2016).

51. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overruling *Roe* and *Casey* and holding that a right to an abortion is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty").

52. See *id.*

53. John Malcolm, *Grading the SCOTUS: Originalism Rules, and That's a Good Thing*, HERITAGE FOUND. (July 11, 2022), <https://www.heritage.org/courts/commentary/grading-the-scotus-originalism-rules-and-thats-good-thing> [<https://perma.cc/YT52-SNBB>].

54. Michael Stokes Paulsen, *The Magnificence of Dobbs*, PUB. DISCOURSE (June 26, 2022), <https://www.thepublicdiscourse.com/2022/06/83022> [<https://perma.cc/R2XN-WAG6>].

55. Deborah Dinner, *Originalism and the Misogynist Distortion of History in Dobbs*, LAW & HIST. REV.: THE DOCKET, <https://lawandhistoryreview.org/article/dr-deborah-dinner-originalism-and-the-misogynist-distortion-of-history-in-dobbs> [<https://perma.cc/X8ZS-35S4>].

Dobbs is not an originalist opinion at all. Steven Calabresi criticizes the Court for applying substantive due process,⁵⁶ while Lawrence Solum blasts the *Dobbs* majority as “living constitutionalism in its constitutional pluralist flavor from top to bottom.”⁵⁷

To make sense of these competing accounts, this Part begins by exploring how *Dobbs*’s originalism reflects and reinforces social-movement arguments forged in the decades since 1973. *Dobbs* presents history as straightforward, ignoring profound disagreements about our nation’s traditions on abortion in politics and academia.⁵⁸ In turning a blind eye to this scholarly divide, *Dobbs* stresses the work of scholars who rarely study history (and often do so only to criticize *Roe*).⁵⁹ The Court seizes on movement arguments about anti-democratic courts, judicial legitimacy, doctrinal distortion, the workability of precedent, and the roots of polarization in the United States.⁶⁰ If the Court presents *Dobbs* as a definitive guide to our nation’s history, it is better read as a product of our recent past and the complex movement–countermovement conflicts that shape law and public attitudes about abortion in this moment.

Yet we should not understand *Dobbs* as a simple exercise in what Reva Siegel has called democratic constitutionalism.⁶¹ In Siegel’s view, democratic constitutionalism involves mobilization, counter-mobilization, and compromise that “structures disagreement; it enables exercises of judicial review that can officially entrench new understandings of the Constitution as law—without immunizing them from renewed popular challenge.”⁶² At its essence, democratic constitutionalism is “a medium through which community in disagreement is forged.”⁶³ *Dobbs*, by contrast, seeks to shrink the community qualified to participate in constitutional politics. The *Dobbs* Court has no interest in public views of our Constitution or the kind of consensus that can come out of movement–countermovement conflict. Instead, *Dobbs* weaponizes the rhetoric of settlement and neutrality to delegitimize that very kind of compromise, excluding or ignoring altogether the constitutional visions of those with whom the conservative majority disagrees.

56. See Steven G. Calabresi, *The True Originalist Answer to Roe v. Wade*, WALL ST. J. (May 8, 2022, 12:38 PM), <https://www.wsj.com/articles/the-true-originalist-answer-to-ro-e-v-wade-11652027903> [<https://perma.cc/Z7ML-2Y2E>].

57. Lawrence Solum (@lsolum), TWITTER (May 5, 2022, 5:33 AM), <https://twitter.com/lsolum/status/1522162603291643904?s=20&t=ZXuCGy1afXDpkXFgCmeO9A> [<https://perma.cc/2N47-DWYP>].

58. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248–49 (2022); *id.* at 2317 (Breyer, J., dissenting).

59. See *id.* at 2255 (simplifying the complex history of abortion statutes in America’s past).

60. See *id.* at 2275–78.

61. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 193–94 (2008).

62. *Id.* at 193, 244.

63. *Id.* at 245.

A. HISTORY AND PRECEDENT

Justice Alito has long espoused originalism to separate constitutional interpretation from politics. In his *Obergefell v. Hodges* dissent, Alito complained about what he called a “perhaps irremediable corruption of our legal culture’s conception of constitutional interpretation.”⁶⁴ He later elaborated on these points. Without history and tradition constraining the Court’s understanding of liberty under the Fourteenth Amendment, he reasoned, there were no practical limits to what the Court might do: “[I]t raises questions of legitimacy, . . . because the more the Court does this sort of thing, the more the process of nomination and confirmation will become like an election. It will become like a political process.”⁶⁵

In *Dobbs*, Alito similarly presents an approach grounded in history and tradition as a way to save a damaged Court from politics.⁶⁶ The alternative, as represented by *Roe* and *Casey*, Alito writes, “imposes no clear restraints on what Justice White called the ‘exercise of raw judicial power.’”⁶⁷ The majority promises that its approach, tied to *Washington v. Glucksberg*, will make our constitutional politics more democratic by returning interpretive “authority to the people and their elected representatives.”⁶⁸ Justices Brett Kavanaugh and Clarence Thomas sound a similar note in their concurrences. Justice Kavanaugh concludes that an approach based on history and tradition reveals that, when it comes to abortion, “[t]he Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process.”⁶⁹

The twists and turns of the history set out in *Dobbs* suggest that our traditions are far more complex than the Court implies. The majority emphasizes that no court, treatise, or scholarly work identified a right to abortion before the 1960s; indeed, the majority concludes that “abortion had long been a *crime* in every single State.”⁷⁰ The Court begins with medieval authorities, surveying what it calls “the eminent common-law authorities,” and concluding that at least after quickening, the point at which fetal movement can be detected, abortion was criminalized.⁷¹ The majority also relies on a handful of scholarly works and early cases to support the argument that “the common law did not condone even pre[qu]ickening abortions.”⁷² *Dobbs* spends markedly less time on the tradi-

64. *Obergefell v. Hodges*, 576 U.S. 644, 742 (2015) (Alito, J., dissenting).

65. Adam J. White, *Justice Alito: Judicial Restraint Amidst the Court’s “Postmodern” Activism*, MANHATTAN INST.: WEEKLY STANDARD (July 20, 2015), <https://www.manhattan-institute.org/html/justice-alito-judicial-restraint-amidst-courts-postmodern-activism-6328.html> [<https://perma.cc/WZZ3-2YFM>] (transcribing an interview Justice Alito gave about his judicial philosophy).

66. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2244 (2022).

67. *Id.* at 2260 (citing *Roe v. Wade*, 410 U.S. 179, 222 (1973) (White, J., dissenting)).

68. *Id.* at 2284 (citing *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997)).

69. *Id.* at 2305 (Kavanaugh, J., concurring).

70. *Id.* at 2248 (majority opinion).

71. *Id.* at 2249.

72. *Id.* at 2250.

tion and history of the United States itself, only noting that manuals for justices of the peace, along with early American editions of Blackstone's *Commentaries*, include statements treating abortion as a crime.⁷³

It is puzzling for a Court expounding “our scheme of ordered liberty” to spend so little time on the history of the United States and so much on the views of authorities on abortion at a time when the definition of abortion was unsettled.⁷⁴ Historians have shown that, for centuries, the difference between ending a pregnancy and restoring a person's menstrual period was not well understood.⁷⁵ Historians also question how much we can glean from Alito's evidence that pre-quickening abortion was not condoned: many early English trials mention abortion only incidentally as part of trials for fornication or other forms of illicit sex.⁷⁶ Even Alito's reliance on Blackstone and other early common law authorities is strange, given that the *Commentaries* provided that life “begins in contemplation of law as soon as an infant is able to stir in the mother's womb.”⁷⁷

The Court concludes its lengthy discussion of the significance of quickening and the contour of early common law by suggesting that the early history is much less important than what was happening in the nineteenth century.⁷⁸ “[T]he vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy.”⁷⁹ Similarly, the Court tells us that the motives of those who passed such laws do not matter before delivering a lengthy defense of the very same motives.⁸⁰

The majority is particularly dismissive of the idea that any social movement could have significantly influenced the lawmakers who criminalized abortion in the nineteenth century.⁸¹ Amici in *Dobbs* outlined the well-chronicled history of the fight to prohibit abortion before quickening, one led by the then-recently founded American Medical Association (AMA).⁸² Historians have documented the model laws written by the AMA and the lobbying campaigns it conducted in state legislatures, local medical societies, and the media.⁸³ The motives that emerge from this history are unsurprisingly complicated: these activists argued that fetal

73. *See id.* at 2251.

74. *See id.* at 2246 (emphasis added).

75. *See* REAGAN, *supra* note 26, at 8.

76. *See* Carla Spivack, *To “Bring Down the Flowers”: The Cultural Context of Abortion Law in Early Modern England*, 14 WM. & MARY J. WOMEN & L. 107, 107–08, 131–33 (2007); FRANCES E. DOLAN, *DANGEROUS FAMILIARS: REPRESENTATIONS OF DOMESTIC CRIME IN ENGLAND, 1550–1700*, at 136 (1994).

77. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *125.

78. *See Dobbs*, 142 S. Ct. at 2252.

79. *Id.*

80. *See id.* at 2255–56.

81. *See id.*

82. *See* Brief for American Historical Association and Organization of American Historians as Amici Curiae Supporting Respondents at 2–4, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

83. *See, e.g.*, MOHR, *supra* note 26, at 122–99; REAGAN, *supra* note 26, at 23–30; JANET FARRELL BRODIE, *CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA* 143–87 (1993).

life deserved protection while worrying that legal abortion was leading to a decline in the nation's White population and women (especially women then perceived as White and Anglo-Saxon) abandoning their proper roles as wives and mothers.⁸⁴ The Court sees no complexity in this history at all, reasoning that those who banned abortion were "spurred by a sincere belief that abortion kills a human being."⁸⁵ Besides, the Court suggests, no social movement—even one with socially destructive motives—could exercise such influence over the law.⁸⁶ Are we to believe, the Court asks, "that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?"⁸⁷

The Court's view of the nineteenth-century campaign to criminalize abortion is especially ironic because *Dobbs* itself is so much a product of social-movement struggle. What can we understand about *Dobbs* if we look beyond the Court's opinion to the decades of popular constitutional struggle that came before the Court's decision? *Dobbs* itself invites this question by stressing that "Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly."⁸⁸ This appeal to popular constitutionalism makes sense in the context of an opinion that is responsive to, and borrows heavily from, conservative-movement constitutionalism.

Read against the backdrop of recent-movement struggles over abortion, *Dobbs*'s originalism operates not as a strategy to avoid constitutional politics but to fundamentally reorient them. Democratic constitutionalism, too, allows the Court to participate in and shape the broader public dialogue about the Constitution. The Court has long adopted understandings of the Constitution rooted in the back-and-forth, messy compromises that define social-movement battles over fundamental rights, all while leaving open the possibility that fights outside the Court could once again destabilize doctrine and produce new interpretations. This mode of reasoning is inherently inclusive—what Siegel calls community in and by disagreement.⁸⁹ When we look at *Dobbs* in the context of recent social-movement debate, we see that the Court is practicing a very different kind of popular constitutionalism.

B. FROM PERSONHOOD TO THE PROTECTION OF DEMOCRACY

The modern fight to reverse *Roe* began as a backup solution for an anti-abortion movement focused on the constitutional recognition of fetal

84. Brief for American Historical Association and Organization, *supra* note 82, at 21–22. The majority's proclaimed indifference to motive rings especially hollow in light of Justice Thomas's focus on historically problematic claims about the eugenic roots of the abortion-rights movement—claims favorably referenced by the majority. *Box v. Planned Parenthood of Indiana and Kentucky*, 139 S. Ct. 1780, 1782–84 (2019) (Thomas, J., concurring); *Dobbs*, 142 S. Ct. at 2257 n.42.

85. *Dobbs*, 142 S. Ct. at 2256.

86. *See id.*

87. *Id.*

88. *Id.* at 2242.

89. *See* Siegel, *supra* note 61, at 245.

personhood. The contemporary anti-abortion movement emerged in the 1960s when states began introducing modest abortion-law reforms, many of them based on the model adopted by the American Law Institute (ALI) in 1959 that created exceptions for health, dangerous fetal conditions, and rape and incest.⁹⁰ Activists mobilized to oppose state-level reform, many of them with ties to local Catholic dioceses.⁹¹ The Catholic Church had a standing arsenal of arguments against legal abortion but many of them sounded in religion rather than law and combined hostility to the termination of pregnancy with opposition to contraception.⁹²

Personhood became the rallying cry for those looking for a secular, constitutional explanation of why all abortions (with perhaps the exception of those needed to save the life of a pregnant person) should remain criminal.⁹³ Theorists like Robert Byrn, a professor at Fordham, and David Louisell, a Berkeley law professor, argued that the word “person” in the Fourteenth Amendment applied from the moment sperm fertilized an egg.⁹⁴ As a result, anti-abortion advocates suggested performing an abortion was broadly unconstitutional—a denial of the fetal person’s right to due process and equal protection.⁹⁵ This argument for personhood resonated with a growing social movement—one that would, by the early 1960s, include a generally socially conservative, White, middle-class, but otherwise varied group of Protestants, Mormons, Catholics, and other believers.⁹⁶

Roe devastated the anti-abortion movement not simply because the Supreme Court recognized a right to abortion, but also because the Court explicitly rejected the definition of personhood that had energized so many of the movement’s rank and file.⁹⁷ So it was no surprise that in the immediate aftermath of the decision, anti-abortion members of Congress, lawyers, academics, and grassroots activists rallied around a federal constitutional personhood amendment.⁹⁸ By August 1973, there were various proposals circulating in Congress, and anti-abortion lawyers were at work on a “unity amendment” of their own.⁹⁹

Some of the arguments that figure centrally in *Dobbs* emerged in the aftermath of the temporary failure of personhood strategies. For the bet-

90. Loren G. Stern, *Abortion: Reform and the Law*, 59 J. CRIM. L. & CRIMINOLOGY 84, 87 (1968).

91. See DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 30–120 (2016).

92. See *id.*

93. See *id.*; see also ZIEGLER, *supra* note 23, at 15, 62–63 (detailing the arguments of the early anti-abortion movement).

94. See Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 835–42 (1973); David W. Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 253 (1969).

95. See Byrn, *supra* note 94, at 835–42.

96. See Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 892 (2014).

97. See ZIEGLER, *supra* note 23, at 37–41.

98. See *id.*

99. See *id.*

ter part of a decade, the anti-abortion movement searched for allies in both political parties, but after 1980, Ronald Reagan and his supporters in the emerging Religious Right—from veteran political operative Paul Weyrich to megachurch leader Jerry Falwell—had identified the Republican Party as the “party of life.”¹⁰⁰ And yet, even after Reagan won a sweeping victory in 1980 and a more conservative, anti-abortion class took over Congress, there were not enough votes for a personhood amendment or even a federal statute enshrining fetal rights.¹⁰¹ A Supreme Court decision supplied the movement with a new plan of attack: if a personhood amendment was out of reach, the movement might be able to leverage its relationship with the Republican Party to reshape the Supreme Court and ensure that *Roe* was overturned.¹⁰²

New focus on control of the Court required new arguments. The Reagan Administration had already struggled to adopt a position on abortion that would unite a then-fragile Republican coalition.¹⁰³ Some libertarian Republicans were deeply suspicious of social conservatives and preferred abortion to be legal; other far-right conservatives wanted Congress to strip the Court of jurisdiction in cases involving abortion and school prayer.¹⁰⁴ Reagan wanted to maintain the loyalty of anti-abortion voters without alienating independents and moderates, and he agreed with John G. Roberts, then associate counsel to the President, that “unalloyed jurisprudential iconoclasm . . . could be a disaster.”¹⁰⁵ Reagan positioned *Roe*’s reversal as a point of consensus for all conservatives: whatever one thought of abortion, *Roe* was an undemocratic and activist decision, and it should be overturned on that basis alone. “Supreme Court reversal of *Roe*,” wrote Reagan staffers Michael Uhlmann and Stephen Galebach, “is the simplest and easiest way to end a tragic episode of judicial overreaching.”¹⁰⁶

Anti-abortion groups soon echoed these arguments, shoring up a partnership with the GOP and shaping the views of a public that had not been persuaded by the fight for personhood. When the Supreme Court upheld the Hyde Amendment, a ban on Medicaid reimbursement for abortion,¹⁰⁷ anti-abortion leaders defending it in Court said nothing about personhood, instead celebrating what they described as “a victory for the

100. See, e.g., Joshua Prager, *Norma McCorvey: The Woman Who Became ‘Roe’—Then Regretted It*, POLITICO (Dec. 28, 2017), <https://www.politico.com/magazine/story/2017/12/28/norma-mccorvey-obituary-216184> [<https://perma.cc/C9DA-SE26>]. On the forging of a relationship between the Republican Party and the anti-abortion movement, see ZIEGLER, *supra* note 44, at 42, 53–55; DANIEL K. WILLIAMS, *GOD’S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT* 112–14 (2010).

101. See ZIEGLER, *supra* note 44, at 84–86.

102. See *id.* at 86–92.

103. See ZIEGLER, *supra* note 2, at 42–56.

104. See *id.*

105. Memorandum from John G. Roberts, Assoc. Couns. to the President, to Fred F. Fielding, Couns. to the President (Apr. 22, 1985) (on file with Reagan Library).

106. Memorandum from Michael M. Uhlmann & Stephen H. Galebach to Edwin L. Harper (Aug. 23, 1982) (on file with Reagan Library).

107. See *Harris v. McRae*, 448 U.S. 297, 301–326 (1980).

democratic process.”¹⁰⁸ By 1989, defense of democracy had become the leading anti-abortion argument for reversing *Roe*, even as support for the principle of personhood remained unchanged.¹⁰⁹ By 1992, Ronald Reagan and George H.W. Bush had forged a six-justice majority that many expected to reverse *Roe*.¹¹⁰ In *Casey*, anti-abortion amici, together with the respondents and the United States, stressed that *Roe* had threatened the “principles of democratic self-governance,”¹¹¹ but the Court could “repair the damage done” by overturning it.¹¹²

Casey prompted a new round of movement–countermovement conflict, this time around the effects of *Roe* on American politics and the principles of stare decisis.¹¹³ In preserving what the joint opinion called the “essential holding” of *Roe*, *Casey* notes that *Roe* “engendered opposition” over workability concerns, but reasoned that *Roe* was not actually unworkable.¹¹⁴ *Casey* also took an expansive approach to reliance interests.¹¹⁵ While few might plan a pregnancy, the Court stressed that women’s ability “to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”¹¹⁶ And the Court took up the questions of legitimacy raised by the Bush Administration and anti-abortion amici, suggesting that reversing *Roe*, not saving it, would irreparably harm the Court.¹¹⁷

In the lead-up to and aftermath of *Casey*, anti-abortion leaders set out to shape Americans’ ideas not just about abortion but about precedent itself. Contrary to what the Court held in *Casey*, anti-abortion lawyers argued that a decision was unworkable when it failed to produce lasting settlement of an issue.¹¹⁸ In *Casey*, Henry Hyde and a group of conserva-

108. ZIEGLER, *supra* note 2, at 41.

109. See Bob Woodward, *The Abortion Papers*, WASH. POST (Jan. 22, 1989), <https://www.washingtonpost.com/archive/opinions/1989/01/22/the-abortion-papers/ce695bcc-a7f9-4b09-bd57-8d7efff37a46> [https://perma.cc/CKV9-BT25].

110. See Rowl Evans & Robert Novak, *Justice Kennedy’s Flip*, WASH. POST (Sept. 4, 1992), <https://www.washingtonpost.com/archive/opinions/1992/09/04/justice-kennedys-flip/17eb4e0b-72f6-4678-b5bb-7a3e8f79b395> [https://perma.cc/6U3G-5YFT]; Joan Biskupic, *How the Supreme Court Crafted Its Roe v. Wade Decision and What it Means Today*, CNN (Sept. 23, 2021, 7:00 AM), <https://www.cnn.com/2021/09/23/politics/roe-v-wade-history/index.html> [https://perma.cc/365F-Q8PT].

111. Brief for Petitioners at 23, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (No. 19-1392).

112. Brief for Hon. Henry J. Hyde et al. as Amici Curiae Supporting Respondents at 30, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902).

113. *Casey*, 505 U.S. at 872–74 (holding that there is a right to an abortion, but the state can regulate pre-viability abortions so long as such regulation does not create an undue burden).

114. See *id.* at 846, 855.

115. See *id.* at 856.

116. *Id.*

117. See *id.* at 869 (stating that overruling *Roe* would cause “both profound and unnecessary damage to the Court’s legitimacy, and to the Nation’s commitment to the rule of law”).

118. See Laurie Sobel, Amrutha Ramaswamy & Alina Salganicoff, *Abortion at SCOTUS: Dobbs v. Jackson Women’s Health*, KAISER FAM. FOUND. (July 7, 2022), <https://www.kff.org/womens-health-policy/issue-brief/abortion-at-scotus-dobbs-v-jackson-womens-health> [https://perma.cc/Z6HZ-FVL7].

tive legislators argued that *Roe* was unworkable because “public opinion polls show[ed] consistent majority support for restrictions on abortions far more stringent than allowed by *Roe*.”¹¹⁹ The National Right to Life Committee (NRLC), a leading anti-abortion group, stressed that *Roe* was unworkable because it was undemocratic and had not produced lasting consensus on the abortion issue.¹²⁰ “Because of its weak foundation,” the group argued, “*Roe* exacerbated the abortion controversy.”¹²¹ Americans United for Life (AUL) released a memo in *Casey*’s aftermath urging abortion opponents to redefine unworkability: the movement should claim that precedents were unworkable when intense cultural disagreement about them persisted—and when a precedent did not adequately accommodate the demands of those who disagreed.¹²² AUL insisted that “*Roe* has been ‘workable’ only when the Court has abandoned various aspects of *Roe* to uphold abortion regulations.”¹²³ It continued that workability requires federal courts be “able to apply *Roe* in such a way as to give real meaning to both the state’s interests and the woman’s interests that *Roe* itself created.”¹²⁴ Anti-abortion lawyers stressed that state abortion restrictions and political opposition to abortion established that *Roe* was not settled law.¹²⁵

Anti-abortion lawyers stressed that a precedent could not be workable if it produced conflicting interpretations in the academy or the lower courts.¹²⁶ James Bopp Jr. and Richard Coleson of the NRLC argued that *Roe* should be overturned because no court could consistently apply it: “[I]t is difficult, if not impossible, to predict what the Court will do with any given regulation.”¹²⁷ Related to these claims was the so-called abortion distortion argument—the idea that the Court had warped its rules on standing, its approach to the First Amendment, and much more in its single-minded quest to preserve *Roe*. These arguments built on claims made by Justice O’Connor’s dissent in *Thornburgh v. American College of Obstetricians and Gynecologists* that *Roe* and its progeny had worked a “major distortion” in much of the Court’s jurisprudence.¹²⁸

These ideas about *stare decisis* relied on the very existence of an anti-abortion movement as an argument for reversing *Roe*. When the anti-

119. Brief for Hon. Henry J. Hyde et al., *supra* note 112, at 11.

120. See Brief for Nat’l Right to Life, Inc. as Amici Curiae Supporting Respondents/Cross-Petitioners at 6–7, *Casey*, 505 U.S. 833 (No. 91-744, 91-902).

121. *Id.* at 7.

122. See Mary Ziegler, *Taming Unworkability Doctrine: Rethinking Stare Decisis*, 50 ARIZ. ST. L.J. 1215, 1233 (2018).

123. *Id.* (quoting Clarke D. Forsythe, *AUL Briefing Memo: The Good News About Planned Parenthood v. Casey*, AMS. UNITED FOR LIFE, Jul. 1992).

124. *Id.* (quoting Forsythe, *supra* note 123).

125. See *id.* at 1233, 1253.

126. See *id.* at 1218–21.

127. James Bopp Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. PUB. L. 181, 201 (1989); see also Ziegler, *supra* note 122, at 1226–28.

128. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O’Connor, J., dissenting).

abortion movement and its allies in the Republican Party railed against legal abortion, that demonstrated that *Roe* was not settled law.¹²⁹ When anti-abortion leaders successfully fought for state restrictions, that proved *Roe* to be unworkable.¹³⁰ And when anti-abortion lawyers litigated case after case in the Supreme Court or the lower courts, any shift in the Court's jurisprudence was proof that *Roe* was fatally flawed—and potential evidence of the abortion distortion wreaking havoc on U.S. law.¹³¹

C. CONSTITUTIONAL POLITICS IN *Dobbs*

Dobbs draws heavily on these movement arguments about workability, backlash, and distortion. The Court stressed that *Roe* should be overturned because it “fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since.”¹³² The Court emphasized that *Casey*'s failure to reach a “final settlement of the question of the constitutional right to abortion” served as a sign that it was time “to heed the Constitution and return the issue of abortion to the people's elected representatives.”¹³³ When discussing workability, the Court highlighted the “ambiguity” produced by *Roe* and *Casey*, the evolving rules adopted by the Court that “muddie[d] things further.”¹³⁴ The litigation led by the anti-abortion movement had “generated a long list of Circuit conflicts” further demonstrating that neither precedent was workable.¹³⁵ And *Dobbs* reasoned that *Roe* and *Casey* had “diluted” everything from “the strict standard for facial constitutional challenges” to First Amendment doctrines.¹³⁶

Dobbs's claims on democratic legitimacy bear a striking resemblance to those forged in anti-abortion struggles to move beyond personhood. Indeed, for the reasons detailed above, the Alito opinion enlists the trope that the equality cause of our time is the protection of potential life, not gender equality.¹³⁷ Justice Alito dismisses—in one paragraph—the argument that the Constitution's Equal Protection Clause provides a basis for the right to abortion for pregnant people.¹³⁸ The *Casey* plurality opinion did not explicitly enlist the Equal Protection Clause, but it clearly connected abortion rights to equality: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives”¹³⁹ and “attention to

129. See Ziegler, *supra* note 96, at 870–71.

130. See Ziegler, *supra* note 122, at 1222–23.

131. See *id.* at 1222–23, 1229–30.

132. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 995–96 (1992)).

133. *Id.* at 2242–43.

134. *Id.* at 2272.

135. *Id.* at 2274.

136. *Id.* at 2275–76.

137. See *id.* at 2257.

138. See *id.* at 2245–46.

139. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

the gender equality dimension of reproductive self-determination has intensified.”¹⁴⁰ But Justice Alito chose not to engage with arguments for equal protection that appeared in numerous briefs filed in *Dobbs*.¹⁴¹ Mentioned but dismissed by Justice Alito, a friend of the court brief by constitutional law scholars details how the “equality principles” in the Court’s decisions since *Roe* provide support for abortion rights.¹⁴² The U.S. Solicitor General’s Office quoted the language from *Casey* as well as Justice Ginsburg’s link between abortion rights and “equal citizenship stature” to urge the Court that “broad social reliance” on *Roe* and *Casey* counseled against overruling them.¹⁴³ Rather, Justice Alito cites Justice Ginsburg’s scholarly critique of *Roe*¹⁴⁴ but fails to acknowledge her arguments for equality and non-discrimination based on pregnancy as a better framework for abortion rights.

Separating abortion from equality supports the majority’s argument that women can gain equal footing in society without controlling when or whether they have children. Alito refutes that abortion restrictions are sex-based classifications by relying on a rarely cited Supreme Court case decided half a century ago, *Geduldig v. Aiello*.¹⁴⁵ *Geduldig*, which refused to see pregnancy discrimination as sex discrimination, spurred Congress to pass the Pregnancy Discrimination Act (PDA), undermining the Court’s decision and clarifying that pregnancy discrimination *was* included in Title VII’s prohibition of sex discrimination.¹⁴⁶

This complex history notwithstanding, Alito dismisses any reliance argument outright.¹⁴⁷ The *Dobbs* majority argues that “[b]oth sides make important policy arguments” about whether changes in society warrant retaining or overruling *Roe* and *Casey*.¹⁴⁸ Yet Alito ignores the extensive briefing about the reliance interests and impact—after half a century—on *Roe* and then *Casey* and instead reduces the reliance interest to the claim that without abortion, “women will be unable to compete with men in the workplace and in other endeavors” and be inhibited in choosing relationships.¹⁴⁹

140. Rachel Rebouché & Linda C. McClain, *Losing Casey Would Be a Critical Blow to Gender Equality*, HILL (May 15, 2022 1:00 PM), <https://thehill.com/opinion/judiciary/3487761-losing-casey-is-a-critical-blow-to-gender-equality> [<https://perma.cc/CG8J-JNBR>].

141. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245–46 (2022).

142. Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae Supporting Respondents at 15, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

143. Brief for United States as Amicus Curiae Supporting Respondents at 28–29, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

144. *Dobbs*, 142 S. Ct. at 2279.

145. See *id.* at 2235, 2245–46 (citing *Geduldig v. Aiello*, 417 U.S. 484, 496 (1974)).

146. See Shannon E. Liss, *The Constitutionality of Pregnancy Discrimination: The Lingering Effects of Geduldig and Suggestions for Forcing its Reversal*, 23 N.Y.U. REV. L. & SOC. CHANGE 59, 61 (1997).

147. See *Dobbs*, 142 S. Ct. at 2277.

148. *Id.* at 2259.

149. *Id.* at 2258.

Indeed, echoing the anti-abortion movement, *Dobbs* questions whether abortion bans *ever* impede people from attaining their goals. As early as the 1990s, anti-abortion lawyers suggested that women had made gains since the 1970s, but for reasons having nothing to do with abortion. Such arguments have continued to circulate in the years since, defining the message of the 2020 March for Life¹⁵⁰ and figuring centrally in amicus briefs in *Dobbs* itself.¹⁵¹ In dicta, Justice Alito takes up the question put to lawyers in the oral argument: just how big a burden is an unwanted pregnancy?¹⁵² While invoking the rhetoric of neutrality forged in anti-abortion circles, the majority opinion suggests that unintended pregnancy is no burden at all:

[A]ttitudes about the pregnancy of unmarried women have changed drastically; . . . federal and state laws ban discrimination on the basis of pregnancy; . . . leave for pregnancy and childbirth are now guaranteed by law in many cases; . . . the costs of medical care associated with pregnancy are covered by insurance or government assistance; . . . States have increasingly adopted “safe haven” laws, which generally allow women to drop off babies anonymously; and . . . a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.¹⁵³

Justice Alito cites the PDA, Family and Medical Leave Act (FMLA), and insurance coverage under the Affordable Care Act (ACA) as proof of how the law supports pregnant people.¹⁵⁴ But the FMLA is unpaid leave accorded only to a segment of U.S. workers.¹⁵⁵ The PDA creates a civil cause of action that petitioners have found difficult to sue and win under.¹⁵⁶ And the ACA, while providing meaningful prenatal and postnatal coverage, nonetheless requires payment and purchase of a plan on an

150. See Kurt Jensen, *March for Life 2020 Theme Pays Tribute to Pro-Life View of Early Feminists*, NAT'L CATH. REP. (Oct. 18, 2019), <https://www.ncronline.org/news/people/march-life-2020-theme-pays-tribute-pro-life-view-early-feminists> [<https://perma.cc/9AHE-CSST>].

151. See Brief for Women Legislators and the Susan B. Anthony List as Amici Curiae Supporting Petitioners at 11–12, 23, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (arguing that women have gained more influence in state legislatures and sought more abortion bans); Brief of 240 Women Scholars and Professionals, and Prolife Feminists Organizations in Support of Petitioners at 18–19, 29–42, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (arguing that the gains by women have nothing to do with abortion access and that abortion actually harms women seeking equality).

152. See *Dobbs*, 142 S. Ct. at 2258.

153. *Id.* at 2258–59.

154. *Id.*

155. See 29 U.S.C. § 2611 (laying out the eligibility requirements for covered employees and employers under the Act). The COVID-19 pandemic, for example, laid bare the “care crisis” and the consequences of an inadequate infrastructure for child and elder care. Julie Kashen & Nina Pérez, *The Urgent Need for Child Care Solutions*, CENTURY FOUND. (Jan. 6, 2022), <https://tcf.org/content/commentary/urgent-need-child-care-solutions/?agreed=1> [<https://perma.cc/C7XQ-V9QF>].

156. See Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html> [<https://perma.cc/7Q4T-XZ5M>] (describing the limitations of the PDA).

exchange.¹⁵⁷

One need not support abortion rights to see how disconnected from reality Justice Alito's depiction is; the opinion fails to reflect any of the physical, emotional, and social aspects of pregnancy through the rhetoric of neutrality. Adoption may be some people's preferred choice following an unwanted pregnancy, but offering post-pregnancy options is not proof that carrying a pregnancy to term does not exact a heavy burden. The choice to give birth is of the utmost importance *because* of the profound and irrevocable effects on someone's life and prospects as well as the consequences for "unborn life." When it comes to reliance and equality, *Dobbs* stakes a claim to neutrality while adopting anti-abortion equality arguments all but wholesale.

Dobbs practices a kind of originalism that ignores popular compromises forged in social-movement politics. By reaching constitutional equality arguments not fully aired by either party, *Dobbs* aims for a permanent settlement of constitutional struggles around abortion with no concern for what movements, voters, or other stakeholders have to say. It provides no roadmap for how to consider the inevitable interstate and interjurisdictional conflicts happening now and to come. Instead, *Dobbs* presents a version of history that is uncontested and uncontestable, frozen in place at a time when those in power were White and male. It delegitimizes the voices of those who disagreed with or sought to change the settlements of the past. In the name of democracy and neutrality, *Dobbs* tries to put an end to the constitutional politics of abortion but ignites new grounds of contestation, both in courts and in practice.

III. THE ANTI-ABORTION AGENDA

Dobbs cannot produce a lasting constitutional settlement partly because it does not deliver the overarching change that the anti-abortion movement still desires.¹⁵⁸ As much as the movement has highlighted arguments about democracy, its fundamental goal has never wavered.¹⁵⁹ At first, leaders tied their cause to an unenumerated right to life rooted in the Fourteenth Amendment, the Declaration of Independence, and even international human rights law.¹⁶⁰ AUL drafted a declaration of purpose that reflected these arguments: "We believe, in the words of the Declaration of Independence, that 'all men are created equal'; and thus that to be true to its heritage, this nation must guarantee to the least and most dis-

157. See *Affordable Care Act Information for Workers and Families*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-workers-and-families> [https://perma.cc/V8TM-6VBG].

158. See Mary Ziegler, *The Abortion Fight Has Never Been About Just Roe v. Wade*, ATLANTIC (May 20, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/abortion-fight-roe-v-wade/618930> [https://perma.cc/FPD4-N6RX].

159. See *id.*

160. See Ziegler, *supra* note 96, at 887–89, 895.

advantaged among us an equal share in the right to life.”¹⁶¹ John Noonan, an anti-abortion scholar, compared the right to life to the right to procreate implicitly recognized in *Skinner v. Oklahoma*.¹⁶² Just as victims of involuntary sterilization had “no redemption,” the same was true of deprivation of the unborn child’s “one civil right—the right to life itself.”¹⁶³

A. THE RISE AND REEMERGENCE OF PERSONHOOD

Between 1967 and 1969, states began reforming criminal abortion laws.¹⁶⁴ In some states, such as Georgia, there was very little organized opposition to reform bills.¹⁶⁵ In others, such as California, Catholic lawyers mounted a spirited campaign against reform but ultimately failed.¹⁶⁶ The ALI proposal struck many Republican and Democratic lawmakers as “strictly a health matter.”¹⁶⁷ Anti-abortion leaders expressed concern, as anti-abortion lawyer Eugene Quay explained, that many believed the only opposition to the ALI bill to be “that of dogmatic religion and a population minority.”¹⁶⁸

Personhood emerged as an argument that could legitimize the anti-abortion movement and make sense of its unwillingness to compromise. Robert Byrn, a professor at Fordham, argued that fetuses were no different in any relevant respect than any other person; fetuses were not aggressors and the fact of fetal dependence on a gestating person was irrelevant.¹⁶⁹ “The more dependent and helpless a person is,” Byrn claimed, “the more solicitous the law is of his welfare.”¹⁷⁰ Nor, Byrn argued, did it matter that many pregnancies ended in miscarriage or stillbirth: “Our law has never recognized the uncertain health of a human being as justification for destroying him.”¹⁷¹ As Byrn saw it, all human beings qualified as persons, and all persons under the Equal Protection Clause were entitled to the full protection of the Fourteenth Amendment.¹⁷² Byrn stated,

there is no qualitative difference, *scientifically speaking*, between human life in the womb and human life after birth. Hence, legislation, which would remove the life of a person in the womb from the

161. Declaration of Purpose from Americans United for Life (1971) (on file with the Concordia Seminary, Lutheran Church-Missouri Synod, St. Louis, Missouri, the Executive File).

162. See John T. Noonan Jr., *Amendment of the Abortion Law: Relevant Data and Judicial Opinion*, 15 CATH. LAW. 124, 130 (1969).

163. *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

164. See generally, DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 335–88 (1998).

165. See *id.* at 340–48.

166. See WILLIAMS, *supra* note 100, at 82–83.

167. See GARROW, *supra* note 164, at 324.

168. Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J., 395, 396 (1961).

169. Robert M. Byrn, *Abortion in Perspective*, 5 DUQ. L. REV. 125, 130 (1966).

170. *Id.* at 133.

171. *Id.*

172. *Id.* at 134–35.

full and equal protection of the law, would be as discriminatory, as “irrational,” and as inimical to the [E]qual [P]rotection [C]lause as the legislative classification of races.¹⁷³

If the Constitution recognized fetal personhood, abortion itself was unconstitutional.¹⁷⁴ Equally important, personhood arguments proposed a very different approach to the Fourteenth Amendment. Byrn argued that abortion was more irrational than (and analytically similar to) racial discrimination.¹⁷⁵ But race as a paradigmatic suspect class centered on the long history of subordination facing people of color, their relative political powerlessness, and their possession of an immutable trait.¹⁷⁶ Byrn suggested that fetuses were more politically powerless than any other group because they have “a complete dependence upon others for sustenance.”¹⁷⁷ In other salient ways, however, he proposed a transformation of equal protection jurisprudence. Fetuses, by definition, lack an immutable trait. Byrn and his colleagues did not argue that fetuses had suffered a history of subordination either.¹⁷⁸ Quay, Byrn, and their colleagues stressed instead that the law had consistently and strongly protected fetal life.¹⁷⁹

This model of equal protection, centered on dependence and helplessness, erased the importance of past subordination. Discrimination, as abortion opponents defined it, hinged on biology, not on intentional bias, structural discrimination, or the legacy of past subordination.¹⁸⁰ At first, anti-abortion lawyers debated how best to enforce personhood.¹⁸¹ While consensus around a constitutional abortion ban was strong, some, like Marjory Mecklenburg, the former chairwoman of NRLC, argued that the law honored personhood not just by recognizing fetal rights or assigning a fetal guardian but also by prohibiting illegitimacy discrimination, expanding access to contraception, and protecting pregnant workers from discrimination in the workplace.¹⁸²

Neither the *Roe* decision nor the ultimate failure of a constitutional personhood amendment changed the importance anti-abortion leaders attached to this vision of personhood.¹⁸³ For the most part, anti-abortion

173. *Id.*

174. *See, e.g.*, John Finnis, *Abortion Is Unconstitutional*, *FIRST THINGS* (Apr. 2021), <https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional> [<https://perma.cc/SE96-25W9>].

175. *See* Byrn, *supra* note 169, at 132–35.

176. *See* SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 97 (2011) (explaining that race had become the paradigmatic suspect class). On the definition of a suspect class, see *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442–47 (1985).

177. *See* Byrn, *supra* note 169, at 133.

178. *See* Byrn, *supra* note 94, at 814–15, 844–49; Quay, *supra* note 168, at 395–96.

179. *See* Byrn, *supra* note 169, at 130–31; Byrn, *supra* note 94, at 814–16, 824–29; Quay, *supra* note 168, at 395–96.

180. *See supra* notes 169–179 and accompanying text; Byrn, *supra* note 94, at 851.

181. *See* ZIEGLER, *supra* note 23, at 35–37.

182. *See id.* at 35–37.

183. *See id.* at 42–63; ZIEGLER, *supra* note 44, at 22–27, 56–77.

leaders in the 1980s focused on reversing *Roe* and reshaping the Supreme Court, but personhood arguments hardly disappeared.¹⁸⁴ Beginning in the mid-1980s, anti-abortion leaders set out to write fetal personhood into criminal homicide, child abuse, and child neglect laws.¹⁸⁵ Between 1985 and 1995, for example, AUL lobbied states to include fetuses in homicide laws (with exceptions for legal abortion); more than twenty states had such laws on the books by the mid-1990s.¹⁸⁶ At the same time, AUL applauded the prosecution of pregnant people who used drugs or alcohol for child abuse.¹⁸⁷ It was no accident that the personhood claims of the 1980s expanded the carceral state. In the 1980s, the anti-abortion movement deepened its alliance with a Republican Party that fought for new federal sentencing guidelines, mandatory minimum sentences, and limits on pretrial release.¹⁸⁸ Efforts to punish pregnant people for child abuse, child neglect, or even feticide previewed a punitive turn in the broader anti-abortion movement.

Between 1996 and 2015, so-called movement incrementalists rose to prominence and focused on laws that would limit access to abortion and chip away at *Roe* while Republicans reshaped the Supreme Court.¹⁸⁹ Nevertheless, the recognition of fetal personhood remained the movement's ultimate aspiration.¹⁹⁰ Because of anti-abortion lobbying, this goal found expression in every Republican platform during this period. In 1996, for example, the GOP supported "a human life amendment to the Constitution" and "legislation to make clear that the Fourteenth Amendment's protections apply to unborn children," enforced through "legislative and judicial protection of that right against those who perform abortions."¹⁹¹ This language remained unchanged through 2008¹⁹² when the anti-abortion movement lobbied for additional talking points outlining "a moral obligation to assist, not to penalize, women struggling with

184. See ZIEGLER, *supra* note 23, at 58–60; see generally, MICHELE B. GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* (2020).

185. See Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL OF RIGHTS J. 735, 756–57 (2018); GOODWIN, *supra* note 184, at 12–45 (2020).

186. *Fetal Law*, ARIZ. DAILY STAR, Jun. 15, 1990, at A4.

187. See Ziegler, *supra* note 184, at 752–54.

188. On Republicans' "tough-on-crime" agenda in the 1980s, see SASHA ABRAMSKY, *HARD TIME BLUES: HOW POLITICS BUILT A PRISON NATION* 42–89, 196 (2002); JOHN HAGAN, *WHO ARE THE CRIMINALS? THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN* 145–60 (2012).

189. On the rise of incrementalists, see ZIEGLER, *supra* note 23, at 49–56.

190. See *id.* at 37.

191. Republican Party Platform of 1996, AM. PRESIDENCY PROJECT (Aug. 12, 1996), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1996> [https://perma.cc/RF53-G5D5].

192. See 2000 Republican Party Platform, AM. PRESIDENCY PROJECT (Jul. 31, 2000), <https://www.presidency.ucsb.edu/documents/2000-republican-party-platform> [https://perma.cc/7A25-26ZA]; 2004 Republican Party Platform, AM. PRESIDENCY PROJECT (Aug. 30, 2004), <https://www.presidency.ucsb.edu/documents/2004-republican-party-platform> [https://perma.cc/698C-8JAJ].

the challenges of an unplanned pregnancy.”¹⁹³ In 2016, the platform language on fetal rights became even more explicit:

The Constitution’s guarantee that no one can “be deprived of life, liberty or property” deliberately echoes the Declaration of Independence’s proclamation that “all” are “endowed by their Creator” with the inalienable right to life. Accordingly, we assert the sanctity of human life and affirm that the unborn child has a fundamental right to life which cannot be infringed.¹⁹⁴

Nevertheless, efforts to write fetal personhood into the law between 2008 and 2012 failed, with leading anti-abortion activists arguing that the courts would strike down state amendments recognizing fetal personhood.¹⁹⁵ The transformation of the Supreme Court between 2016 and 2020 reinvigorated a push for fetal personhood.¹⁹⁶ Following the confirmation of Brett Kavanaugh, states began introducing abortion bans, many at six weeks, the point at which doctors could purportedly detect fetal cardiac activity.¹⁹⁷ Alabama, for example, passed a law banning abortion at fertilization,¹⁹⁸ and its state constitution recognizes the rights of “unborn children, including the right to life.”¹⁹⁹ Georgia passed a six-week ban explicitly recognizing fetal personhood.²⁰⁰ In 2021, Arizona passed a statute granting fetuses the “rights, privileges and immunities available to other persons.”²⁰¹

The *Dobbs* decision intensified hopes for the recognition of personhood. Anti-abortion scholars Josh Hammer and Joshua Craddock claim that *Dobbs* “actually hints at this understanding of [Fourteenth] Amendment personhood” by acknowledging “the moral salience of the

193. 2008 Republican Party Platform, AM. PRESIDENCY PROJECT (Sep. 1, 2008), <https://www.presidency.ucsb.edu/documents/2008-republican-party-platform> [https://perma.cc/6JGP-7U2G].

194. 2016 Republican Party Platform, AM. PRESIDENCY PROJECT (July 18, 2016), <https://www.presidency.ucsb.edu/documents/2016-republican-party-platform> [https://perma.cc/93E9-579T].

195. On the trajectory of the fight for state constitutional personhood amendments, see *The Personhood Movement*, PROPUBLICA, <https://www.propublica.org/article/the-personhood-movement-timeline> [https://perma.cc/NQ6Y-Y3UB]. On the failure of personhood strategies and pushback from incrementalists, see ZIEGLER, *supra* note 23, at 165, 205.

196. Jonathan F. Will, I. Glenn Cohen & Eli Y. Adashi, *Personhood Seeking New Life with Republican Control*, 93 IND. L.J. 499, 501 (2018).

197. See Sabrina Tavernise, *‘The Time Is Now’: States Are Rushing to Restrict Abortion, or to Protect It*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/us/abortion-laws-2019.html> [https://perma.cc/WG6N-C54E] (noting also that it is contested whether a heartbeat is what registers at six weeks).

198. ALA. CODE § 26-23H (2022).

199. ALA. CONST. art. I, § 36.06.

200. GA. CODE ANN. § 16-12-141 (2022). A Georgia state district court invalidated this law as unconstitutional in November, 2022, but the state supreme court enjoined the lower court’s ruling, and the case is still pending. *Sistersong Women of Color Reprod. Just. Collective v. State*, No. 2022CV367796, 2022 WL 16960560 (Ga. Super. Nov. 15, 2022), *appeal docketed*, No. S23A0421 (Ga. Dec. 8, 2022).

201. ARIZ. REV. STAT. § 1-219 (2021), *enjoined by Isaacson v. Brnovich*, 2022 WL 2665932 (D. Ariz. July 11, 2022).

unborn child.”²⁰² The significance of a Supreme Court opinion recognizing fetal personhood that appeals to the anti-abortion movement is difficult to understate. Polls suggest that most Americans do not support the criminalization of abortion early in pregnancy, much less at fertilization and without exception.²⁰³ A Supreme Court decision recognizing fetal personhood would require no popular mandate while vindicating a constitutional vision that has mobilized abortion opponents since the 1960s.

Instead, the majority opinion of *Dobbs* ends by listing the state interests now deemed legitimate in banning abortion, and personhood is chief among them.²⁰⁴ Justice Alito writes that it is rational for states to legislate pursuant to

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.²⁰⁵

The Court also identified personhood—or at least claims related to it—as the key distinguishing factor singling out abortion from other substantive due process rights such as intimate sexual relations, marriage, and contraception.²⁰⁶ The Court emphasized that abortion is fundamentally different because it destroys what the law at issue described as an “unborn human being.”²⁰⁷

Even with the Supreme Court’s blessing to legislate as broadly as possible to stop abortion access, *Dobbs* will not bring an end to constitutional abortion politics because the anti-abortion movement has broader ambitions. Different axes of strategic disagreement have emerged about whom to punish, how to address out-of-state abortion, and how to draw the line between speech and conduct.

B. THE ANTI-ABORTION FRACTURE

Before 1992, when many expected the Supreme Court to reverse *Roe*, leading anti-abortion groups were silent about the prospect of regulating out-of-state conduct. While scholars vigorously debated whether states

202. See Josh Hammer & Josh Craddock, *The Next Goal for the Pro-Life Movement Is Personhood*, NEWSWEEK (July 19, 2022, 6:30 AM), <https://www.newsweek.com/next-pro-life-goal-constitutional-personhood-opinion-1725698> [<https://perma.cc/FXW2-FQUP>].

203. See *Majority Disapproves of Supreme Court’s Decision to Overturn Roe v. Wade*, PEW RSCH. CTR. (Jul. 6, 2022), <https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade> [<https://perma.cc/7XWJ-VWKT>]; Jennifer Agiesta, *CNN Poll: About Two-Thirds of Americans Disapprove of Overturning Roe v. Wade*, CNN (July 28, 2022, 2:00 PM), <https://www.cnn.com/2022/07/28/politics/cnn-poll-abortion-roe-v-wade/index.html> [<https://perma.cc/6TQZ-EZ8X>].

204. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022).

205. *Id.*

206. See *id.* at 2280.

207. *Id.* at 2258.

could apply criminal abortion laws outside their borders,²⁰⁸ anti-abortion leaders instead stressed a proposal that would ban abortion except in the so-called hard cases, such as rape and incest, with no mention of out-of-state travel.²⁰⁹ After *Dobbs*, by contrast, state lawmakers, together with groups like the Thomas More Society, have shown an interest in legislation directly prohibiting travel for abortion or applying criminal laws to doctors who perform legal abortions in protective states on patients traveling from places where abortion is a crime.²¹⁰

Interest in limiting travel reflects a growing conviction in the anti-abortion movement that some constitutional hurdles are surmountable, especially in the aftermath of the Supreme Court's decision in *Whole Woman's Health v. Jackson*.²¹¹ Texas's SB8, enacted before *Dobbs*, prohibits abortion at around six weeks and allows enforcement only by private citizens, who may seek a minimum of \$10,000 from anyone performing an abortion or helping someone to seek one.²¹² Texas anti-abortion activists argued that abortion providers could not pursue a challenge to SB8 in federal court under *Ex parte Young*.²¹³ While sovereign immunity limited suits against the states in federal court, *Young* recognized an exception for suits against state officials enforcing unconstitutional laws.²¹⁴ Texas argued that SB8 prohibited state officials from acting—that is, enforcing the law—and thereby closed the door to federal courts.²¹⁵ The Supreme Court in *Jackson* allowed abortion providers' challenge to SB8 to proceed but only against a handful of licensing officials, reasoning that the state *had* allowed them to enforce SB8 as the result of unartful drafting.²¹⁶ Had Texas more clearly prohibited all state enforcement, the Court suggested, it would have been impossible to challenge the constitutionality of SB8 in federal court—as its drafters appeared to intend.²¹⁷ The Texas activists who wrote SB8, much like the Thomas More Society, advocate that states should prohibit interstate travel for abortion or criminalize the conduct of doctors who perform legal abortions on patients from anti-abortion states using an SB8-style mechanism.²¹⁸ Even if these laws violate the right to travel, the argument

208. See David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 2–3 (2023).

209. See generally, ZIEGLER, *supra* note 23, at 136.

210. See Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients From Crossing State Lines*, WASH. POST (June 29, 2022), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines> [<https://perma.cc/J6SL-YAAS>].

211. See generally, *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495–96 (2021).

212. S.B. 8, 87th Gen. Assemb., Reg. Sess. (Tex. 2021).

213. See Transcript of Oral Argument at 3–5, *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021) (No. 21-463), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-463_6kgm.pdf [<https://perma.cc/ZEC5-YVYQ>].

214. *Ex parte Young*, 209 U.S. 123, 161–62 (1908).

215. See Transcript of Oral Argument, *supra* note 213, at 45–46.

216. *Jackson*, 142 S. Ct. at 536–37.

217. *Id.* at 532.

218. See Amy Forliti & Geoff Mulvihill, *Overturing Roe vs. Wade Isn't the End for Abortion Opponents*, L.A. TIMES (July 30, 2022, 12:06 PM), <https://www.latimes.com/>

goes, it will be all but impossible to effectively challenge them.²¹⁹ But other anti-abortion leaders have reason to oppose this strategy: polling suggests that support for the right to travel runs high, even among Republicans,²²⁰ and anti-abortion groups would have little control over the plaintiffs who bring suit, some of whom may have minimal interest in the movement's goals.²²¹

Anti-abortion activists likewise disagree about how to distinguish protected speech from conduct. Instead of regulating out-of-state conduct, the model law proposed by the NRLC expansively defines accomplice liability to include

(1) giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortions or means to obtain an illegal abortion; (3) [sic] hosting or maintaining a website, or providing internet service, that encourages or facilitates efforts to obtain an illegal abortion; (4) offering or providing illegal “abortion doula” services; and (5) providing referrals to an illegal abortion provider.²²²

While the model law claims to distinguish political advocacy for abortion rights from prohibited speech, the line between the two is hard to draw. The law's proponents most obviously seek to prohibit service providers, like Google and Facebook, from advertising abortion services in states where the procedure is illegal.²²³ But how would a prosecutor differentiate political advocacy for reproductive rights from speech that “encourages . . . efforts to obtain an illegal abortion”?²²⁴ Similar uncertainty about how broadly to define abortion accomplices persists in anti-abortion lawmakers' efforts to intimidate corporations, directors, and chief executive officers deemed to have aided and abetted employees seeking

world-nation/story/2022-07-30/overturing-roe-vs-wade-isnt-the-end-for-abortion-oppo-
nents [https://perma.cc/F9NP-2KFM].

219. See Lydia Wheeler & Patricia Hurtado, *Abortion-Travel Bans Are ‘Next Frontier’ With Roe Set to Topple*, BLOOMBERG L. (May 4, 2022, 4:35 AM), <https://news.bloomberglaw.com/health-law-and-business/abortion-travel-bans-emerge-as-next-frontier-after-roes-end> [https://perma.cc/ZTW6-E6ZU].

220. *Political and Religious Activation and Polarization in the Wake of the Roe v. Wade Overturn*, PUB. RELIGION RSCH. INST. 9–10 (July 7, 2022), https://www.prii.org/wp-content/uploads/2022/07/PRRI-July-2022_Abortion-Policy.pdf [https://perma.cc/7ZTF-T44H].

221. See, e.g., Vivia Chen, *Meet the Quirky Plaintiffs Suing Under the Texas Abortion Law*, BLOOMBERG L. (Oct. 5, 2021, 10:31 AM), <https://news.bloomberglaw.com/business-and-practice/meet-the-quirky-plaintiffs-suing-under-the-texas-heartbeat-act> [https://perma.cc/BW3B-YCQV].

222. Memorandum from James Bopp Jr., NRLC Gen. Couns., Courtney Turner Milbank & Joseph D. Maughon to NRLC 6 (June 15, 2022) [hereinafter NRLC Memo], <https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf> [https://perma.cc/RKQ5-USFF].

223. See Press Release, Josh Hawley, Senator, *Hawley Demands Answers from Google About Pro-Life Censorship* (Sept. 15, 2021), <https://www.hawley.senate.gov/hawley-demands-answers-google-about-pro-life-censorship> [https://perma.cc/7ER3-6849].

224. NRLC Memo, *supra* note 222, at 6; see also Michele Goodwin & Mary Ziegler, *The Next Anti-Abortion Tactic: Attacking the Spread of Information*, N.Y. TIMES (Dec. 3, 2022), <https://www.nytimes.com/2022/12/03/opinion/abortion-first-amendment-free-speech.html> [https://perma.cc/T79M-STDH].

abortion. Lawmakers in the Texas Freedom Caucus have threatened to bar corporations from doing business in the state if they reimburse employees for the cost of abortion-related travel and to pursue criminal charges against individual executives under pre-*Roe* law.²²⁵

The rise of the anti-abortion establishment has also increased the odds that women and other pregnant persons could face punishment themselves.²²⁶ The idea of punishing women was central to the doctors who sought to criminalize abortion in the nineteenth century; the model law proposed by the AMA included criminal punishment for women seeking abortions or performing them on themselves.²²⁷ In practice, however, from the late nineteenth century to the 1960s, criminal prosecutions of pregnant people were rare (more common was humiliation, public shaming, and surveillance used to discover when criminal abortions had occurred and when women were enlisted to testify against providers and others who had helped them).²²⁸

Decentralization of the anti-abortion establishment, together with the rising use of medication abortion, has opened the door to criminal punishment for people seeking abortion.²²⁹ The ascendancy of abortion abolitionists has created an important opportunity for those favoring punishment of those who have abortions. The idea that abortion is murder—or that pregnant people should face punishment—is not new in anti-abortion circles: in the 1980s and 1990s, Operation Rescue called supporters to action by insisting that if abortion was murder (and a grave sin), protestors should act like it.²³⁰

After the decline of Operation Rescue, a small group of Oklahoma activists with a similar worldview founded a Christian organization in 2011 that advocated for the immediate abolition of abortion.²³¹ Free the States, the organization that grew out of these efforts, not only insisted that “rights are grounded in the law of God” but also borrowed the imagery and states’ rights arguments of the Tea Party, seeking “to protect the unalienable rights of the people to live freely in the states” and to “set

225. See Zach Despart, *Businesses That Help Employees Get Abortions Could Be Next Target of Texas Lawmakers If Roe v. Wade Is Overturned*, TEX. TRIB. (May 23, 2022, 5:00 AM), <https://www.texastribune.org/2022/05/23/texas-companies-pay-abortions> [https://perma.cc/ZRE2-KBNZ]; Goodwin & Ziegler, *supra* note 224.

226. See Elyssa Spitzer, *Some States Are Ready To Punish Abortion in a Post-Roe World*, CTR. FOR AM. PROGRESS (June 24, 2022), <https://www.americanprogress.org/article/some-states-are-ready-to-punish-abortion-in-a-post-roe-world> [https://perma.cc/5DXW-5WFB].

227. See REAGAN, *supra* note 26, at 1–30.

228. See *id.* at 5, 20.

229. See, e.g., Lindgren, *supra* note 46.

230. The group’s leader, Randall E. Terry, encouraged his followers, “Rescue as often as you can. . . . Go to jail as often as you can.” Charles E. Shepard, *Operation Rescue’s Mission to Save Itself*, WASH. POST (Nov. 24, 1991), <https://www.washingtonpost.com/archive/politics/1991/11/24/operation-rescues-mission-to-save-itself/1e85a059-e51b-494d-94fe-1ac4a2b5ea45> [https://perma.cc/T388-W3LK].

231. See *Who We Are*, FREE THE STATES, <https://freethestates.org/who-we-are> [https://perma.cc/74XE-VCDC].

States free to abolish abortion within their borders.”²³² Abortion abolitionism grew considerably after the election of Donald Trump, who made headlines in March 2016 after suggesting that women who had illegal abortions should face “some form of punishment.”²³³ Between 2016 and 2017, the abortion abolitionist movement grew, with twenty-three organizations in operation by 2022.²³⁴ Abortion abolitionists, like those leading Free the States, End Abortion Now, and the Foundation to Abolish Abortion, have developed an explicitly religious strategy, additionally arguing that true equal protection—which anti-abortion leaders all demand—requires not only the immediate prohibition of all abortions but also some criminal punishment for people who terminate pregnancies.²³⁵ The Foundation to Abolish Abortion developed model legislation to advance this agenda, including a bill that made significant progress in the Louisiana State Legislature before larger anti-abortion groups successfully lobbied for its modification.²³⁶ Although most leading anti-abortion groups still oppose punishing those who have abortions, abortion abolitionists have been buoyed by growing support in the Southern Baptist Convention, which passed an abortion abolitionist resolution in 2021 affirming that “the murder of preborn children is a crime against humanity that must be punished equally under the law” and demanding legislation “abolishing abortion immediately, without exception or compromise.”²³⁷ Abortion abolitionism may also have a practical appeal: if it is hard for states to extradite or regulate the conduct of out-of-state providers, abortion funds, or other actors aiding people seeking abortions who live and work in states where abortion is a crime, it may simply be easier to enforce criminal abortion laws if pregnant people are fair game.

To be sure, these proposals have been advanced at the time of writing. Model legislation from the NRLC extends the extraterritorial application of state laws for minors who cross state lines to get an abortion, and a bill tracking that language has been introduced in South Carolina.²³⁸ In 2023, Texas representative Steve Toth introduced a bill that would prohibit any entity from seeking to “provide information on how to obtain an abor-

232. *Id.*

233. Emily Crockett, *Donald Trump: “There Has To Be Some Form of Punishment” For Women Who Have Abortions*, Vox (Mar. 30, 2016, 5:02 PM), <https://www.vox.com/2016/3/30/11333472/trump-abortions-punishment-women> [<https://perma.cc/US4W-KHAG>].

234. See Elizabeth Dias, *Inside the Extreme Effort to Punish Women for Abortion*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/us/abortion-abolitionists.html> [<https://perma.cc/K7D7-PEJ3>].

235. See *id.*

236. See Jennifer Kay, *Louisiana Anti-Abortion Foes Oppose Bill as Too Extreme*, BLOOMBERG L. (May 9, 2022, 2:50 PM), <https://news.bloomberglaw.com/health-law-and-business/louisiana-abortion-bill-too-extreme-right-to-life-group-says> [<https://perma.cc/MH5B-ACTC>].

237. *On Abolishing Abortion*, S. BAPTIST CONVENTION (June 21, 2021), <https://www.sbc.net/resource-library/resolutions/on-abolishing-abortion> [<https://perma.cc/GB4D-4NKZ>] (resolution developed at the 2021 Annual Meeting of the Southern Baptist Convention).

238. See NRLC Memo, *supra* note 222, at 5–7.

tion-inducing drug.”²³⁹ The law would not only bar anyone from creating a website or app that included information about abortion pills, but also require internet service providers to make sure no one can find such information online.²⁴⁰ NRLC model legislation recommends criminalizing anyone who aids or abets an abortion—a clause possibly broad enough to include anyone who provides funds, offers a ride to the clinic, or helps with childcare while a person receives abortion care, wherever it occurs.²⁴¹ In Texas, prosecutors have threatened abortion funds with liability, causing some to stop offering help and prompting litigation challenging the chilling effect of Texas’s law.²⁴² Jonathan Mitchell, the architect of SB8, brought a wrongful death lawsuit on behalf of a man angry that his ex-wife used pills to terminate her pregnancy.²⁴³ The suit, which describes this act as murder, seeks a million dollars each against friends who helped the woman obtain the pills and the company that manufactured them.²⁴⁴

These strategies may not succeed.²⁴⁵ States and cities will resist enforcing abortion bans, relying on funding powers and their discretion to prosecute or investigate abortion crimes. District attorneys in Austin, New Orleans, Milwaukee, and Fairfax County, among others, announced that they will not prioritize abortion-related crimes.²⁴⁶ More significantly, states have legislated to protect providers and patients in so-called “shield laws.”²⁴⁷ Massachusetts, California, Connecticut, New York, Delaware, Illinois, New Jersey, and Hawaii passed statutes that exempt in-state providers from extradition (so long as they are not fleeing justice),

239. See Tex. H.B. 2690 § 171A.051(a)(3), 88th Leg. R.S. (2023).

240. See *id.* § 171.051(a).

241. See NRLC Memo, *supra* note 222, at 6.

242. See Christopher Rowland, *Groups That Aid Abortion Patients Pull Back, Fearing Legal Liability*, WASH. POST (July 15, 2022, 6:00 AM), <https://www.washingtonpost.com/business/2022/07/15/abortion-aid-drying-up> [<https://perma.cc/QEN7-KQAK>].

243. See Eleanor Klibanoff, *Three Texas Women Are Sued for Wrongful Death After Allegedly Helping Friend Obtain Abortion Medication*, TEX. TRIB. (Mar. 10, 2023), <https://www.texastribune.org/2023/03/10/texas-abortion-lawsuit> [<https://perma.cc/X8WS-EBZ6>].

244. See *id.*

245. “In the abortion context, this strategy cedes the moral high ground opponents have sought by arguing that restrictions actually protect women.” Dov Fox, *Medical Disobedience*, 136 HARV. L. REV. 1032, 1107 (2023).

246. See Casey Tolan, *Some Big-City District Attorneys Vow Not To Prosecute Abortion Cases, Setting Up Legal Clashes In Red States*, CNN (June 30, 2022, 4:27 AM), <https://www.cnn.com/2022/06/29/us/district-attorneys-abortion-prosecutions-invs/index.html> [<https://perma.cc/9DF8-RQCJ>]; Nicola Narea, *District Attorneys Could Be a Last Defense Against Abortion Bans*, VOX (June 25, 2022, 4:05 PM), <https://www.vox.com/policy-and-politics/2022/6/25/23182868/district-attorneys-trigger-laws-abortion-ban-roe> [<https://perma.cc/RXY8-AG6A>]; Steve Descano, *My Governor Can Pass Bad Abortion Laws. But I Won't Enforce Them.*, N.Y. TIMES (May 31, 2022), <https://www.nytimes.com/2022/05/31/opinion/prosecutor-abortion-virginia.html> [<https://perma.cc/L6F4-RDH4>].

247. Fifteen states have passed some sort of “shield law” that protects abortion providers and abortion seekers. Ctr. for Pub. Health L. Rsch., *Post-Dobbs State Abortion Restrictions and Protections*, POL’Y SURVEILLANCE PROGRAM (Aug. 31, 2022), <https://lawatlas.org/datasets/post-dobbs-state-abortion-restrictions-and-protections> [<https://perma.cc/JS4C-LB8R>]. For example, some laws include prohibition against disclosing health records, refusing extradition, or similar measures. See *id.*

prohibit cooperation with out-of-state investigations, and limit disciplinary actions taken by out-of-state entities for providing nonresident patients with reproductive and abortion care.²⁴⁸ Governors of numerous states have issued executive orders since *Dobbs* was decided, with similar effect.²⁴⁹ States like California, Oregon and New York have allotted millions of dollars to assist with the costs of abortion care, with a focus on the needs of abortion travelers.²⁵⁰

The stage is set for even further conflicts over abortion law with state actors playing the defining roles. However, these laws, moving in markedly different directions, come up against longstanding traditions of comity and cooperation among states. These actions reveal the priorities at opposite ends of the abortion debate. But they tell us little about how the majority of states in the middle—with neither the will nor impetus, at present, to ban or advance abortion—will react in the months and years to come. In the next Part, we map the emerging debates and conversations that will set the terms for potential state action—even in those states leaning toward anti-abortion policies.

IV. REDEFINING ABORTION

When the Court first undid abortion rights, commentators focused on the extent to which states would criminalize abortion.²⁵¹ Less attention was paid to the equally contested question of what abortion means in the first place. Prominent anti-abortion groups like Students for Life have suggested that all chemical contraceptives are abortifacients and may fall under state bans; they have succeeded in enacting laws with the same effect in Wyoming (though presently enjoined).²⁵² In the context of carving exceptions to existing bans, anti-abortion advocates have both nar-

248. David Cohen, Greer Donley, Rachel Rebouché & Isabelle Aubrun, *Understanding Shield Laws*, 51 J.L. MED. & ETHICS (forthcoming 2023); see also H.B. 5090, 192nd Gen. Ct., Reg. Sess. (Mass. 2021); H.B. 5414, 2022 Gen. Assemb. (Conn. 2022); Press Release, Governor Kathy Hochul, Governor Hochul Signs Nation-Leading Legislative Package to Protect Abortion and Reproductive Rights for All (June 13, 2022), <https://www.governor.ny.gov/news/governor-hochul-signs-nation-leading-legislative-package-protect-abortion-and-reproductive> [https://perma.cc/A4TX-WS3E]; H.B. 455, 151st Gen. Assemb. (Del. 2022); S.B. 2642, 220th Leg. (N.J. 2022).

249. See Kyla Guilfoil, *Where Are State Leaders Taking Extra Steps to Ensure a Right to Abortion?*, ABC NEWS (July 7, 2022, 12:15 PM), <https://abcnews.go.com/US/state-leaders-protect-abortion-rights/story?id=86330488> [https://perma.cc/B3S2-QZ4L]; Ca. Exec. Order N-12-22 (June 27, 2022), <https://www.gov.ca.gov/wp-content/uploads/2022/06/6.27.22-EO-N-12-22-Reproductive-Freedom.pdf> [https://perma.cc/8ZRN-ZTK6].

250. See Casey Parks, *States Pour Millions Into Abortion Access*, WASH. POST (May 13, 2022, 12:22 PM), <https://www.washingtonpost.com/dc-md-va/2022/05/13/oregon-new-york-funding-abortion/> [https://perma.cc/S6F8-ECXN].

251. See, e.g., Caroline Kitchener, Kevin Schaul, N. Kirkpatrick, Daniela Santamarina & Lauren Tierney, *Abortion Is Now Banned Or Under Threat In These States*, WASH. POST (Jan. 5, 2023, 4:04 PM), <https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/> [https://perma.cc/K8Z7-KCJD].

252. *The Abortion Alphabet—The ABC's of How Lives Can Be Ended with Drugs*, STUDENTS FOR LIFE (May 2022), <https://docs.google.com/viewerng/viewer?url=https://studentsforlife.org/wp-content/uploads/2022/05/ABCsFinalC4Flyer-1.pdf> [https://perma.cc/BHS7-B4PA].

rowed and expanded the definition of abortion, suggesting that many lifesaving procedures do not qualify as abortion in the first place.²⁵³ The post-*Dobbs* era will witness a fracture on how the nation defines abortion because competing interests—in contraception and fertility services—will face increasing contestation.

A. UNDER LAW

After states criminalize abortion, new questions emerge about what precisely is being banned. Anti-abortion leaders, in part, seek to expand the definition of abortion to include many contraceptives approved by the FDA.²⁵⁴ This strategy has roots reaching back to the 1960s when the early anti-abortion movement worked to distance itself from the Catholic Church and its hostility to birth control.²⁵⁵ Groups like the NRLC became officially single-issue organizations, adamantly neutral on birth control.²⁵⁶ Some anti-abortion activists in the 1970s even supported broadening contraception funding as a way to reduce demand for abortion.²⁵⁷ But without taking an official stand on abortion, anti-abortion leaders continued to define some common contraceptives as abortifacients.²⁵⁸ When Republicans sought to cut or even eliminate family planning under Title X in the 1980s, anti-abortion organizations like NRLC stressed that some forms of birth control were abortion in disguise.²⁵⁹ In the 1970s, Illinois passed a law treating some contraceptives, especially IUDs, as abortifacients.²⁶⁰ In the late 1990s when Democrats in the House of Representative and across several states proposed provisions attached to appropriations bills requiring contraceptive coverage for employees, anti-abortion groups initially responded with a familiar argument—that many contraceptives were in fact abortifacients.²⁶¹ In 1998, after the FDA approved Preven, an emergency contraceptive, anti-

253. See, e.g., Kate Zernike, *What Does ‘Abortion’ Mean? Even the Word Itself Is Up for Debate*, N.Y. TIMES (Oct. 18, 2022), <https://www.nytimes.com/2022/10/18/us/abortion-roe-debate.html> [<https://perma.cc/C9E2-VJ3S>].

254. See Joerg Dreweke, *Contraception Is Not Abortion: The Strategic Campaign of Anti-abortion Groups to Persuade the Public Otherwise*, GUTTMACHER POL’Y REV., Fall 2014, at 14, 14, <https://www.guttmacher.org/gpr/2014/12/contraception-not-abortion-strategic-campaign-antiabortion-groups-persuade-public> [<https://perma.cc/G24T-QGYG>].

255. See ZIEGLER, *supra* note 23, at 33–35.

256. See William Saletan, *Rubber-Baby Money Lumpers: The Pro-Life Movement’s Contraception Problem*, SLATE (Aug. 3, 2009, 7:58 AM), <https://slate.com/technology/2009/08/the-pro-life-movement-s-contraception-problem.html> [<https://perma.cc/9SQQ-V9QS>].

257. See Robert N. Karrer, *The National Right to Life Committee: Its Founding, Its History, and the Emergence of the Pro-Life Movement Prior to Roe v. Wade*, 97 CATH. HIST. REV. 527, 541 (2011).

258. See Rachel Benson Gold, *Title X: Three Decades of Accomplishment*, GUTTMACHER POL’Y REV., Feb., 2001, at 5, 8 https://www.guttmacher.org/sites/default/files/article_files/gr040105.pdf [<https://perma.cc/LKU3-EBPL>].

259. See Jeannie I. Rosoff & Asta M. Kenney, *Title X and Its Critics*, 16 FAM. PLAN. PERSPS., 111, 111–12 (1984).

260. See *Review Set of State Law on Abortion*, CHI. TRIB., May 21, 1985, at 1.

261. See *Contraceptive Coverage in the Federal Employees Health Benefits Program*, CTR. FOR REPROD. RTS. (Aug. 1, 2003), <https://reproductiverights.org/contraceptive-coverage-in-the-federal-employees-health-benefits-program> [<https://perma.cc/3J87-BJ6B>].

abortion groups were ready: rather than argue that emergency contraceptives took the life of a rights-holding person, anti-abortion groups argued that many Americans *believed* this to be true and that regulators and legislators should defer to the objections of pharmacists and parents who held this belief.²⁶² In 1999, Pharmacists for Life, an anti-abortion group, successfully lobbied Walmart to refuse to offer Preven.²⁶³ By 2005, this campaign had widened, with anti-abortion groups encouraging state lawmakers to pass laws allowing any pharmacist to refuse to stock *any* drug for reasons of conscience.²⁶⁴ “Pharmacists,” explained conservative lobbyist Paul Caprio in 2005, “are coming forward saying that they want to exercise their rights of conscience.”²⁶⁵

After the Obama Administration introduced the contraceptive mandate of the Affordable Care Act in 2012,²⁶⁶ the blurred line between abortion and birth control was hard to miss. When Hobby Lobby and other religious employers challenged the mandate under the Religious Freedom Restoration Act,²⁶⁷ the Thomas More Law Center argued not only that the mandate required “religiously-objecting employers [to] ignore fundamental tenets of their faith to provide insurance coverage for drugs and devices that have the ability to end a newly formed human life,” but also that many forms of birth control, including ECs, did in fact “end a newly-formed human life.”²⁶⁸ The scope of current abortion bans is ambiguous by design. Banning abortion will almost certainly affect birth control in those states. The Republican response to a July 2022 House bill guaranteeing the right to birth control²⁶⁹ is telling: anti-abor-

262. See Susan A. Cohen, *Objections, Confusion Among Pharmacists Threaten Access to Emergency Contraception*, GUTTMACHER POL’Y REV., June 1999, at 1, 1–3, https://www.guttmacher.org/sites/default/files/article_files/gr020301.pdf [<https://perma.cc/TUE3-YCS5>] (discussing pharmacists’ reluctance to distribute Preven due to moral objections to abortion); see generally Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 187, 192–93 (Susanna Mancini & Michel Rosenfeld eds., 2018) (discussing conscience objections and health care refusal laws allowing health care providers to refuse to offer certain types of care); Adam Sonfield, *New Refusal Clauses Shatter Balance Between Provider ‘Conscience,’ Patient Needs*, GUTTMACHER POL’Y REV., Aug. 2004, at 1, 1 https://www.guttmacher.org/sites/default/files/article_files/gr070301.pdf [<https://perma.cc/WC8S-8NNQ>].

263. See Dana Canedy, *Wal-Mart Decides Against Selling a Contraceptive*, N.Y. TIMES (May 14, 1999), <https://www.nytimes.com/1999/05/14/business/wal-mart-decides-against-selling-a-contraceptive.html> [<https://perma.cc/7YVY-WMCC>].

264. See Adam Sonfield, *Rights vs. Responsibilities: Professional Standards and Provider Refusals*, GUTTMACHER POL’Y REV., Aug., 2005, at 7, 8–9, https://www.guttmacher.org/sites/default/files/article_files/gr080307.pdf [<https://perma.cc/9DX3-6BRE>].

265. Monica Davey & Pam Belluck, *Pharmacies Balk on After-Sex Pill and Widen Fight in Many States*, N.Y. TIMES (Apr. 19, 2005), <https://www.nytimes.com/2005/04/19/us/pharmacies-balk-on-aftersex-pill-and-widen-fight-in-many-states.html> [<https://perma.cc/NP76-XDTP>].

266. 42 U.S.C. § 300gg-13(a)(4).

267. Following a circuit split, the Supreme Court consolidated these challenges into a single case that it decided in June 2014. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

268. Brief for Thomas More Law Center as Amicus Curiae Supporting Respondents at 4–5, *Sebelius v. Hobby Lobby Stores, Inc.*, 2014 WL 343193 (2014) (Nos. 13-354, 13-356).

269. Right to Contraception Act, H.R. 8373, 117th Cong. (2022).

tion lobbyists and most GOP leaders refused to back the bill, describing it as a “Trojan horse for more abortions.”²⁷⁰ The next frontier of abortion definition battles will be *where* an abortion occurs. Because medication abortion is taken over twenty-four to forty-eight hours, we can expect to see questions about the location of abortion: is it where mifepristone is taken or where an abortion is complete?²⁷¹

Anti-abortion leaders have also sought to *shrink* the definition of abortion, creating another fracture around emergency medical services for pregnant people. Historically, anti-abortion leaders supported an exception for procedures needed to save the life of a pregnant person; this exception was part of the criminal abortion laws that spread across the United States in the late nineteenth century, and leading anti-abortion groups assumed the need for such an exception in the 1960s and 1970s.²⁷² But behind the scenes, early anti-abortion leaders believed that there was no such thing as a medically necessary abortion. In part, this reflected Catholic teachings. In 1869, Pope Pius IX eliminated an earlier distinction between animate and inanimate embryos (and between early and late abortion), proscribing excommunication for abortion.²⁷³ In 1917, the Church clarified that this penalty applied to those who had abortions as well as those who performed them.²⁷⁴ Catholic natural law teaching, however, has long distinguished between direct (or intentional) abortion and procedures that end fetal life as a secondary but unavoidable effect of efforts to save the life of a pregnant person. As Pope John Paul II later explained, “direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave moral disorder.”²⁷⁵

In the 1950s and 1960s, as Cesarean sections became safer and more widespread and maternal mortality rates declined, anti-abortion physicians believed that previously life-saving abortions were no longer needed.²⁷⁶ As early as 1961, anti-abortion physicians and scholars stressed that “the medical profession has all but ruled out therapeutic abortion as necessary or a justifiable life-saving treatment of the complications of pregnancy.”²⁷⁷ After *Roe*, these arguments were less visible, but the argument that life-saving procedures were not and could never be

270. Sahil Kapur, *House Passes Legislation to Enshrine a Right to Contraception in Federal Law*, NBC NEWS (July 21, 2022, 12:01 PM), <https://www.cnbc.com/2022/07/21/house-passes-legislation-to-enshrine-a-right-to-contraception-in-federal-law.html> [https://perma.cc/6K2S-HJZQ].

271. Cohen, Donley & Rebouché, *supra* note 36.

272. *See generally*, Monica E. Eppinger, *The Health Exception*, 17 GEO. J. GENDER & L. 665, 732–33 (2016).

273. Elizabeth Spahn & Barbara Andrade, *Mis-Conceptions: The Moment of Conception in Religion, Science, and Law*, 32 UNIV. S.F. L. REV. 261, 272 (1998).

274. *See id.*; 1917 CODE c.430, § 1.

275. Pope Paul VI, *EVANGELIUM VITAE: ON THE VALUE AND INVIOABILITY OF HUMAN LIFE* (1995), https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html [https://perma.cc/N6VM-5PSG].

276. *See Move to Relax Abortion Laws*, THE MONITOR: THE OFF. NEWSPAPER OF THE ARCHDIOCESE OF S.F., Jan. 27, 1961, at A1.

277. *Id.*

abortions persisted. In the 1990s, as anti-abortion groups championed laws linking abortion to a heightened risk of post-traumatic stress or breast cancer, the movement recoiled when larger medical organizations and peer-reviewed studies repudiated those conclusions.²⁷⁸ As anti-abortion organizations lost faith in leading medical organizations like the American College of Obstetricians and Gynecologists (ACOG), major organizations more publicly staked out the position that there was no such thing as a medically necessary abortion—and that any life-saving procedure was not an abortion at all. In 2009, for example, the American Pro-Life College of Obstetricians and Gynecologists, then a conservative group within ACOG and now the American Association of Pro-Life Obstetricians and Gynecologists, passed a resolution providing that any medically necessary procedure was not an abortion.²⁷⁹

The argument that life-saving procedures could not be abortion also caught on because of international developments in sexual and reproductive rights. In 2000, when the United Nations formulated its Millennium Development Goals, there was considerable focus on the reduction of maternal mortality.²⁸⁰ Abortion-rights supporters and public health experts mobilized to show the extent to which criminal abortion laws contributed to maternal mortality; by 2003, the World Health Organization reported that illegal abortions accounted for thirteen percent of all maternal deaths.²⁸¹ Anti-abortion groups responded by working to demonstrate that any life-saving procedure was not an abortion. In 2012, at the International Symposium on Maternal Health, a group of anti-abortion clinicians from Ireland issued the Dublin Declaration, a statement explaining that direct abortion was never medically necessary.²⁸² The Dublin Declaration built on the work of international and transnational anti-abortion physicians; for example, a Chilean study suggested that maternal mortality rates had decreased since the country's abortion ban and that improvements in fetal surgery, neonatal intensive care units, and Cesarean section procedures made it possible to save pregnant patients

278. See Mary Ziegler, *Substantial Uncertainty: Whole Woman's Health v. Hellerstedt and the Future of Abortion Law*, 2016 SUP. CT. REV. 77, 95–96 (2016).

279. *What is AAPLOG's Position on "Abortion to Save the Life of the Mother?,"* AM. ASS'N OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS (July 2009), <https://aaplog.org/what-is-aaplogs-position-on-abortion-to-save-the-life-of-the-mother> [<https://perma.cc/3V9V-CXUC>].

280. Goal 5, "Improve Maternal Health," sought a three-fourths reduction in maternal mortality and "universal access to reproductive health" by 2015. *Official List of Millennium Development Goals Indicators*, UNITED NATIONS STATS. DIV. (Jan. 15, 2008), <https://mdgs.un.org/unsd/mdg/Host.aspx?Content=indicators/OfficialList.htm> [<https://perma.cc/4ZSY-SAD6>].

281. *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2003*, WHO (2003), <https://apps.who.int/iris/handle/10665/43798> [<https://perma.cc/U6NN-K9B4>].

282. *Dublin Declaration on Maternal Healthcare*, DUBLIN DECLARATION (2012), <https://www.dublindeclaration.com> [<https://perma.cc/7MUQ-4YYB>]; see also Carl O'Brien, *Forum in Dublin on Maternal Health*, IRISH TIMES (Sept. 10, 2012), <https://www.irishtimes.com/news/forum-in-dublin-on-maternal-health-1.527381> [<https://perma.cc/L8R6-R3R2>].

and fetuses in most scenarios.²⁸³ The death of Savita Halappanavar one month after the Dublin Declaration's release increased interest in Irish abortion law by U.S. anti-abortion organizations. Halappanavar, a thirty-one-year-old dentist, had an incomplete miscarriage, but doctors in Ireland refused to treat her because of the Eighth Amendment, the nation's constitutional prohibition on abortion.²⁸⁴ Anti-abortion groups pointed to the Dublin Declaration in claiming that Halappanavar's death, while tragic, had nothing to do with Ireland's Eighth Amendment.²⁸⁵ Organizations from Feminists for Life to Students for Life adopted the same definition of abortion and opposition to life-saving abortion exceptions.²⁸⁶

Dobbs belies arguments that the definition of abortion cannot stretch to include birth control, fertility treatments, or medical interventions for miscarriages and stillbirths. Consider birth control after *Dobbs*. In *Griswold v. Connecticut*, the Court held there was a constitutional right to privacy for a married couple to determine whether to use contraception.²⁸⁷ The *Griswold* majority opinion was explicit that the text of the Constitution specifically does not mention a right to privacy, let alone a right to contraception.²⁸⁸ Highlighting rights protected despite their lack of textual expression, such as parental control over children, the Court looked to the infamous penumbra of explicit protections for unenumerated fundamental rights.²⁸⁹ Enumerated rights, found in various constitutional provisions, are the foundation for "peripheral rights."²⁹⁰ *Eisenstadt v. Baird* reaffirmed this holding and added arguments around equal protection when the Court extended the right to privacy and contraception to all adults—single or married.²⁹¹

Dobbs undermines the right to contraception as set out in *Griswold* and *Eisenstadt*. The same arguments that undercut the history of and reliance on abortion apply with equal force to contraceptives. On reliance, recall that the Court invoked arguments that suggest pregnancy is no longer a social or financial burden.²⁹² Pregnancy, according to Justice Alito, is no longer a source of shame, as exemplified by state provisions

283. See Elard Koch et al., *Women's Education Level, Maternal Health Facilities, Abortion Legislation and Maternal Deaths: A Natural Experiment in Chile from 1957 to 2007*, PLOS ONE, May 2012, at 2, 13–14.

284. See Kitty Holland, *Eighth Amendment 'Played Major Role in Savita's Death'*, IRISH TIMES: SOC. AFFS. (Oct. 19, 2017), <https://www.irishtimes.com/news/social-affairs/eighth-amendment-played-major-role-in-savita-s-death-1.3261037> [<https://perma.cc/E2XH-3TSL>].

285. See, e.g., David Mullins, *Improved Services, Not a Repeal of the 8th, Is Needed to Prevent Outcomes Like That of Savita Halappanavar*, LIFE INST. BLOG (Sept. 20, 2017), <https://thelifeinstitute.net/blog/2017/improved-services-not-a-repeal-of-the-8th-is-needed-to-prevent-outcomes-like-that-of-savita-halappanavar> [<https://perma.cc/7UCL-UL7X>].

286. See Mary Ziegler, *Why Exceptions for the Life of the Mother Have Disappeared*, ATLANTIC (August 2, 2022, 5:53 PM), <https://www.theatlantic.com/ideas/archive/2022/07/abortion-ban-life-of-the-mother-exception/670582> [<https://perma.cc/J5LC-C242>].

287. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

288. *Id.* at 482–83.

289. *Id.* at 482.

290. *Id.* at 483.

291. *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

292. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2258–59 (2022).

providing protection against discrimination on the basis of pregnancy and unpaid leave for pregnancy and childbirth, for instance.²⁹³ He rejects the argument that people must rely on abortion to “exercis[e] their freedom to choose the types of relationships they desire” and “compete with men in the workplace and in other endeavors.”²⁹⁴ But most significantly, the majority in *Dobbs*, as highlighted extensively in Part II, offers an interpretation of what is “deeply rooted” in the country’s history and tradition that undercuts recognition of birth control given its own complicated history of legality.²⁹⁵

To the point in this Part, increased attempts to define birth control as abortion will precede erasure of constitutional protection for contraception. Justice Alito, in *Burwell v. Hobby Lobby*, accepted the argument that emergency contraception and intrauterine devices were abortifacients.²⁹⁶ ECs stop ovulation, while most IUDs make cervix conditions such that fertilized eggs do not implant. Justice Alito’s view, however, tracks the definition of contraception advanced by the anti-abortion movement: abortion is not only the removal of an implanted, fertilized egg; abortion is also preventing a fertilized egg from implanting.²⁹⁷ This interpretation supports an agenda for conferral of rights at conception, regardless of whether a pregnancy has taken hold—and a few states are now adopting it.²⁹⁸

Outside of contraception, there are services currently taken for granted that might more easily be defined as abortion. This debate promises to take on central significance in the fertility industry. People who can afford fertility services increasingly turn to in vitro fertilization (IVF), in which an egg is fertilized with sperm outside the womb and inserted into the uterus. Couples or individuals use IVF from their own biological materials to produce children, or gestational surrogates carry pregnancies after IVF, relying on the genetic materials of intended parents or do-

293. *See id.*

294. *Id.* at 2258.

295. Consider the Comstock Act, which Congress passed in 1873, five years after the Fourteenth Amendment’s ratification. The Comstock Act criminalized mailing “obscene, lewd or lascivious,” “immoral,” or “indecent” publications, making it a federal offense to disseminate contraception through the mail and across state lines, punishable by up to five years in prison. An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, Ch. 258 42d Cong. § 2 (1873). Soon after, twenty-four of thirty-seven states passed similar laws to restrict contraception access. It was not until the twentieth century that challenges to contraception restrictions were successful, though narrowly construed. *See Leah R. Fowler & Michael R. Ulrich, Femtechnodystopia*, 75 STAN. L. REV. (forthcoming 2023).

296. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 691 (2014) (finding that the challenged regulations requiring employers to provide insurance coverage for employees’ contraceptives violated the Religious Freedom Restoration Act on the grounds that the employers believed “the four contraceptive methods at issue are abortifacients”).

297. The emergency contraceptives and IUDs at issue in *Burwell* “may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus,” which the employers found objectionable as abortion. *Id.* at 697–98.

298. A Louisiana bill defines “person” at the moment of fertilization, independent of implantation and protects a fertilized egg “by the same laws protecting other human beings.” H.B. 813, 2022 Reg. Sess. (La. 2022).

nors.²⁹⁹ Because of the nature of IVF and the success rate of fertilized eggs implanting in the uterus wall, multiple embryos (or, at that stage of development, blastocysts) are often transferred to the uterine cavity in each cycle.³⁰⁰ A common practice to avoid a multiple pregnancy, “selective reduction” occurs immediately after confirmation that multiple embryos transferred through IVF have implanted in the womb.³⁰¹ A physician injects one or more implanted embryos with potassium chloride and those embryos are resorbed into the uterine lining.³⁰² Selective reduction is an abortion, although it is not typically called an abortion.³⁰³

Abortion bans that apply from conception threaten the practice of IVF generally (regardless of whether selective reduction occurs). Already, fertility agencies have moved from states with bans or have changed their protocols.³⁰⁴ To add a further complication, many people freeze the embryos created through IVF.³⁰⁵ State bans refer to abortion during pregnancy, implying that embryos outside a womb are exempt. But the lack of clarity has caused many to question whether post-*Dobbs* laws can preclude discarding embryos, either because they are not needed or because they have been tested and contain some genetic or other anomaly.³⁰⁶

None of these scenarios capture the confusion over miscarriage care currently playing out in hospitals and under physician care. Early accounts suggest that providers do not understand when they can provide care during a miscarriage;³⁰⁷ does a pregnancy have to end in order to be compliant with abortion bans or can providers intervene when pregnancy loss is in process?³⁰⁸ The questions prompted by abortion bans post-

299. See *In Vitro Fertilization (IVF)*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716> [<https://perma.cc/TU38-XSHE>].

300. See *id.*; *Blastocyst*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/body/22889-blastocyst> [<https://perma.cc/Q2K8-WAWK>].

301. Radhika Rao, *Selective Reduction: “A Soft Cover for Hard Choices” or Another Name For Abortion?*, 43 J.L. MED. & ETHICS 196, 196, 200 (2015).

302. *Id.* at 200.

303. *But see id.* at 196 (distinguishing selective reduction from abortion).

304. See Hillary Berk, *Clash of the Titans: Escalating Conflict Between Selective Reduction Clauses in Surrogacy Contracts and the Re-Criminalization of Abortion*, in THE HANDBOOK OF LAW AND REPRODUCTION (Berk, Carbone, & Madeira eds., 2023) (draft on file with authors).

305. See *In Vitro Fertilization (IVF)*, *supra* note 299.

306. See, e.g., AM. SOC’Y FOR REPROD. MED. CTR FOR POL’Y AND LEADERSHIP, STATE ABORTION TRIGGER LAWS: POTENTIAL IMPLICATIONS FOR REPRODUCTIVE MEDICINE 4 (2022), https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/dobbs/cpl-report_impact-of-state-trigger-laws-on-reproductive-medicine_final.pdf [<https://perma.cc/KZZ2-ACJV>].

307. See Frances Stead Sellers & Fenit Nirappil, *Confusion Post-Roe Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2022, 9:09 AM), <https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care/> [<https://perma.cc/6D56-TYYN>].

308. The federal statute governing emergency care preempts state law, and most state bans include a medical emergency exception in any case. Press Release, U.S. Health and Human Services, Following President Biden’s Executive Order to Protect Access to Reproductive Health Care, HHS Announces Guidance to Clarify that Emergency Medical Care Includes Abortion Services (July 11, 2022), <https://www.hhs.gov/about/news/2022/07/11/following-president-bidens-executive-order-protect-access-reproductive-health-care->

Dobbs target how we define pregnancy, miscarriage, and abortion and how they interrelate.

B. IN APPLICATION

Constitutional law has long shaped reproductive services. Before *Roe*, abortion services were not only concentrated in a handful of states but also arduous to obtain, often requiring approval from hospital committees.³⁰⁹ When *Roe* came down, the legal abortion rate shot up by more than twenty percent, but some states, especially in the South, lacked the infrastructure to provide services.³¹⁰ When the journal *Family Planning Perspectives* published a study in 1973, no doctor in Mississippi or Louisiana offered abortions; by 1974, only one in nine secular public hospitals nationwide performed abortions.³¹¹ People of color experienced the most harm because of the maldistribution of services: by 1974, they made up eighty percent of the deaths due to self-managed abortion, up from sixty-four percent in 1972.³¹²

Political pressure, combined with market forces, harnessed the constitutional change *Roe* wrought in a new model of services. Groups from the National Abortion Rights Action League to the National Organization for Women prioritized service delivery, calling on public hospitals to offer abortions and demanding the opening of low-cost abortion clinics in case hospitals were unwilling to meet demand.³¹³ Physicians responded by opening outpatient abortion clinics across the country, from feminist clinics to conventional medical services to Planned Parenthood affiliates and profit-driven referral services.³¹⁴ The spread of clinics reframed abortion as a distinctive service and encouraged providers to professionalize and systemize standards of care; the National Abortion Federation, which formed in 1977 with the consolidation of two other professional groups, offered conferences and guidelines to promote best practices in the emerging field of abortion services.³¹⁵ The rise of stand-alone clinics also proved to be a strategic gift to anti-abortion groups, which had an easier time protesting at the locations where patients sought abortions and presenting abortion as set apart physically as well as ideologically from

hhs-announces-guidance-clarify-that-emergency-medical-care-includes-abortion-services.html [https://perma.cc/FTJ6-ZAAX].

309. Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue?*, GUTTMACHER POL'Y REV., Mar. 2003, at 8, 10, https://www.guttmacher.org/sites/default/files/article_files/gr060108.pdf [https://perma.cc/T42G-MHF2].

310. Edward Weinstock, Christopher Tietze, Frederick S. Jaffe & Joy G. Dryfoos, *Legal Abortions in the United States Since the 1973 Supreme Court Decisions*, 7 FAM. PLAN. PERSPS. 23, 23 (1975).

311. *Id.* at 28, 31 (counting only those hospitals that performed more than twenty-five abortions in the first quarter of 1974).

312. Willard Cates, Jr. & Roger Rochat, *Illegal Abortions in the United States: 1972–1974*, 8 FAM. PLAN. PERSPS. 86, 87 (1976).

313. See ZIEGLER, *supra* note 44, at 30–42.

314. See *id.* at 21–34.

315. See JOHANNA SCHOEN, ABORTION AFTER ROE 93–136 (2015).

the rest of medical care.³¹⁶

Like *Roe*, *Dobbs* will shape the kind of services offered by abortion providers now and moving forward. As noted, since first approving medication abortion, the FDA required, among other things, that the drug be dispensed in person.³¹⁷ This requirement dramatically limited medication abortion's reach because it subjected medication abortion to the same barriers of in-clinic services.

During the COVID-19 pandemic, the in-person requirement was an additional means for transmission by requiring patient-provider contact—contact that had no safety or efficacy justification.³¹⁸ In December 2021, after reviewing the evidence of the efficacy and safety of “no-touch” medication abortion, the FDA permanently removed the in-person dispensation requirement.³¹⁹

On the back of this litigation and agency rule change, medication abortion is now offered in twenty-three states through telehealth. The process involves a pregnant person meeting online with a health care professional who evaluates whether the patient is a candidate for medication abortion according to the mandates of state law.³²⁰ The provider mails pills directly to the patient at the address of their choosing—home or otherwise.³²¹ The process takes three to five days and is far cheaper than in-person care.³²² Telehealth services serve abortion seekers forced to travel out of state,³²³ and in January 2021, the FDA announced a certification process for pharmacies, including retail pharmacies, to dispense mifepristone.³²⁴ Certification will include, among other requirements, that a pharmacy agree to particular record keeping, reporting, and medication tracking ef-

316. See ZIEGLER, *supra* note 2, at 21–22.

317. Greer Donley, *Medication Abortion Exceptionalism*, 107 CORNELL L. REV. 627, 639 (2022).

318. See Rachel Rebouché, *The Public Health Turn in Reproductive Rights*, 78 WASH. & LEE L. REV. 1355, 1383–86 (2021).

319. See Donley, *supra* note 317, at 650 (citing Letter from Patrizia A. Cavazzoni, Dir. Ctr. Drug Evaluation & Rsch., FDA, to Donna Harrison & Quentin L. Van Meter at 25–38 (Dec. 16, 2021), <https://www.regulations.gov/document/FDA-2019-P-1534-0016> [<https://perma.cc/ED3T-SUJM>]).

320. Cohen, Donley & Rebouché, *supra* note 208, at 10–11.

321. Donley, *supra* note 317, at 690.

322. See *id.* at 690–91; Cohen, Donley & Rebouché, *supra* note 208, at 12–14.

323. Technology is playing an increasingly important role both in coordinating and delivering abortion care and in fertility tracking. App developers can make more accurate and privacy-protective products independent of external coercion. This may ultimately be the most promising and realistic avenue for fast reform. See Fowler & Ulrich, *supra* note 295, at 28–33, 69.

324. Pharmacies were already permitted to dispense misoprostol, the second drug in the two-drug regimen. However, an anti-abortion group, the Alliance for Defending Freedom, filed a lawsuit against the FDA in November 2022. The plaintiffs claim that the FDA overstepped their authority to approve mifepristone and misoprostol. See Allie Reed & Celine Castronuovo, *Abortion Pill Opponents Seize New Chance to Target FDA Approval*, BLOOMBERG L. (Nov. 23, 2022, 4:25 AM), <https://news.bloomberglaw.com/us-law-week/abortion-pill-opponents-seize-new-chance-to-target-fda-approval> [<https://perma.cc/8LRJ-2GAE>].

forts and to designate a representative to ensure compliance.³²⁵ In addition to recording prescribers and patients, the pharmacy must track and verify receipt of shipments, must be able to track the shipments it makes to patients, and must record the lot number from each package of mifepristone dispensed.³²⁶ Walgreens and CVS indicated a willingness to seek certification; but controversy soon followed over which states it would serve.³²⁷

In addition, de-linking abortion from in-person care has created new avenues to access safe abortion, even in states that ban it. The wave of states banning almost all abortion from conception will find it difficult to control how their residents gain access to abortion. Abortion that is decentralized and independent of in-state physicians will undermine state efforts to police and criminalize abortion.³²⁸

Unlike the pre-*Roe* era, self-managed abortion, as it has typically been described, with medication refers to abortion achieved through mailed pills without the help of a provider, including abortion care with the assistance of a provider outside of the pregnant person's jurisdiction.³²⁹ People can buy abortion pills online and have them shipped from an international pharmacy no matter where they live.³³⁰

Self-managed abortion is not a novel phenomenon. Aid Access shipped abortion pills to the United States starting in 2018.³³¹ After SB8 took effect in Texas, demand for Aid Access services increased by 1180% in the law's immediate aftermath.³³² The reasons to pursue self-managed abortion include affordability (hundreds of dollars less than brick-and-mortar clinics) and privacy, in that the pregnant person can take the pills

325. See FDA, RISK EVALUATION AND MITIGATION STRATEGY (REMS) SINGLE SHARED SYSTEM FOR MIFEPRISTONE 200MG (2021), <https://www.fda.gov/media/164651/download> [<https://perma.cc/5WYH-3YH4>].

326. See *id.*; David Cohen, Greer Donley & Rachel Rebouché, *The FDA's Abortion Pill Update Includes Pointless and Harmful Restrictions*, HILL (Jan. 23, 2023), <https://thehill.com/opinion/healthcare/3805289-the-fdas-abortion-pill-update-includes-pointless-and-harmful-restrictions> [<https://perma.cc/5QK2-L2NZ>].

327. See Pam Belluck & Julie Creswell, *Walgreens Faces Blowback for Not Offering Abortion Pill in 21 States*, N.Y. TIMES (Mar. 7, 2023), <https://www.nytimes.com/2023/03/07/business/walgreens-abortion-pill.html> [<https://perma.cc/387T-ZDA2>]; Niha Masih, *California Suspends \$54M Walgreens Contract Over Abortion Pills Policy*, WASH. POST (Mar. 9, 2023), <https://www.washingtonpost.com/business/2023/03/09/california-walgreens-contract-abortion-mifepristone> [<https://perma.cc/2N74-BX9C>].

328. See Cohen, Donley & Rebouché, *supra* note 208, at 10–15.

329. Rachel K. Jones & Megan K. Donovan, *Self-Managed Abortion May Be on the Rise, But Probably Not a Significant Driver of the Overall Decline in Abortion*, GUTTMACHER INST. (Nov. 2019), <https://www.guttmacher.org/article/2019/11/self-managed-abortion-may-be-rise-probably-not-significant-driver-overall-decline> [<https://perma.cc/98FU-5JBU>].

330. See Jennifer Conti, *The Complicated Reality of Buying Abortion Pills Online*, SELF MAG. (Apr. 9, 2019), <https://www.self.com/story/buying-abortion-pills-online> [<https://perma.cc/BS7Z-DVM6>].

331. See Donley, *supra* note 317, at 660; Jones & Donovan, *supra* note 329.

332. Abigail R.A. Aiken, Jennifer E. Starling, James G. Scott & Rebecca Gomperts, *Association of Texas Senate Bill 8 With Requests for Self-Managed Medication Abortion*, JAMA NETWORK OPEN (Feb. 25, 2022), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789428> [<https://perma.cc/6K8D-UF7E>].

at home.³³³

Medication abortion delivered by mail opens possibilities for care across state borders. As Aid Access has shown, people receive abortion pills by mail and often from a U.S. abortion provider. The anti-abortion movement knows that abortion pills, accessible through websites and telehealth, threaten its goal of a nationwide ban on abortion. But unlike the stories of botched procedures before *Roe*, first trimester abortion can be safely and effectively accomplished with pills ordered over the internet and taken early in pregnancy.

In light of the difficulty of reigning abortion in from abroad or across borders, states have contemplated laws that ban medication abortion's advertisement, shipment, or dispensation.³³⁴ The "sanctuary city for the unborn" movement—the foundation for SB8—is promoting a model ordinance criminalizing possession or distribution of abortion pills.³³⁵ More recently, a very old federal law—the Comstock Act³³⁶—has been a weapon for anti-abortion activism. Though there are persuasive reasons to believe the Act is not enforceable and narrowly interpreted,³³⁷ anti-abortion activists have nevertheless tested its scope by marshaling the Act in recent lawsuits.

Beyond interstate and interjurisdictional conflicts, the post *Dobbs* landscape is marked by movements and markets. What is to stop anti-abortion activists from setting up sites that only purport to deliver medication abortion? The information trail these websites create could alert anti-abortion activists to people seeking abortions who can then be threatened with criminal prosecution, whether the state officially permits that or not. How will these measures actually be enforced? We should, of course, understand that the people who are caught by enforcement efforts will be those who are already the most marginalized.³³⁸ As those efforts take shape, new alliances and oppositions will emerge.

V. BEYOND *DOBBS*: THE FUTURE OF REPRODUCTIVE JUSTICE

Dobbs has provoked a moment of reckoning for supporters of reproductive rights, health, and justice, prompting debate about past strategic

333. Cohen, Donley, & Rebouché, *supra* note 208, at 12–13.

334. See Christine Vestal, *Abortion Medications Set to Become Next Legal Battlefield*, PEW STATELINE (July 13, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/13/abortion-medications-set-to-become-next-legal-battlefield> [https://perma.cc/KM3M-9BTS] (providing the example of South Dakota's proposed ban on "mail-order abortion pills").

335. See *Home*, SANCTUARY CITIES FOR THE UNBORN, <https://sanctuarycities-fortheunborn.org> [https://perma.cc/EW3W-RJZP].

336. An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, Ch. 258 42d Cong. § 2 (1873); see also *supra* note 295.

337. Cohen, Donley and Rebouché, *supra* note 36; *Application of Comstock Act to the Mailing of Prescription Drugs that Can Be Used for Abortion*, Op. O.L.C., slip op. at 16 (2022), https://www.justice.gov/d9/opinions/attachments/2023/01/03/2022-12-23_-_comstock_act_1.pdf [https://perma.cc/959N-3XER].

338. See generally, GOODWIN, *supra* note 184.

missteps and revealing division about how best to proceed. Current and future backlash to *Dobbs* will shake up party politics and organizing strategies that define reproductive justice in the United States. This Part assesses movement strategies without *Roe*—how they may evolve in surprising ways given the changing laws and practices governing abortion. Now that the federal Constitution is no longer the floor for pre-viability abortion, abortion-rights supporters must shift from defense to offense, having lost the constitutional litigation battle (for now) for abortion rights. But an underappreciated aspect of future anti-abortion strategy will be its split attention: trying to advance a national ban on abortion or constitutional recognition of fetal personhood while protecting *Dobbs*. This suggests an upheaval in the political and on-the-ground alliances that characterized the last several decades. In the wake of that upheaval, we briefly map new ways in which future Americans will understand abortion rights.

Without *Roe*, the abortion-rights movement can imagine entirely new approaches. Arguments sounding in “privileges and immunities, the right to travel, religious liberty, federal preemption, the dormant commerce clause, uncompensated takings, procedural due process, federal jurisdiction, health justice, and vagueness,” for example.³³⁹ But most likely, the sea change in abortion advocacy, especially in the near term, is its move away from constitutionalism and toward access. As we have shown, abortion rights were historically tethered to patient–physician relationship, but that has changed as more and more people receive care from providers who are not doctors and end pregnancies with pills, often without the help of any in-state provider.³⁴⁰

On the legislative level, abortion-rights advocates can try to persuade lawmakers and administrative officials to expand access where it continues to exist. So far, a number of states have signaled their willingness to do so.³⁴¹ Moreover, private industry is weighing in on abortion in ways it had not before. Corporations like Citigroup offered their employees abortion travel benefits;³⁴² their example is one that the federal govern-

339. David S. Cohen, Greer Donley & Rachel Rebouché, *Rethinking Strategy After Dobbs*, 75 STAN. L. REV. ONLINE 1, 7 (2022).

340. See generally, Lindgren, *supra* note 46, at 180, 188–92 (framing the right to abortion as one independent of the patient–provider relationship).

341. See, e.g., Matt Stout, *Baker Signs Abortion Rights Expansion Bill Into Law*, BOS. GLOBE (July 29, 2022, 5:04 PM), <https://www.bostonglobe.com/2022/07/29/metro/baker-signs-abortion-rights-expansion-bill-into-law> [<https://perma.cc/LU7G-6URB>] (describing recently passed legislation in Massachusetts to increase abortion access and protect abortion providers from out-of-state prosecution, signed by Republican Governor Charlie Baker).

342. Lananh Nguyen, *Citigroup Will Pay Travel Costs for Employee Abortions in Response to the Texas Law*, N.Y. TIMES (Mar. 17, 2022), <https://www.nytimes.com/2022/03/17/business/citigroup-texas-abortion.html> [<https://perma.cc/386H-ES46>]; see also Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/article/abortion-companies-travel-expenses.html> [<https://perma.cc/MSM9-PFPG>] (listing companies who have promised to cover abortion travel expenses like Starbucks, JPMorgan Chase, PayPal, Amazon, and Reddit).

ment is following in asking abortion-permissive states to apply for 1115 Medicaid Waivers to fund abortion travel for out-of-state patients.³⁴³

Support for abortion rights could be found in expected places. The fertility industry is a multimillion-dollar business; threatening its livelihood in the ways described above might galvanize otherwise abortion-ambivalent lobbyists to defeat personhood bills. As a more attenuated prediction, states that become travel sites for abortion care, like Kansas where voters refused to amend the state constitution to preclude abortion rights,³⁴⁴ may come to view even its heavily regulated abortion services as a contribution to the state economy and embrace that its voters do not share the beliefs of the most restrictive states.

For these and other perceptions to take hold, abortion-rights supporters must decide where to direct their attention. Over the past half-century, there has been internal disagreement within the abortion-rights movement over scope and focus, especially regarding how the movement should center racial justice. This marginalization of race led to the development of the reproductive justice framework.³⁴⁵

“[R]eproductive justice that might be achieved through these coalitions—that is, achieved through ordinary modes of political persuasion,” wrote Robin West in 2009, “might prove more enduring than what we have garnered to date from the Court.”³⁴⁶ *Roe* had long shaped the strategies, priorities, and arguments of those supporting reproductive justice. Will the erasure of *Roe*, notwithstanding its immeasurable real-world costs, usher in a new and more productive era for supporters of reproductive justice? *Roe* itself unquestionably transformed advocacy around issues of reproductive health, rights, and justice since the 1970s. Pro-choice advocates have at times pushed aside other key issues to their coalition, from sterilization abuse in the 1970s to voting rights in the 2010s, because the right to abortion seemed to be in such existential danger. Scholars, including those strongly supportive of abortion rights, have criticized the framework set forth in *Roe*, but many have felt compelled to defend part or all of it, worrying that anything less would only increase the risk of

343. Morgan Chalfant, *Biden Signs Executive Order to Support Patients Traveling for Abortions*, HILL (Aug. 3, 2022, 3:24 PM), <https://thehill.com/homenews/administration/3586693-biden-signs-executive-order-to-support-s-traveling-for-abortions> [https://perma.cc/34HR-VJ5R].

344. Dylan Lysen, Laura Ziegler & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NAT'L PUB. RADIO (Aug. 3, 2022, 2:18 AM), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment> [https://perma.cc/P59J-LMEU].

345. *Reproductive Justice*, SISTER SONG, <https://www.sistersong.net/reproductive-justice> [https://perma.cc/7RVS-X8WQ] (describing the history of the Reproductive Justice movement developed in response to “the women’s rights movement, led by and representing middle class and wealthy [W]hite women, [which] could not defend the needs of women of color and other marginalized women and trans people”).

346. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1432 (2009).

abortion rights being undone.³⁴⁷

Yet the obstacles facing a future movement for reproductive justice are political as well as juridical. In the late 1970s, the larger, better-funded reproductive rights groups, including NARAL and Planned Parenthood, assumed the Supreme Court would strike down any restrictive law, including the Hyde Amendment, a ban on Medicaid reimbursement for abortion.³⁴⁸ But by the late 1980s, the leaders of those groups understood that Republicans had remade the Supreme Court and that some retreat from abortion rights was inevitable.³⁴⁹ Even as NARAL and Planned Parenthood planned for a major political mobilization, however, they played down strategies, arguments, and initiatives that would have helped people of color.³⁵⁰ Their plan instead was to build the largest possible political majority, one that would cow politicians by offering “evidence of numbers and [a] potential pro-choice majority.”³⁵¹ In the late 1980s, Hickman-Maslin Research, a political polling firm working with NARAL, urged the group to avoid what were considered divisive arguments about civil rights, racism, or sexism in favor of the more innocuous message that the “Constitution . . . protect[s] every woman’s right to make her own decision, . . . free from the dictates of government.”³⁵² To win over ambivalent politicians, NARAL and Planned Parenthood narrowed their priorities, practicing laser focused single-issue politics.³⁵³ At the same time, large pro-choice groups worked in increasingly close-knit coalitions, conducting focus groups and polls to determine which messages had the broadest appeal with likely voters—a strategy likely to yield a rhetorical agenda that resonated primarily with White Independents or Republicans.³⁵⁴ These priorities not only produced the message that abortion should be “safe, legal, and rare” in the 1990s but ensured that those who led and even joined the most visible pro-choice groups tended to be White.³⁵⁵

347. See, e.g., Susan E. Wills, *Ten Legal Reasons to Reject Roe*, U.S. CONF. OF CATH. BISHOPS, <https://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/ten-legal-reasons-to-reject-roe> [https://perma.cc/AKE6-AAUT]; Aria Bendix & Dana Varinsky, *The Biggest Health Risks Women Would Face If Roe v. Wade is Overturned*, NBC NEWS (May 4, 2022, 3:33 AM), <https://www.nbcnews.com/health/health-news/health-risks-overturning-roe-v-wade-abortion-rcna27109> [https://perma.cc/AMS3-6FW5].

348. See ZIEGLER, *supra* note 44, at 33–34.

349. See *id.* at 102–03.

350. See *id.* at 100–01; see also ZIEGLER, *supra* note 2, at 104–20.

351. ZIEGLER, *supra* note 44, at 102 (quoting NARAL Agenda (Mar. 8, 1989) (on file with Schlesinger Archive, Harvard University, Box 204, Folder 8)).

352. *Id.* (quoting Memorandum from Hickman-Maslin Research to NARAL Re: “Do’s and Don’ts” (Mar. 22, 1989) (on file with Schlesinger Archive, Harvard University, Box 204, Folder 9)).

353. See *id.* at 102–03; see also SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* 144 (1991).

354. See generally, STAGGENBORG, *supra* note 353, at 143–45; Tracy A. Weitz, *Rethinking the Mantra That Abortion Should be “Safe, Legal, and Rare,”* 22 J. WOMEN’S HIST. 161, 163 (2010).

355. See Weitz, *supra* note 354, at 163.

By the mid-2000s, the disconnect between the priorities of leading pro-choice groups and the reality of reproductive health care had grown. From 1974 to 2005, the abortion rate fell for people in every racial group,³⁵⁶ but people of color comprised an increasingly high percentage of those who had abortions: the abortion rate for Latinx patients was twice as high as that of White patients, while the rate among Black patients was nearly five times higher than White abortion seekers.³⁵⁷

Reproductive justice organizers have long worked parallel to the more visible pro-choice organizations. In the 1970s, Black feminists launched organizations that considered abortion as part of an interconnected set of issues touching on race, class, sex, sexuality, and poverty.³⁵⁸ By the 1990s, a more sustained reproductive movement had taken shape following the 1994 Cairo Conference on World Population and Development with the founding of the SisterSong Reproductive Justice Collective.³⁵⁹ Young activists of color like Kierra Johnson of Choice USA (later, URGE), Silvia Henriquez of the National Institute for Reproductive Health, and Kalpana Krishnamurthy of the Third Wave Foundation fought in the mid-2000s for an agenda that wove together concerns about abortion and contraception with access to care for LGBTQI+ patients, voting rights, and anti-poverty work.³⁶⁰ But similar political hurdles made wealthier pro-choice groups reluctant to talk about broader reproductive justice.

In 2005, for example, the Packard Foundation, a major donor to pro-choice organizations, completed focus group research suggesting that strategies and messages built on reproductive and racial justice would “reflect experience of women & families of color” but still favored a single issue, small government agenda—one that reflected a “new willingness to acknowledge that abortion [was] undesirable.”³⁶¹ Other pro-choice focus group studies in the 2000s proposed similar strategies centered on “personal responsibility,” calculated to appeal to voters unsure about abortion.³⁶²

In a post-*Dobbs* era, a new approach to reproductive justice will have to grapple with the political as well as legal reasons that a reproductive

356. Rachel K. Jones, Mia R. S. Zolna, Stanley K. Henshaw & Lawrence B. Finer, *Abortion in the United States: Incidence and Access to Services, 2005*, 40 *PERSPS. ON SEXUAL & REPROD. HEALTH* 6, 9 (2008).

357. Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, *GUTTMACHER POL'Y REV.*, Aug. 2008, at 2, 2, https://www.guttmacher.org/sites/default/files/article_files/gpr110302.pdf [<https://perma.cc/MQC3-6WEK>].

358. See JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* 56–57 (2003).

359. See Jael Silliman, Marlene Gerber Fried, Loretta Ross & Elena R. Gutiérrez, *Undivided Rights: Women of Color Organize for Reproductive Justice* 49–50 (2016).

360. See *id.* at 87–88; Ziegler, *supra* note 2, at 101–06, 112, 120.

361. Ziegler, *supra* note 2, at 109 (quoting Messaging on Reproductive Rights and Health Prepared for the David and Lucile Packard Foundation (Spring 2005) (on file with Smith College, Box II, Reproductive Justice Messaging Folder)).

362. *Id.* (quoting Memorandum from Women Donors Network to Interested Parties (January 2007) (on file with Smith Collene, Box II, Reproductive Justice Messaging Folder)).

justice agenda has been pushed to the side. And a post-*Dobbs* agenda will have to account for the fact that people of color receive a disproportionate share of abortions; it must listen to and prioritize the needs of those most affected by post-*Dobbs* criminal regimes. *Dobbs*, too, reveals the extent to which reproductive issues, from contraception to infertility to miscarriage care, are inextricably linked to abortion—and the degree to which issues of democracy, from gerrymandering to the rules of campaign finance, have already influenced the abortion laws we have and the Supreme Court in charge of interpreting them. It is not enough for a reproductive justice agenda to avoid the single-issue politics of the past. Access to the vote is as central an issue of reproductive justice as is access to abortion. How reproductive justice advocates illuminate the relationship between eroding democratic norms and shrinking access to reproductive health care is one of the many uncertainties—and opportunities—that will define the age of fracture.

VI. CONCLUSION

In recent years, the abortion debate has seemed to yield few surprises. Before 2022, familiar arguments for life or choice resulted in something of a stalemate in the courts, state legislatures, and Congress—abortion was recognized as a right but was inaccessible across large swaths of the country, especially for those who were marginalized. When anti-abortion advocates gained the upper hand in the Supreme Court, the dismantling of abortion rights came to seem inevitable—and all the more so when a full draft of *Dobbs* leaked in May, 2022.³⁶³

The past and present of our abortion debate cannot tell us what will happen next. Yet the chapter *Dobbs* opened will hardly be defined by well-worn ruts and predictable outcomes. The coming age will expose fresh disagreement about what abortion means and when life begins, about the balance of local, state, and federal power, and about the meaning of constitutional equality. A post-*Dobbs* America will make visible the contradictions and strategic battles in both the abortion-rights movement and anti-abortion movement, all while opening new possibilities for the movement for reproductive justice. The age of fracture will be one of chaos, with profound costs for people who are or can become pregnant. But as history teaches us, destroying the status quo can also create once unimaginable opportunities for change.

363. See, e.g., Chloe Reichel, *The Leaked Dobbs Opinion, Explained*, HARV. L.: BILL OF HEALTH (May 24, 2022), <https://blog.petrieflom.law.harvard.edu/2022/05/24/the-leaked-dobbs-opinion-explained> [<https://perma.cc/GG8F-JNKV>].

