Women's Right to Equality and Reproductive Autonomy: The Impact of *Dobbs v. Jackson Women's Health Organization*

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I. INTRODUCTION

The United Nations Working Group on the Issue of Discrimination Against Women in Law and Practice views the right to reproductive autonomy as essential to women's equality.[1] The UN Committee on the Elimination of Discrimination Against Women (established by the Convention on the Elimination of All Forms of Discrimination Against Women[2]) also emphasizes the importance of reproductive autonomy and the gender-specific health risks of enforced pregnancy and childbirth.[3] Many international courts and treaty-monitoring bodies have also issued decisions recognizing that denial of abortion care violates a woman's human rights, particularly when a pregnancy threatens her life or health, or resulted from rape or incest.[4] Comparative studies of national laws further demonstrate that

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[1] Human Rights Council, Report of the Working Group on the Issue of Discrimination Against Women in Law and Practice, ¶ 35, U.N. Doc. A/HRC/38/46 (May 14, 2018), https://digitallibrary.un.org/record/1637427?ln=en.

[2] G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (Dec. 18, 1979) [hereinafter CEDAW]. The United States signed the CEDAW on July 17, 1980 but the U.S. Senate has not given its consent to ratify it. Melanne Verveer & Rangita de Silva de Alwis, *Why Ratifying the Convention on the Elimination of Discrimination Against Women (CEDAW) is Good for America's Domestic Policy*, GEORGETOWN UNIV. INSTI. FOR WOMEN, PEACE & SEC. (Feb. 18, 2021), https://giwps.georgetown.edu/why-ratifying-the-convention-on-the-elimination-of-discrimination-against-women-cedaw-is-good-for-americas-domestic-policy/. However, as a signatory, the United States is obligated to "refrain from acts which would defeat the object and purpose" of the treaty while preparing for ratification. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). This is a principle of customary international law, codified in the Vienna Convention on the Law of Treaties, art 18. *See id.*

[3] Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24: Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women—Women and Health, 20th Sess., 1999, U.N. Doc. A/54/38/Rev.1, at ¶31(c) (1999).

[4] *See* U.N. Office of the High Commissioner for Human Rights, Information Series on Sexual and Reproductive Health and Rights: Abortion (2020), https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf; Johanna B. Fine, Katherine Mayhall, & Lilian Sepúlveda, *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*,

the global trend is towards liberalization.[5] Even jurisdictions that still formally prohibit abortion often provide broad exceptions – not only for the life of the woman but also for situations in which the pregnancy would likely damage her physical or mental health, or the well-being of her family.[6]

Yet, sections of the United States are rapidly moving in the opposite direction. In *Dobbs v. Jackson Women's Health Organization*,[7] the United States Supreme Court upheld (by a vote of 6 to 3) a Mississippi statute prohibiting abortion after the fifteenth week of pregnancy. The Court had originally granted certiorari to decide the limited question of whether all pre-viability bans on elective abortions are unconstitutional and Chief Justice Roberts (who concurred in the judgment but did not join the majority opinion) argued that the Court should confine itself to that limited question.[8] Nonetheless, the Supreme Court went further and decided (by a vote of 5 to 4) to overrule *Roe v. Wade*[9] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[10] As of January 2023, twenty-four states had either prohibited abortion in most circumstances or were in the process of doing so.[11] Meanwhile, other states (and also the federal government) have responded to *Dobbs* by reaffirming or strengthening legal protections for reproductive autonomy. There are also competing lawsuits pending in the federal courts concerning mifepristone, a drug commonly used for early abortions: one seeks a nationwide ban on the drug while the other seeks to

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HEALTH & HUM. RTS. L. J. (June 2, 2017), https://www.hhrjournal.org/2017/06/the-role-of-international-human-rights-norms-in-the-liberalization-of-abortion-laws-globally/.

[5] Women and Foreign Policy Program Staff, *Abortion Law: Global Comparisons*, COUNCIL ON FOREIGN RELS. (last updated June 24, 2022), https://www.cfr.org/article/abortion-law-global-comparisons.

[6] *E.g.*, Abortion Act 1967 ch. 87 (UK), https://www.legislation.gov.uk/ukpga/1967/87/data.pdf.

[7] 142 S. Ct. 2228 (2022).

[8] *Id.* at 2314 (Roberts, C.J., concurring) (arguing that the Court should uphold the Mississippi statute by adopting a narrowed reading of the Court's prior decisions and "leave for another day" the broader question of whether there is any right to abortion under the federal Constitution).

[9] 410 U.S. 113 (1973).

[10] 505 U.S. 833 (1992); *Dobbs*, 142 S. Ct. at 2242.

[11] Elizabeth Nash & Isabel Guarnieri, *Six Months After Roe: 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INST. (Jan. 10, 2023), https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup?utm_source=Guttmacher+Email+Alerts&utm_campaign=7cad5c6af6-24states&utm_medium=email&utm_term=0_-7cad5c6af6-%5BLIST_EMAIL_ID%5D; *see also Tracking the States Where Abortion is Now Banned*, N.Y. TIMES (Jan. 6, 2023, 10:30 AM), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html.

make it more accessible."[12] Thus, the decision in *Dobbs* has set the stage for new conflicts, at least some of which will likely work their way to the Supreme Court.

While individuals of all gender identities can become pregnant, this Article focuses on the impact of *Dobbs* on women's right to equality, as restrictions on abortion disproportionately affect women and perpetuate stereotypes of their role in society. Part II of the Article begins by reviewing the approach taken in *Roe*, which analyzed abortion from the perspective of a gender-neutral right to privacy, part of the liberty that is protected by the Due Process Clause. In *Casey*, the Supreme Court dispensed with the trimester framework, but upheld *Roe's* "essential holding" (the right to terminate a pregnancy pre-viability). *Casey* also arguably broadened the jurisprudential foundations for a right to abortion, reflecting the intertwining rights of liberty and equality. This interpretative approach to the Fourteenth Amendment's Due Process Clause – sometimes referred to as "equal dignity"[13] – was further developed in the cases of *Lawrence v. Texas*,[14] *United States v. Windsor*,[15] and *Obergefell v. Hodges*,[16] which confirmed the rights of LGBT citizens to equal citizenship. Yet, the concept of equal dignity was never as robustly applied in cases relating to women's right to access abortion. Moreover, the Supreme Court never expressly overruled *Washington v. Glucksberg*[17] or *Geduldig v. Aiello*,[18] cases that would come back to haunt advocates for reproductive autonomy.

Part III of the Article then analyzes the likely impact of *Dobbs* on constitutional interpretation in the federal courts. In addition to resurrecting *Glucksberg* and its rigid test for unenumerated rights, Justice Alito's majority opinion takes a very narrow view of American history, ignoring the reproductive autonomy that women originally exercised and the discriminatory motives underlying the campaign to criminalize abortion at

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[12] Spencer Kimball, *Dueling Court Cases in Washington State and Texas Could Determine Legality of Abortion Pill*, CNBC, https://www.cnbc.com/2023/03/29/abortion-pill-dueling-court-cases-could-determine-legality-of-mifepristone.html.

[13] Laurence H. Tribe, *Equal Dignity, Speaking its Name*, 129 HARV. L. REV. F. 16, 22 (2015).

[14] 539 U.S. 558 (2003).

[15] 570 U.S. 744 (2013).

[16] 576 U.S. 644 (2015).

[17] 521 U.S. 702 (1997) (holding that the state of Washington's prohibition on causing or aiding a suicide did not violate the 14th Amendment and setting forth a rigid test for unenumerated rights, which is discussed *infra*).

[18] 417 U.S. 484 (1974) (holding that a state-operated disability income protection plan could exclude a normal pregnancy without violating the Equal Protection Clause).

the state level in the 1800s. While the majority opinion expressly states that it has no impact beyond the right to abortion, it is difficult to reconcile the approach taken in *Dobbs* with other case law on substantive due process, particularly recent cases protecting the rights of the LGBT community. Justice Alito also failed to acknowledge the relationship between a right to reproductive autonomy and the Equal Protection Clause. Ultimately, this could undermine equal protection jurisprudence in areas other than abortion.

Part IV considers the impact of *Dobbs* from a more pragmatic perspective. Contrary to the expectations of many in the anti-abortion movement, *Dobbs* is unlikely to substantially decrease the number of abortions in the United States. This is partly because advocates for reproductive autonomy are employing new strategies, including law reform and litigation at the state level. Women in restrictive states are also finding ways to get around the new bans, as abortion pills can be obtained from other states and, if necessary, from foreign countries. But the inequality that has long existed in reproductive health care will be further exacerbated by *Dobbs*. Women of color, women who live with disabilities, and women who live in poverty will suffer disproportionately, partly because they will have greater difficulty obtaining abortion pills from outside their states, but also because they have higher rates of maternal mortality and are more likely to be targeted for investigation and prosecution if they "self-manage" an abortion. The question is how legislators and policy makers will grapple, if at all, with those systemic inequalities. Part V thus briefly concludes with some recommendations for legislation at the state level.

II. REPRODUCTIVE AUTONOMY – AT THE NEXUS OF PRIVACY, LIBERTY AND EQUALITY?

A. *The Relationship Between Gender Equality and Reproductive Autonomy*

When arguing for a right to reproductive autonomy (whether in the courts or in legislative bodies) advocates around the world have relied on a range of legal principles, including: the right to bodily integrity, the right to privacy, the right to liberty and individual self-determination, and the right to be free from torture and inhumane treatment. On the surface, these are gender-neutral rights that can be claimed by any individual. However, reproductive autonomy can also be analyzed from a feminist perspective, thereby invoking the more recently developed principles of gender equality and equal

protection of the law.[19] Because women bear a disproportionate share of the burdens of childcare, the violation of their right to liberty caused by forced motherhood will generally continue for many years.[20] Adoption does not cure these violations, partly because women who are denied abortions rarely opt for adoption.[21] Moreover, adoption cannot relieve the substantial pain, risks, and burdens that result from involuntary pregnancy and childbirth. For some women, denial of abortion care has proven fatal.[22] In the United States, approximately 700 women die every year due to pregnancy-related complications, and the mortality rate is particularly high for women of color.[23] The reproductive justice movement draws attention to these persistent inequalities, recognizing that the ability of women to make meaningful choices is shaped by intersecting forms of discrimination, including not only gender discrimination but also racism, classism, and heterosexism.[24] The reproductive justice movement is also much broader than the right to choose abortion; it also advocates for the human right to have children and the right to raise them in safe and sustainable communities.[25]

In addition to the discriminatory *impact*, feminist scholars have also critiqued the discriminatory *origins* of restrictions on reproductive autonomy. Under this analysis, a government's decision to restrict access to contraception or abortion reflects men's desire to exercise power over

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[19] *See, e.g.*, Reva B. Siegel, Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression, 56 Emory L. J. 815, 817–22 (2007).

[20] *See id.* at 826–27.

[21] Gretchen Sisson, Lauren Ralph, Heather Gould & Diana Greene Foster, Adoption Decision Making Among Women Seeking Abortion, 27 Women's Health Issues 1, 1–2 (2017). https://www.researchgate.net/publication/313127526_Adoption_Decision_Making_among_Women_Seeking_Abortion.

[22] *See, e.g.*, Joe Parkins Daniels et al., Killed by Abortion Laws: Five Women Whose Stories we must Never Forget, Guardian (May 7, 2022, 7:00 AM), https://www.theguardian.com/global-development/2022/may/07/killed-by-abortion-laws-five-women-whose-stories-we-must-never-forget; Megan Specia, How Savita Halappanavar's Death Spurred Ireland's Abortion Rights Campaign, N.Y. Times (May 27, 2018), https://www.nytimes.com/2018/05/27/world/europe/savita-halappanavar-ireland-abortion.html.

[23] Latoya Hill, Samantha Artiga, & Usha Ranji, *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, Kaiser Fam. Found. (Nov. 1, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/#.

[24] Loretta Ross & Rickie Solinger, Reproductive Justice: An Introduction 9–17 (1987).

[25] *Id.*

women and to keep them in their traditional roles as mothers and wives.[26] It also reflects a fundamental distrust of women's ability to make important decisions. As Catharine MacKinnon argued, the issue is not simply whether a fetus is a form of life; rather, the issue is: "Why should women not make life or death decisions?"[27] The feminist case for reproductive autonomy thus critiques the male-dominated social structure as a whole. In contrast, the principles of bodily integrity, liberty, and privacy pose no obvious threat to the traditional unequal balance of power between men and women within the family. Indeed, by resisting public intervention into the "private sphere" of family life, undue emphasis on the right to privacy may, at times, help to perpetuate gender discrimination.[28] The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") attempts to address this concern by obligating state parties to redress inequality within the family[29] (rather than simply in aspects of public life) and to ensure that women enjoy an equal right "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."[30]

B. Roe v. Wade *and the Gender-Neutral Right to Privacy*

The United States Supreme Court's early jurisprudence on reproductive autonomy was primarily based on a gender-neutral right to privacy, part of the liberty guaranteed by the Fourteenth Amendment's Due Process Clause. In 1965, in *Griswold v. Connecticut*, the Court struck down a statute prohibiting the use of contraceptives on the ground that it violated the right to marital privacy.[31] Seven years later, in *Eisenstadt v. Baird*, the Court clarified that this is an individual right and struck down a statute preventing unmarried individuals from obtaining contraception.[32] In addition to the right to privacy, the Court also held that the statutory distinction between married

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[26] CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93–102 (1987).

[27] *Id.* at 94.

[28] *Id.* at 101. For a summary of responses to this argument in the context of access to abortion *see*, for example, ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 54–81 (1988) and Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J. L. & PUB. POL'Y 419, 438–39 (1995).

[29] CEDAW, *supra* note 2, at Arts. 5, 12, 16.

[30] *Id.* at Art. 16 § 1(e).

[31] 381 U.S. 479 (1965).

[32] 405 U.S. 438, 445–46 (1972).

and unmarried people violated the Equal Protection Clause.[33] But the Court did not point out the inherent *gender inequality* of the law, although an involuntary pregnancy caused by a bar on contraception could certainly be analyzed as a sex-specific burden imposed by the state.[34]

Roe v. Wade was decided one year later, in 1973.[35] The plaintiffs in *Roe* and the companion case (*Doe v. Bolton*[36]) did not argue that the statutes constituted discrimination on the basis of sex. At that time, the Supreme Court had only just begun to recognize how sex-based statutes can violate the Equal Protection Clause.[37] Thus, it is not surprising that the litigants would pursue a more conservative strategy, arguing that the Texas and Georgia statutes violated the right to privacy and the doctor-patient relationship.[38] Justice Blackmun's opinion in *Roe* did acknowledge the significant physical and psychological burdens of pregnancy, childbirth, and motherhood.[39] However, he did not emphasize the sex-specific nature of an involuntary pregnancy.[40] Rather, he focused on the private nature of the medical decision and the right of the doctor to determine, in consultation with his patient, whether a pregnancy should be terminated.[41]

The Court has missed other opportunities to recognize the sex-based nature of laws and government policies that affect pregnant women. For example, in 1974, in *Geduldig v. Aiello*, the Court held that a state-operated disability income protection plan could exclude normal pregnancy without violating the Equal Protection Clause.[42] The dissenting opinion of Justice Brennan (joined by Justices Marshall and Douglas) pointed out that the state had singled out "for less favorable treatment a gender-linked disability peculiar to women" and thus created a "double standard" for disability compensation.[43] The dissent argued that "[s]uch dissimilar treatment of men

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[33] *Id.* at 447–48.

[34] *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 978 (1984).

[35] 410 U.S. 113 (1973).

[36] *See generally id.*; *Bolton*, 410 U.S. 179 (1973) (challenging a Georgia statute that permitted abortion only when the pregnancy threatened the life or health of the woman or resulted from rape and in cases of fetal impairment).

[37] Reed v. Reed, 404 U.S. 71, 76 (1971).

[38] *See, e.g.*, *Roe*, 410 U.S. at 116.

[39] *Id.* at 153.

[40] *See generally id.*

[41] *See id.* at 154.

[42] 417 U.S. 484 (1974). The Court made a similar ruling in the context of interpreting Title VII but Congress then overruled the Court by amending Title VII to state explicitly that classification on the basis of pregnancy constitutes a sex-based classification.

[43] *Id.* at 501.

and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination."[44]

Geduldig was widely criticized[45] and the lower federal courts initially sought to blunt its impact by distinguishing cases arising under Title VII.[46] When the Supreme Court insisted on applying the logic of *Geduldig* to Title VII,[47] Congress did not hesitate to overrule it by enacting the Pregnancy Discrimination Act 1978.[48] Even in the context of constitutional interpretation, it is arguable that *Geduldig* has been superseded by subsequent case law, including *United States v. Virginia*[49] (in which the Supreme Court applied heightened scrutiny to sex-based state action) and *Nevada Department of Human Resources v. Hibbs* (in which the Court held that Congress could use its powers under the Equal Protection Clause to enact the Family and Medical Leave Act and remedy inequality in maternity and paternity leave policies).[50] But *Geduldig* was never expressly overruled (and, as discussed below, was cited by Justice Alito in *Dobbs*).[51]

Over the years, many constitutional law experts have also critiqued the Court's general failure to analyze reproductive autonomy through the lens of women's right to equality. For example, Ruth Bader Ginsburg observed (well before she was elevated to the Supreme Court) that the Court's position in *Roe* was weakened "by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."[52] The privacy analysis has also been blamed for decisions upholding statutes that prohibit public funding for abortions (although it is

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[44] *Id.*

[45] *See, e.g.*, Law, *supra* note 34, at 982–83, 1037; Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 442–43, 451 (2007).

[46] Shannon E. Liss, *The Constitutionality of Pregnancy Discrimination: The Lingering Effects of* Geduldig *and Suggestions for its Reversal*, 23 REV. L. & SOC. CHANGE 59 (1997).

[47] *See generally* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

[48] Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e), https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg2076.pdf#page=1.

[49] 518 U.S. 515 (1996).

[50] 538 U.S. 721 (2003).

[51] *See* discussion *infra* Part III.

[52] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 386 (1985). Ginsburg and certain other commentators also believed that *Roe* "ventured too far" by announcing the trimester framework, *id.* at 381–82, an issue that is not analyzed in this article. The alternative would have been to simply strike down the Texas and Georgia statutes and let state legislators figure out how to comply with the ruling.

not at all clear that those cases would have come out differently had *Roe* been decided on Equal Protection grounds).[53] Of course, the anti-abortion movement did not confine itself to restricting public funding for abortion. Rather, it devised numerous strategies to overrule *Roe*, including articles attacking the constitutional analysis and the scope of the judgment, an unsuccessful campaign to amend the Constitution to expressly protect the unborn, and a far more successful campaign to work for the appointment of Supreme Court justices who were expected to disagree with *Roe* (even if they were careful not to say so explicitly in Senate confirmation hearings).[54]

The impact of these multiple strategies was felt as early as 1989 when the Court upheld, by a 5 to 4 vote, a Missouri statute that was clearly intended to make it difficult to obtain a legal abortion.[55] The provisions upheld by the Court included a statutory preamble that declared that life begins at conception, a restriction on abortions in public facilities, and a requirement that a number of tests of fetal viability be performed if the pregnancy was twenty or more weeks.[56] Although only Justice Scalia expressly stated that he would overrule *Roe*, the decision in *Webster* created significant uncertainty regarding *Roe's* precedential weight.[57] It also gave conservative states an incentive to continue to enact and enforce a variety of burdensome regulations, often adopted in the name of ensuring "informed" consent or to require that the parents or spouse of the pregnant woman be notified.[58] The uncertainty regarding the status of Roe increased with the retirements of two

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[53] This is partly because U.S. constitutional law emphasizes formal (as opposed to substantive) equality. Thus, even if a legal right to terminate one's pregnancy had been grounded in the Equal Protection Clause, it is unlikely that the Court would have required the government to subsidize abortions. *See* Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J. L. & PUB. POL'Y 419, 452 (1995).

[54] *See, e.g.*, Lexi Lonas, *What the Conservative Justices Said About* Roe v. Wade *During Confirmation Hearings*, HILL (May 3, 2022), https://thehill.com/regulation/court-battles/3475490-what-the-conservative-justices-said-about-roe-v-wade-during-confirmation-hearings/.

[55] *See generally* Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

[56] *Id.* at 501.

[57] Justice O'Connor suggested a new interpretation of *Roe*, that it required only that states do not impose an "undue burden" on women's right to choose abortion. *Webster*, 492 U.S. at 530. But she also noted that she found the trimester framework problematic and that "there will be time enough to reexamine" *Roe*. *Id.* at 526. The trimester framework was ultimately discarded in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[58] Martha M. Ezzard, *State Constitutional Privacy Rights Post Webster—Broader Protection Against Abortion Restrictions?*, 67 DENV. U. L. REV. 401, 401–02 (1990) (summarizing state statutes enacted as a result of the decision in *Webster*).

of the four dissenters in Webster: Justice Brennan (in 1990) and Justice Marshall (1991). This enabled President Bush to nominate Justice David Souter and Justice Clarence Thomas. The two nominees managed not to reveal their views on abortion during their confirmation hearings, leading to substantial speculation on whether Roe would survive.[59]

C. Casey and the Concept of Equal Dignity

In 1992, the Court had to examine one of the statutes enacted in the aftermath of *Webster*, the Pennsylvania Abortion Control Act of 1982.[60] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[61] only two justices (Blackmun and Stevens, who had also dissented in *Webster*) expressed wholehearted support for *Roe*. But three additional justices (O'Connor, Kennedy and Souter) voted to reaffirm *Roe's* "essential holding," which they described as the "recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."[62] The plurality's decision was partly based on the force of stare decisis.[63] But the justices also arguably put the right to abortion on a firmer constitutional foundation, by emphasizing the link between reproductive autonomy and women's full citizenship.[64] The opinion emphasized that every woman has a right to liberty and to reject, if she so chooses, the traditional role of wife and mother.[65] As the plurality stated:

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[59] Frederic J. Frommer, *When Two Liberal Judges Nearly Doomed Roe v. Wade—By Retiring*, WASHINGTON POST (June 6, 2022), https://www.washingtonpost.com/history/2022/06/06/thurgood-marshall-william-brennan-roe/.

[60] 18 PA. CONS. STAT. §§ 3205 (requiring that a woman seeking an abortion give her informed consent prior to the procedure, and specifying that she be provided with certain information at least 24 hours before the abortion is performed); 3206 (mandating the informed consent of one parent for a minor to obtain an abortion but providing a judicial bypass procedure); 3209 (mandating that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband); 3203 (defining a "medical emergency" that will excuse compliance with the foregoing requirements); and 3207(b), 3214(a), and 3214(f) (imposing reporting requirements on abortion providers).

[61] 505 U.S. 833 (1992).

[62] *Id.* at 846.

[63] *Id.* at 845–46.

[64] *Id.* at 856 (noting that "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").

[65] *Id.* at 856–57.

> [T]he liberty of the woman is at stake in a sense unique to the human condition . . . [h]er suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.[66]

This language implicitly recognized the sex-based nature of a statutory restriction on abortion.

The justices also struck down what was arguably the most offensive restriction in Pennsylvania's Abortion Control Act – the spousal notification requirement.[67] In addition to acknowledging the many reasons why a woman might not wish to notify her husband (such as situations of domestic violence), the plurality concluded that the requirement was inconsistent with women's right to equality:

> Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family.[68]

In essence, the plurality stated that the scope of women's right to liberty under the Due Process Clause must be ascertained in line with their current status under the Constitution (which is, of course, much different than when the Due Process Clause was adopted in 1868). Justices Stevens and Blackmun were even more explicit regarding the connection between gender equality and reproductive autonomy.[69] Stevens described *Roe* as "an integral

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[66] *Id.* at 852.

[67] The court below (the Court of Appeals for the Third Circuit) had also struck down the spousal notification requirement. It is noteworthy, however, that one judge in the three-judge panel had dissented from that part of the judgment—Samuel Alito. In a dissenting opinion, then Judge Alito stated, "The Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems—such as economic constraints, future plans, or the husbands' previously expressed opposition—that may be obviated by discussion prior to the abortion." Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 726 (3d Cir. 1991) (Alito, J., concurring in part and dissenting in part).

[68] *Casey*, 505 U.S. at 898.

[69] *Id.* at 912, 927–28 (Blackmun and Stevens, JJ., concurring).

part of a correct understanding of both the concept of liberty and the basic equality of men and women."[70] Blackmun cited numerous academic sources supporting the proposition that a right to equality includes access to legal abortion.[71] And this time, Blackmun expressly invoked the Equal Protection Clause:

> By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. . . . The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual, or the Constitution."[72]

Although the plurality's opinion was not as explicit about the relevance of the Equal Protection Clause, Professor Emeritus Laurence Tribe would later cite *Casey* as an early example of the nexus between the right to liberty and the right to equality.[73] This concept – often referred to as "equal dignity" – was further developed by Justice Kennedy in *Lawrence v. Texas*,[74] *United States v. Windsor*,[75] and *Obergefell v. Hodges*.[76] In essence, Justice Kennedy synthesized the rights to liberty and equality and applied the anti-subordination principle, arguing that if the rights protected by the Fourteenth Amendment "were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[77] Under this approach, in order to fulfill

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[70] *Id.* at 912.

[71] *Id.* at 928, n.4 (stating that a "growing number of commentators are recognizing this point" and citing articles by such scholars as Laurence Tribe, Reva Siegel, and Cass Sunstein).

[72] *Id.* at 928–29 (internal citations omitted).

[73] Tribe, *supra* note 13, at 22 (citing *Casey*, 505 U.S. at 851).

[74] 539 U.S. 558, 567 (2003).

[75] 570 U.S. 744, 770 (2013).

[76] 576 U.S. 644, 674 (2015).

[77] *Id.* at 671.

the promise of the Fourteenth Amendment, the Court must apply the Due Process Clause alongside the Equal Protection Clause and draw on our contemporary understanding of the oppressive nature of longstanding laws and policies."

This interpretative approach enabled Justice Kennedy to avoid applying *Washington v. Glucksberg*,[78] where the Court had stated that an unenumerated right is only protected under the Due Process Clause if it is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[79] In *Obergefell*, Kennedy simply stated that such a narrow test for unenumerated rights would be "inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."[80] Rather, the Court would embrace the more flexible approach articulated by Justice Harlan in *Poe v. Ullman*,[81] which had also been applied in both *Griswold* and *Casey*.

The concept of equal dignity has been rightly applauded as an essential step in affirming the equal citizenship of gay and lesbian individuals.[82] But, as Justice Ginsburg observed, it was not as robustly applied in cases asserting women's rights.[83] This was particularly true with respect to abortion, perhaps because the anti-abortion movement has been actively promoting its own competing narratives of dignity and equality.[84] This can be seen in the "fetal personhood" campaign[85] and in literature claiming (falsely) that a fetus experiences pain as early as the first trimester.[86] The anti-abortion movement

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[78] 521 U.S. 702 (1997) (holding that the state of Washington's prohibition on causing or aiding a suicide did not violate the 14th Amendment).

[79] *Id.* at 721. *Glucksberg* also required a "careful description" of the asserted right. *Id.* at 724.

[80] 576 U.S. 644, 671 (2015).

[81] Griswold v. Connecticut, 381 U.S. 479, 484 (citing *Poe*, 367 U.S. 497, 516–22 (1961) (Harlan, J., dissenting)); Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 847 (citing *Poe*, 367 U.S. at 541 (Harlan, J., dissenting)).

[82] Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147 (2015).

[83] Adam Liptak, *Justices' Rulings Advance Gays; Women Less So*, N.Y. TIMES (Aug. 14, 2014), https://www.nytimes.com/2014/08/05/us/as-guys-prevail-in-supreme-court-women-see-setbacks.html.

[84] Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, NEW YORKER (June 5, 2019), https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars.

[85] *Id.*

[86] *See Facts are Important: Gestational Development and Capacity for Pain*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/advocacy/facts-are-important/gestational-development-capacity-for-pain (noting that: "peer-reviewed studies on the matter have consistently reached the conclusion that abortion before [24 weeks] does not

has also portrayed abortion as a form of discrimination, implying that it is often sought due to the sex, race, or disability of the fetus.[87] This strategy included a campaign to persuade the American public that sex-selective abortion is rampant in the United States,[88] although it is actually very rare.[89] Indeed, the movement has characterized abortion as a form of eugenics, although that term would normally be reserved for state policies rather than an individual woman's decision to terminate a pregnancy.[90] Justice Thomas has repeated these claims many times, arguing that the Court should pay more attention to the eugenic potential of abortion.[91]

These competing narratives may have made it difficult for Justice Kennedy – who is known to be very conflicted on abortion – to fully apply his "equal dignity" framework to women's right to abortion.[92] The Court's decision in

result in the perception of pain in a fetus"). *See also CDC's Abortion Surveillance System FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm (reporting that less than one percent of abortions are performed at or beyond 21 weeks' gestation).

[87] *See* Carole J. Petersen, *Reproductive Autonomy and Laws Prohibiting "Discriminatory" Abortions: Constitutional and Ethical Challenges*, 96 U. DET. MERCY L. REV. 605, 608–09 (2019); *Reproductive Justice, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities*, 28 J. L. & HEALTH 121, 127–28 (2015).

[88] *See, e.g.*, Steven W. Mosher, *President's Page: Let Us Ban Sex–Selective Abortions*, POPULATION RSCH. INST. (Mar. 1, 2007), https://www.pop.org/presidents-page-let-us-ban-sex-selective-abortions/.

[89] The anti-abortion movement sometimes points to the lower birth rate of female than male babies in certain ethnic communities in the United States. However, such statistics do not necessarily evidence sex-selective abortion as fertility clinics offer prospective parents means to influence the sex of their future child, including "sperm sorting" and artificial insemination. Sex-selection can also be achieved through pre-implantation diagnosis of fertilized eggs. *See, e.g.*, Brian Citro, Jeff Gilson, Sital Kalantry & Kelsey Stricker, *Replacing Myths with Facts: Sex-Selective Abortion Laws in the United States*, U. CHI. L. SCH. INT'L HUM. RTS. CLINIC, JUNE 2014, at 7, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2536&context=facpub.

[90] *See* Petersen, *supra* note 87, at 608–19.

[91] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1783–93 (2019) (Thomas, J., concurring). For critique, *see generally* Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025 (2021); Petersen, *supra* note 87.

[92] Charlotte Alter, *Here's What Justice Kennedy Thinks About Abortion*, TIME (Mar. 2, 2016), https://time.com/4243675/heres-what-justice-kennedy-thinks-about-abortion/.

Gonzales v. Carhart[93] (decided after *Lawrence* but before *Windsor* and *Obergefell*) is a good example. The case concerned a federal law prohibiting "intact dilation and extraction,"[94] one of two surgical methods applied in the very small percentage of abortions performed after the first trimester (usually due to a fetal disability or a serious health problem of the woman).[95] The federal statute contained a very limited exception for situations when the procedure was necessary to preserve the woman's life.[96] But it contained no exception for situations in which a doctor determined that the procedure was necessary to preserve a woman's health (e.g. to prevent damage to her uterus).[97] A very similar law, enacted by Nebraska, had been struck down by the Court in 2000.[98] But Justice Kennedy dissented from that decision and, in 2007, he provided the fifth vote to uphold the federal equivalent of Nebraska's ban.[99] He also wrote the majority opinion, which ignores women's rights to liberty, dignity, or equality.[100] Rather, Justice Kennedy took the position that *Casey* allows the state to regulate the medical profession and simply accepted Congress' findings that a "moral, medical, and ethical consensus exists" that the procedure is brutal, inhumane, and never medically necessary.[101] He also repeated paternalistic assumptions about women who have abortions, implying that they do not really understand what they are agreeing to and that abortion injures a woman's mental health.[102] Although the government had not even argued this point, Justice Kennedy further suggested that a ban on this method of abortion might be justified by the government's interest in protecting women from making a decision that they would regret:

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[93] 550 U.S. 124 (2007).

[94] *Id.* at 124. Congress used the term "partial birth abortion" (although that is not the medical term for the procedure). *See* Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2003).

[95] Stephen T. Chasen, et al., *Dilation and Evacuation at 20 Weeks: Comparison of Operative Techniques* 190 AM. J. OBSTETRICS & GYNECOLOGY 1180, 1180–83 (2004), https://www.ajog.org/article/S0002-9378(03)02176-8/fulltext#secd42855620e378 (noting that some doctors believe that an intact dilation and evacuation pose less risk of certain complications, such as perforating the woman's bladder).

[96] *Gonzales*, 550 U.S. at 141.

[97] *Id.* at 143.

[98] Stenberg v. Carhart, 530 U.S. 914 (2000).

[99] *Id.* at 656–79 (Kennedy, J., dissenting); *Gonzales*, 550 U.S. at 130.

[100] *Gonzales*, 550 U.S. at 131.

[101] *Id.* at 141.

[102] Linda Greenhouse, *Adjudging a Moral Harm to Women from Abortions*, N.Y. TIMES (Apr. 20, 2007), https://www.nytimes.com/2007/04/20/us/20assess.html.

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.[103]

As Justice Ginsburg pointed out in her dissent, Justice Kennedy's reasoning was overtly discriminatory and reflected "the ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[104] Although purporting to apply the "undue burden" standard, the case marked a sharp departure from the approach taken in *Casey*, which had insisted on women's equal citizenship and their right to exercise decisional autonomy.[105] It was also very difficult to reconcile *Gonzales v. Carhart* with the Court's 2000 decision in *Stenberg v. Carhart*,[106] creating the impression that the Court was not really committed to its prior decisions.[107]

In 2016, the Court's decision in *Whole Woman's Health v. Hellerstedt* briefly reassured supporters of reproductive autonomy.[108] In that case, the majority applied the "undue burden" standard in a meaningful way, holding that legislation that unduly burdened abortion providers without significant health benefits violated the standard in *Casey*.[109] Some commentators predicted that activists would be able to use the case to challenge other

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[103] *Gonzales*, 550 U.S. at 159 (citations omitted); *see also* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey *and* Carhart, 117 YALE L. J. 1694 (2008).

[104] *Gonzales*, 550 U.S. at 185 (Ginsburg, J., dissenting).

[105] Kenneth L. Karst, *Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 130–33 (2007).

[106] *Compare Gonzales*, 550 U.S. 124 (2007) *with Stenberg*, 530 U.S. 914 (2000).

[107] *See After* Gonzales v. Carhart*: The Future of Abortion Jurisprudence*, PEW RSCH. CTR. (June 14, 2007) (quoting remarks of Eve Gartner, Senior Attorney for Planned Parenthood of America), https://www.pewresearch.org/religion/2007/06/14/after-gonzales-v-carhart-the-future-of-abortion-jarisprudence/.

[108] 579 U.S. 582 (2016).

[109] *Id.*

"TRAP" laws[110] across the country.[111] But that optimism faded quickly after the unexpected election of Donald Trump in November 2016.[112] President Trump managed to appoint three new justices to the Supreme Court—almost unthinkable for a one-term President.[113] Suddenly, the possibility of overruling *Roe* and *Casey* became a reality. The next two sections of the article analyze that new reality, beginning with the impact of *Dobbs* on the Court's approach to constitutional interpretation.

III. THE IMPACT OF DOBBS ON CONSTITUTIONAL INTERPRETATION

A. Revival of the Glucksberg Test and Selective Use of History

When *Obergefell* was decided, it appeared that the Supreme Court had abandoned the *Glucksberg* test for unenumerated rights in favor of the more open-ended common law approach advocated by Justice Harlan's dissent in *Poe v. Ullman*.[114] Indeed, Chief Justice Roberts complained, in his dissenting opinion in *Obergefell*, that the majority had effectively done so.[115] Laurence Tribe also believed that *Obergefell* had "definitively replaced" the rigid formulaic test of *Glucksberg*.[116]

But the *Glucksberg* test came roaring back in *Dobbs*. Justice Alito's opinion states, without any qualification, that an unenumerated right is only protected by the Due Process Clause if it is "deeply rooted in this Nation's

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[110] TRAP is an abbreviation for "Targeted Regulation of Abortion Providers," an umbrella term used to refer to state laws that imposed far more regulations on abortions than on other procedures posing similar or greater medical risks. Although enacted in the name of protecting women's health, the motivation was to force abortion clinics to close. As a result, access to abortion was already very uneven in the United States and depended largely on whether one lived in a conservative or liberal state. *See generally* Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L. J. 1081 (2021).

[111] *See, e.g.*, Erika Hanson, *Lighting the Way Towards Liberty: The Right to Abortion after* Obergefell *and* Whole Woman's Health, 45 HASTINGS CONST. L. Q. 93 (2017).

[112] *See* Ariana de Vogue, *How Trump's Election Reignites the Abortion Wars*, CNN POL. (Dec. 14, 2016, 8:39 AM), https://www.cnn.com/2016/12/14/politics/trump-abortion-supreme-court/index.html.

[113] *See* Frank Bruni, Opinion, *The Special Hell of Trump's Supreme Court Appointment: With a Nonexistent Mandate, He does Extraordinary Damage*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/09/22/opinion/trump-supreme-court-appointment.html.

[114] *See* Poe v. Ullman, 367 U.S. 497, 522–56 (1961) (Harlan, J., dissenting); *see generally* Yoshino, *supra* note 82, at 149 (outlining the Court's contrasting approaches to substantive due process); Ronald Turner, *Whither* Glucksberg*?*, 15 DUKE J. CONST. L. & PUB. POL'Y 183 (2020) (examining differing interpretations of substantive due process post-*Obergefell*).

[115] 576 U.S. 644, 702–03 (2015) (Roberts, C.J., dissenting) (describing *Glucksberg* as the "leading modern case setting the bounds of substantive due process").

[116] Tribe, *supra* note 13, at 16.

history and tradition" and "implicit in the concept of ordered liberty."[117] He then applied that test to the question of abortion and embarked on a lengthy discussion of the history of abortion legislation, concluding that when the Due Process Clause was adopted, three-quarters of the states prohibited abortion at all stages of pregnancy.[118] This was designed to demonstrate that Justice Blackmun's survey of early American history in *Roe* – which had not revealed a tradition of criminalizing abortion prior to "quickening" – was egregiously wrong, and that the right to abortion recognized in *Roe* could not possibly meet the *Glucksberg* test.

However, Justice Alito's historical survey has also been strongly criticized by historians, partly because he did not acknowledge the reproductive autonomy that American women originally exercised, but also because he did not take into account the motives for the anti-abortion statutes that were enacted in the 1800s, or the extent to which they were enforced.[119] Justice Alito is correct that no legal treatise from the early American period proclaimed that women had a "right" to terminate a pregnancy.[120] But at that time the state simply was not involved in matters of pregnancy, childbirth, and abortion. These matters were managed almost entirely by women, as part of a social and community-oriented model overseen by midwives.[121] During

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[117] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[118] *Id.* at 2252–43.

[119] *See, e.g.*, Leslie J. Reagan, *What Alito Gets Wrong About the History of Abortion in America*, POLITICO (June 2, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/06/02/alitos-anti-roe-argument-wrong-00036174 (explaining how the 19th century laws Justice Alito cited in his leaked *Dobbs* draft opinion produced a public health disaster); Maurizio Valsania, *How Alito Cherrypicked History in* Dobbs, COUNTERPUNCH (July 8, 2022), https://www.counterpunch.org/2022/07/08/how-alito-cherrypicked-history-in-dobbs-when-the-us-constitution-was-ratified-women-had-much-more-autonomy-over-abortion-decisions-than-during-19th-century/ (criticizing Justice Alito's "selective foray[] into history" in *Dobbs* that failed to consider how the nineteenth century saw a decrease in the trust in, and power of, women).

[120] Jennifer Schuessler, *The Fight Over Abortion History*, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/arts/roe-v-wade-abortion-history.html.

[121] Ranana Dine, *Scarlet Letters: Getting the History of Abortion and Contraception Right*, CTR. AM. PROGRESS (Aug. 8, 2013), https://www.americanprogress.org/article/scarlet-letters-getting-the-history-of-abortion-and-contraception-right/ ("Colonial women procured pre-quickening abortions mainly with the help of other women in their communities; skilled midwives knew which herbs could cause a woman to abort, and early American medical books even gave instructions for . . . inducing an abortion."); *see also* Reva B. Siegel, *Reasoning*

that time period, women commonly consumed herbs to terminate an early pregnancy (a process referred to as "restoring the menses" rather than as an abortion).[122] As historian Leslie Reagan summarized, "[i]n early America as in early modern England, abortion before 'quickening' was legal under common law and widely accepted in practice."[123] The time of quickening (when the pregnant person begins to perceive fetal movement) was a subjective standard determined by the woman rather than the state. But it would normally occur between sixteen and twenty weeks into a pregnancy.[124]

The legal framework only began to change in the nineteenth century, largely due to the efforts of the American Medical Association (AMA), which was founded in 1847.[125] The campaign to prohibit abortion was led by Dr. Horatio Storer, who is often described as the "father" of American Gynecology.[126] Storer's campaign was supported by the AMA and motivated in part by doctors' desire to consolidate their control over reproductive health care and discredit their chief competitors – traditional female midwives and homeopaths.[127] The legislative campaign against abortion was also inspired by both sexism and racism. Storer and his supporters made a concerted effort to demonstrate a link between abortion and the declining birthrate among Protestant women, arguing that these women were shirking their natural duties and that immigrant families, many of them Catholic, would soon outnumber native-born white Yankees.[128] Justice Alito was made aware of this history but he dismissed it because the statements documenting the

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from the Body: An Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261, 300 (1992).

[122] Reagan, *supra* note 119.

[123] *Id.*; *see also* Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. (forthcoming 2023) (noting that no American state originally banned abortion prior to quickening).

[124] *See Quickening*, CLEVELAND CLINIC (Apr. 22, 2022), https://my.clevelandclinic.org/health/symptoms/22829-quickening-in-pregnancy (defining "quickening" as the time when the pregnant person begins to perceive fetal movements, which normally occurs between 16 and 20 weeks).

[125] *See Abortion is Central to the History of Reproductive Health Care in America*, PLANNED PARENTHOOD ACTION FUND, https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america (last visited Feb. 7, 2023).

[126] Dine, *supra* note 121 ("[A] coalition of male doctors backed by the American Medical Association, the Catholic Church, and the sensationalist newspapers began to campaign for the criminalization of abortion.").

[127] Siegel, *supra* note 121, at 282–85.

[128] *See id.* at 297–300; Brief for American Historical Association et al. as Amici Curiae Supporting Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), at 20–21 [hereinafter Brief for American Historical Association].

discriminatory motives were made by anti-abortion campaigners rather than by the legislators themselves.[129] Of course, women did not have the right to vote in the 1800s and were thus powerless to oppose the doctors' crusade to restrict their liberty.[130] But that did not matter to Justice Alito because he is not interested in interpreting the Due Process Clause in a manner that provides "equal liberty" to groups that were subordinated.[131] He is simply interested in ascertaining whether a right to abortion was part of the nation's history and traditions in 1868. This is why he took pains to include a very long Appendix of state statutes from the 1800s, which purports to demonstrate that the vast majority of states had prohibited abortion at all stages of pregnancy by 1868.[132]

It should be noted that Justice Alito's interpretation of the legislation enacted in the nineteenth century has been disputed. For example, Professor Aaron Tang has argued that only sixteen of the states included in Appendix A to the *Dobbs* opinion prohibited abortion prior to quickening.[133] Historians have also observed that prosecutions were rare and that ordinary citizens continued to believe in the common law position – that a woman should not be punished for terminating her own pregnancy prior to quickening.[134] As noted by the American Historical Association and the Organization of American Historians,

> Even where states prohibited abortion, common-law reasoning resonated in public opinion, deeply affecting the practice of abortion. These historical findings confirm that *Roe*'s central conclusion was correct: American history and

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[129] *Dobbs*, 142 S. Ct. at 2256 (citing the Brief for American Historical Association et al. as Amici Curiae but asking, rhetorically, "[a]re we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?").

[130] *See id.* at 2324–25 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("Those responsible for the original Constitution, including the Fourteenth Amendment [ratified in 1868] did not perceive women as equals, and did not recognize women's rights.").

[131] *See id.* at 2247–48 ("[W]e must guard against the natural human tendency to confuse what [the Fourteenth Amendment] protects with our own ardent views about the liberty that Americans should enjoy . . . . Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term 'liberty.'").

[132] *See id.* at 2248–53; *see also* Appendix A.

[133] Tang, *supra* note 123 (concluding that by 1868 only 16 of the 37 states had departed from the settled understanding that abortion was lawful prior to quickening).

[134] Brief for American Historical Association, *supra* note 128, at 28–30.

> traditions from the founding to the post-Civil War years included a woman's ability to make decisions regarding abortion, as far as allowed by the common law.[135]

In light of Justice Alito's rigid application of the *Glucksberg* test and his failure to consider the fact that women were not equal citizens when the nineteenth century statutes prohibiting abortion were enacted, it would appear that *Dobbs* has unraveled the "double helix" of liberty and equality that characterized Justice Kennedy's opinions in *Lawrence* and *Obergefell*.[136] Justices Breyer, Sotomayor, and Kagan made this point in their joint dissent, noting that the majority opinion treats liberty and equality as inhabiting "hermetically sealed containers" that do not work together.[137] Under Alito's approach, the Due Process Clause need not be interpreted in a manner that gives "equal dignity" to those who were not enjoying equal citizenship in 1868.[138] Thus, if the white men who actually drafted the Due Process Clause would not have recognized a constitutional right of women to reproductive autonomy then neither will the Supreme Court.[139]

B. The Broader Impact of Dobbs *on Substantive Due Process and Equal Protection*

The approach taken in *Dobbs* calls into question other unenumerated rights that the Court has recognized, including the right to use contraception, the right to same-sex intimacy, and the right to same-sex marriage. Justice Thomas' separate concurring opinion was brutally honest about this, as he expressly called for reconsidering "all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."[140] In contrast, Justice Alito's opinion (which Thomas joined) insisted that the decision was confined only to the issue of abortion and would have no impact on these

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[135] *Id.* at 30.

[136] *See* Tribe, *supra* note 13, at 20 (assessing how Justice Kennedy's *Obergefell* opinion synthesized dignity to encompass liberty and equality, creating a "double helix" where equal protection and substantive due process are interwired).

[137] *Dobbs*, 142 S. Ct. at 2329 (Breyer, Sotomayor & Kagan, JJ., dissenting).

[138] *See id.* at 2333 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("[T]he majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today.").

[139] *Id.* at 2247–48 ("Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the 'liberty' protected by the Due Process clause because the term 'liberty' alone provides little guidance."); *see also* Terry Day & Danielle Weatherby, *The* Dobbs *Effect: Abortion Rights in the Rear-View Mirror and the Civil Rights Crisis That Lies Ahead*, 64 Wm. & Mary L. Rev. 1, 11–12 (2022) (discussing the hypocrisy and inconsistency of Justice Alito's "history and tradition" analysis).

[140] *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

other precedents.[141] However, it is certainly difficult to reconcile those cases with the majority's application of *Glucksberg* and its reading of the "history and traditions" of the nation.

Justice Alito's opinion distinguishes *Roe* and *Casey* from other leading cases on substantive due process simply by insisting that abortion is "fundamentally different" because it destroys a fetus, what he frequently refers to as "an unborn human being."[142] That distinction may be persuasive if one is only comparing *Roe* and *Casey* to *Lawrence*, *Windsor*, and *Obergefell*.[143] However, it is more difficult to distinguish a right to abortion from a right to use contraception, especially as some religious groups describe common contraceptive methods (such as IUDs and Plan B) as "abortion-inducing."[144] Indeed, this claim was actually repeated by Justice Kavanaugh in his confirmation hearing.[145] It is also noteworthy that the model law drafted for the National Right to Life Committee (immediately after the *Dobbs* decision) seeks to protect the "unborn" from the moment of fertilization.[146] Thus, it is entirely possible that some states will enact statutes

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[141] *Id.* at 2258.

[142] *Id.* at 2242–43 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[143] *Compare* Roe v. Wade, 410 U.S. 113 (1973) *and* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) *with* Lawrence v. Texas, 539 U.S. 558 (2003) *and* United States v. Windsor, 570 U.S. 744 (2013) *and* Obergefell v. Hodges, 576 U.S. 644 (2015). The stare decisis argument for upholding *Lawrence* and *Obergefell* would also be very strong because intimate relations and family units have been formed in reliance on these cases. *See, e.g.*, Nancy J. Knauer, *Implications of* Obergefell *for Same-Sex Marriage, Divorce, and Parental Rights*, *in* LGBTQ DIVORCE AND RELATIONSHIP DISSOLUTION: PSYCHOLOGICAL AND LEGAL PERSPECTIVES AND IMPLICATIONS FOR PRACTICE 23 (Abbie E. Goldberg & Adam P. Romero eds., 2019).

[144] Pam Belluck, *Science does not Support Claims that Contraceptives are "Abortion-Inducing,"* N.Y. TIMES (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/health/kavanaugh-abortion-inducing-contraceptives.html.

[145] *Id.*

[146] *See National Right to Life Committee Proposes Legislation to Protect the Unborn Post* Roe, NAT'L RIGHT TO LIFE (June 15, 2022), https://www.nrlc.org/communications/national-right-to-life-committee-proposes-legislation-to-protect-the-unborn-post-roe/. For the text of the model law, *see* Memorandum from James Bopp, Jr. et al., to Nat'l Right to Life Comm., et al. (June 15, 2022), https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf. In contrast, the position of the American College of Obstetricians and Gynecologists is that pregnancy does not begin until implantation in the lining of a woman's uterus, which may be several days after fertilization. *See* Rachel Benson Gold, *The Implications of Defining When a Woman is Pregnant*, GUTTMACHER POL'Y REV. (May 9, 2005),

prohibiting popular methods of contraception, particularly those that act, in whole or in part, by preventing implantation.[147]

Given the Court's insistence on a strict application of the *Glucksberg* test, some scholars have argued that the Equal Protection Clause could offer an independent basis for holding that women have a constitutional right to access abortion or contraception.[148] Although the parties did not brief this argument, it was analyzed in an amicus brief authored by three equal protection scholars.[149] In essence they argued: (1) that laws regulating pregnancy are sex-based classifications that should be subjected to heightened scrutiny; (2) that Mississippi's stated justifications for banning abortion reflect sex-role stereotypes; and (3) that Mississippi deliberately chose not to adopt less discriminatory and less coercive (but more effective) means of achieving its stated goals of protecting women's health and fetal life.[150]

There is plenty of data to support the third part of this argument: the maternal mortality rates in Mississippi are alarmingly high and the state has repeatedly refused federal aid and other less coercive alternatives that could promote women's health and fetal life.[151] But those arguments were of no interest to Justice Alito. He cited the amicus brief only for the limited purpose of rejecting its first premise – that laws regulating pregnancy and access to abortion are "sex-based" classifications.[152] Despite the strong critique that *Geduldig* has attracted over the years (and the subsequent case law that has arguably superseded it), Justice Alito cited *Geduldig* for the principle that the regulation of a medical procedure that only one sex can undergo will not trigger heightened scrutiny *unless* it is a mere pretext, designed to affect invidious discrimination.[153] Of course, this does not preclude making an

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https://www.guttmacher.org/gpr/2005/05/implications-defining-when-woman-pregnant.

[147] *See* Melissa Murray, *How the Right to Birth Control Could be Undone*, N.Y. TIMES (May 23, 2022), https://www.nytimes.com/2022/05/23/opinion/birth-control-abortion-roe-v-wade.html.

[148] Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray & Reva Siegel as Amici Curiae Supporting Respondents at 1, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 228 (2022) (No. 19-1392).

[149] *Id.*

[150] *Id.* at 1–5.

[151] *Id.* at 21–29.

[152] *Dobbs*, 142 S. Ct. at 2245.

[153] The brief cited United States v. Virginia, 518 U.S. 515 (1996), and Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003), arguing that the combined effect of the two cases was to establish that laws regulating pregnancy are sex-based classifications that can violate the Equal Protection Clause (thus abrogating Geduldig v. Aiello, 417 U.S. 484 (1974)).

equal protection argument at the state level, whether in legislative and policy debates or in litigation challenging state abortion laws.[154] But for now it will be very difficult to persuade a federal judge that a law restricting access to abortion violates the Equal Protection Clause.

Justice Alito also made one additional point in the majority opinion, which was not directly responsive to the Equal Protection argument, but should set off alarm bells. Justice Alito claimed that women "are not without electoral or political power" and observed that "the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so."[155] Thus, the five justices who joined the majority opinion in *Dobbs* apparently believe that women can now exercise equal political power by "influencing public opinion, lobbying legislators, voting, and running for office."[156] As Marc Spindelman has observed, this comment may be constitutionally significant well beyond the abortion issue.[157] It may set the stage for a future declaration from the Supreme Court that women are not a "discrete and insular minority" entitled to judicial protection under the Equal Protection Clause.[158] In fact, while women voters may outnumber male voters, that has not translated into equal political or economic power. Women still hold a minority of seats in state legislatures and in Congress,[159] and Black women are particularly underrepresented, despite their increased activism.[160]

The majority opinion in *Dobbs* seems to assume that each state legislature will find its own democratic solution to the question of abortion and that the Supreme Court will no longer be troubled by future disputes concerning

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[154] *See, e.g.*, Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside the Abortion Context*, 43 COLUM. J. OF GENDER & L. (forthcoming 2023) (manuscript at 67–68), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4115569.

[155] *Dobbs*, 142 S. Ct. at 2277.

[156] *Id.*

[157] Marc Spindelman, Dobbs' *Other Dangers:* Dobbs *and Women's Constitutional Sex Equality Rights*, NAT'L L.J. (Aug. 1, 2022).

[158] *Id.* (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

[159] *See Women in State Legislatures 2023*, CTR. FOR AM. WOMEN & POL., https://cawp.rutgers.edu/facts/levels-office/state-legislature/women-state-legislatures-2023 (last visited Feb. 11, 2023); *Women in the U.S. Congress 2023*, CTR. FOR AM. WOMEN & POL., https://cawp.rutgers.edu/facts/levels-office/congress/women-us-congress-2023 (last visited Feb. 11, 2023).

[160] *Reading Higher: Black Women in American Politics 2021*, CTR. FOR AM. WOMEN&POL. 1, 3, https://cawp.rutgers.edu/sites/default/files/resources/black_women_in_politics_2021.pdf (last visited Feb. 11, 2023).

abortion. The separate concurring opinion of Justice Kavanaugh expresses similar optimism regarding the ability of states to resolve conflicts, repeatedly insisting that the federal Constitution is simply "neutral" on abortion and that the Court must also be "scrupulously neutral."[161] However, for those who lost their right to reproductive autonomy, *Dobbs* does not feel neutral at all. Moreover, anti-abortion activists are not content with the Court's decision to allow each state to determine the legality of abortion. Rather, they have continued to advocate for a national ban on abortion and for recognition of "fetal personhood" at the federal level, insisting that the word "person" in the Fourteenth Amendment should be interpreted to include the unborn.[162] *Dobbs* has thus opened the door for new disputes, both between states with radically different positions on the question of abortion and between state and federal law.[163] The next section of the Article explores a few of those potential conflicts and the intersectional nature of the discrimination that will be exacerbated by *Dobbs*.

IV. COPING WITH *DOBBS*: NEW STRATEGIES, NEW CONFLICTS, AND PERSISTENT INEQUALITY

A. Alternative Strategies for Securing Access to Abortion

Many women have not been affected by *Dobbs* because they are protected by their state's legal framework.[164] There is some truth in Justice Alito's comments regarding American women's growing political power. Indeed, pro-choice organizations have surprised many politicians with their ability to mobilize support at the state level. Kansas provides a striking example because it is normally a solid Republican state; yet voters rejected, by a significant margin, a proposed constitutional amendment to remove the right to abortion.[165] Similarly, in Michigan (a true "swing state"), voters approved

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[161] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2305 (Kavanaugh, J., concurring).

[162] *See, e.g. John Finnis and Robert P. George*, Equal Protection and the Unborn Child: A Dobbs Brief, 45 Harvard. J. L. AND POLICY 928 (2022); AND SAMIRA ASMA-SADEQUE, SUPREME COURT DECLINES TO TAKE UP FETAL PERSONHOOD CASE, THE GUARDIAN (OCTOBER 11, 2022), HTTPS://WWW.THEGUARDIAN.COM/WORLD/2022/OCT/11/US-SUPREME-COURT-FETAL-PERSONHOOD-APPEAL-CASE.

[163] For a prediction of the conflicts that will likely arise, *see* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023).

[164] *Interactive Map: US Abortion Policies and Access After* Roe, GUTTMACHER INST. (Feb. 6, 2023), https://states.guttmacher.org/policies/?gclid=EAIaIQobChMIkd_dkKfS_AIVKBStBh3gBAIcEAAYASAAAEgKeg_D_BwE.

[165] *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-

an amendment to the state constitution to protect women's right to reproductive freedom, including access to abortion.[166] Supporters of reproductive autonomy in Michigan had a strong incentive to vote for the amendment because they feared that a 1931 state statute banning abortion (which was still on the books) might be enforced in the post-*Dobbs* era.[167]

States with liberal abortion laws are also reviewing their statutes and considering how to better protect reproductive autonomy. Hawai'i is a good example: the state legalized abortion in 1970 (before *Roe v. Wade* was decided) and it certainly will not criminalize abortion now.[168] But in the aftermath of *Dobbs*, legislators who support reproductive freedom began

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amendment. The amendment had been proposed as a way to override the 2019 decision, by the Supreme Court of Kansas, holding that the Kansas Constitution Bill of Rights protects the right to bodily autonomy, including the right to determine whether to continue a pregnancy. *Id.*

[166] Alice Miranda Ollstein, *Michigan Votes to Put Abortion Rights into State Constitution*, POLITICO (Nov. 9, 2022), https://www.politico.com/news/2022/11/09/michigan-abortion-amendment-results-2022-00064778. For the full text of the amendment to Michigan's state constitution, see *State Candidates and Proposals*, MICH. DEP'T STATE, at 22-3, https://www.michigan.gov/sos/elections/upcoming-election-information/voters/candidatesproposals. California and Vermont have also approved constitutional amendments protecting the right to abortion. *Abortion Policy in the Absence of Roe*, GUTTMACHER INST. (Feb. 1, 2023), https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe. In contrast, the constitutions of four states expressly either provide that there is no right to abortion or restrict public funding for abortion. *See id.*

[167] In August 2022, Michigan's Governor obtained a preliminary injunction against enforcement of the 1931 anti-abortion statute. Governor Gretchen Whitmer, *Whitmer Statement on Winning a Preliminary Injunction Against Extreme 1931 Law Banning Abortion* (Aug. 19, 2022), https://www.michigan.gov/whitmer/news/press-releases/2022/08/19/whitmer-statement-on-winning-a-preliminary-injunction-against-extreme-1931-law-banning-abortion. The case was still pending in November 2022 but was dismissed on January 20, 2023 by Michigan's Supreme Court on the ground of mootness (as the amendment to the state constitution invalidated the statute). *See* Rick Pluta, *MI Supreme Court Dismisses Whitmer Abortion Rights Case*, NPR (Jan. 21, 2023), https://www.michiganradio.org/criminal-justice-legal-system/2023-01-21/mi-supreme-court-dismisses-whitmer-abortion-right-case.

[168] Although certain conservative legislators have introduced bills to prohibit abortion in Hawai'i, they have no chance of being enacted as the Democratic Party controls both houses of the legislature. *See Hawaii Party Control, 1992-2023*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Hawaii_state_government (last visited Feb. 11, 2023).

drafting bills to update Hawai'i's statutory framework.[169] The first of these bills was enacted in March 2023 and was immediately signed by Hawai'i Governor Josh Green.[170] The legislation expressly permits medication abortion to be conducted outside of licensed hospitals, physicians' offices, and clinics and clarifies that minors do not need to obtain parental consent to obtain abortion care. The legislation also prohibits recognition and enforcement of other states' laws that impose civil or criminal liability relating to the provision of reproductive health care services.[171] In addition, Hawai'i legislators have proposed a constitutional amendment to entrench the right to access contraception and abortion care.[172]

In states with less supportive legislatures, advocates for reproductive autonomy are litigating in the state courts, a strategy that began even before *Dobbs*.[173] As of February 1, 2023, a total of 36 cases had been filed challenging abortion bans in 21 states, of which 27 were still pending at either the trial or appellate levels.[174] Some of these cases have been decided, in whole or in part, on the basis of women's right to equality.[175] State courts can also interpret privacy clauses in state constitutions through the lens of gender equality. For example, in January 2023, the Supreme Court of South Carolina

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[169] *See, e.g.*, S.B. 890, 2023 Leg., 32d Sess. (Haw. 2023), https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=890&year=2023 (confirming the right to obtain an abortion and the right of physicians, advanced practice registered nurses and other health care providers to provide abortion care via telehealth).

[170] Ben Angarone, *Abortion Protections will be Expanded in Hawaii Under New Law*, Honolulu Civ. Beat (Mar. 22, 2023), https://www.civilbeat.org/beat/abortion-protections-will-be-expanded-in-hawaii-under-new-law/.

[171] S.B. 1, 2023 Leg., 32d Sess. (Haw. 2023), https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=1&year=2023.

[172] *See* S.B. 1167, 2023 Leg., 32d Sess. (Haw. 2023), https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=1167&year=2023 (proposing that the voters be asked the following question: "Shall the Constitution be amended to state that no law shall be enacted that denies or interferes with an individual's reproductive freedom in their most intimate decisions, including the fundamental right to abortion and contraceptives?").

[173] *State Constitutions and Abortion Rights: Building Protections for Reproductive Autonomy*, Ctr. for Reproductive Rts., https://reproductiverights.org/state-constitutions-abortion-rights/ (last visited Feb. 11, 2023).

[174] *State Court Abortion Litigation Tracker*, Brennan Ctr. for Just. (Feb. 1, 2023), https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker.

[175] *State Constitutions and Abortion Rights: Building Protections for Reproductive Autonomy*, *supra* note 173 (discussing cases decided in Alaska, Arizona, California, Iowa, and New Jersey).

held that the state's Fetal Heartbeat and Protection from Abortion Act (which would have prohibited abortion even before many women realize they are pregnant) violated the right to privacy in South Carolina's Constitution.[176] Concerns for gender equality clearly influenced the majority's interpretation of the privacy clause.[177] The state had argued that the privacy right should be interpreted narrowly because the drafting history revealed that the committee that proposed it (in the 1960s) was primarily concerned with electronic surveillance.[178] But Judge Kaye Hearn, who wrote the majority opinion, rejected that argument, in part because of South Carolina's abysmal history with respect to gender equality.[179] She noted that the state did not ratify the Nineteenth Amendment (giving women the right to vote) until 1969 and that it was, therefore, not surprising that women's right to bodily autonomy was not "uppermost in the minds" of the men who proposed the right to privacy.[180] But she emphasized that the thought processes of those men could not limit the scope of South Carolina's right to privacy today.[181] The majority then applied an approach to interpretation that is comparable to that taken by Justice Kennedy in *Obergefell* and *Lawrence* (and cited both cases).[182] It also cited judgements from other states that have interpreted right to privacy clauses to protect a woman's right to abortion.[183]

Women in states that ban abortion are also finding ways to get around the laws. As noted earlier, more than 90% of U.S. abortions occur in the first trimester, when medication abortion is generally safe and effective.[184] In the United States, a medication abortion typically involves taking two drugs: mifepristone (which blocks a hormone necessary for a pregnancy to progress) followed by misoprostol (which triggers uterine contractions and can be used

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[176] Planned Parenthood S. Atl. v. South Carolina, No. 28127, 2023 WL 107972, at *12 (S.C. Jan. 5, 2023).

[177] *See generally id.*

[178] *See id.* at *5, *35.

[179] *See id.* at *35–36.

[180] *Id.* at *5.

[181] *Id.*

[182] *Id.* at *18 (citing Obergefell v. Hodges, 576 U.S. 644 (2015) and Lawrence v. Texas, 539 U.S. 558 (2003)).

[183] *Planned Parenthood S. Atl.*, 2023 WL 107972, at *18.

[184] *See* Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, PEW RSCH. CTR. (Jan. 11, 2023), https://www.pewresearch.org/fact-tank/2023/01/11/what-the-data-says-about-abortion-in-the-u-s-2/.

as an abortifacient on its own if mifepristone is not available).[185] When taken together, the two drugs mimic what happens during a miscarriage.[186] Although the United States Federal Drug Administration (FDA) has only approved this regime for abortion care up through ten weeks' gestation, many women have successfully used this method later in pregnancy.[187] Studies also show that women who have used abortion pills are highly satisfied and that complications are rare.[188] As a result, the World Health Organization (WHO) has published guidelines for "self-managed abortion," a term used for an abortion that involves no individualized medical counseling (not even a telemedicine appointment) but rather is managed entirely by the pregnant person, perhaps with support from a friend or relative.[189]

Indeed, some researchers have argued that abortion pills should be available on an "over-the-counter" basis, without the need for a prescription.[190] Although the FDA has taken a more conservative approach (subjecting mifepristone to a strict risk evaluation and mitigation strategy (REMS)), it has gradually reduced the restrictions.[191] Prior to the COVID-19 pandemic, the FDA required women to obtain abortion pills directly from a doctor, following a pregnancy test, pelvic examination and/or an ultrasound.[192] However, many countries (including the United States) relaxed

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[185] *See* Sarah Zhang, *The Abortion Pill can be Used Later than the FDA Says*, ATLANTIC (June 29, 2022), https://www.theatlantic.com/health/archive/2022/06/how-late-can-you-take-abortion-pill/661437/.

[186] *See id.*

[187] *See id.*; Nathalie Kapp et al., *Medical Abortion at 13 or More Weeks Gestation Provided Through Telemedicine: A Retrospective Review of Services*, 3 CONTRACEPTION X 1 (Jan. 25, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7881210/.

[188] Zhang, *supra* note 185.

[189] WHO Recommendations on Self-Care Intervention: Self-Management of Medical Abortion, 2022 Update, WORLD HEALTH ORG. (Sept. 21, 2022), https://www.who.int/publications/i/item/WHO-SRH-22.1.

[190] *See, e.g.*, Antonia M. Biggs et al., *Comprehension of an Over-the-Counter Drug Facts Label Prototype for a Mifepristone and Misoprostol Medication Abortion Product*, 139 OBSTETRICS & GYNECOLOGY 1111, 1112 (2022), https://journals.lww.com/greenjournal/FullText/2022/06000/Comprehension_of_an_Over_the_Counter_Drug_Facts.17.aspx.

[191] *See, e.g.*, *The FDA Finalizes Rule Expanding the Availability of Abortion Pills*, NPR (Jan. 3, 2023, 11:04 PM), https://www.npr.org/2023/01/03/1146860433/the-fda-finalizes-rule-expanding-the-availability-of-abortion-pills.

[192] Amratha Ramaswamy et al., *Medication Abortion and Telemedicine: Innovations and Barriers During the COVID-19 Emergency*, Kaiser Fam. Found. (June 16, 2021), https://www.kff.org/policy-watch/medication-abortion-telemedicine-innovations-and-barriers-during-the-covid-19-emergency/; Mohana Ravindranath & Alice Miranda Ollstein, *Abortion Clinics Expanding Virtual Options During Pandemic*, POLITICO (Apr. 23, 2020,

restrictions on telemedicine abortion during the pandemic and learned that it is a very safe and effective method of terminating an early pregnancy.[192] In early 2021, the FDA reversed a Trump administration policy and lifted the federal restriction on dispensing abortion pills by mail.[194] Although this decision was initially announced as a temporary measure, it was later made permanent.[195] More recently, the FDA released new guidance allowing retail pharmacies to provide abortion medications.[196] Walgreens and CVS have already announced that they plan to offer the medication in states where abortion is still legal.[197]

B. Conflicts Between State and Federal Law and Likely Interstate Conflicts

Anti-abortion activists have challenged the FDA's decisions regarding abortion medications, going so far as to file a lawsuit seeking to invalidate the FDA's original approval of mifepristone in 2000.[198] The case lacks merit and, if successful, could have serious negative consequences for public health

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10:53 AM), https://www.politico.com/news/2020/04/23/abortion-clinics-expanding-virtual-options-during-pandemic-203768.

[193] Patty Skuster, Jina Dhillon & Jessica Li, *Easing of Regulatory Barriers to Telemedicine Abortion in Response to COVID-19*, 2 FRONTIERS GLOB. WOMEN'S HEALTH, Nov. 2021, at 4, https://www.frontiersin.org/articles/10.3389/fgwh.2021.705611/full.

[194] Pam Belluck, *F.D.A. Will Allow Abortion Pills by Mail During the Pandemic*, N.Y. TIMES (Apr. 4, 2021), https://www.nytimes.com/2021/04/13/health/covid-abortion-pills-mailed.html.

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

[196] U.S. Food & Drug Admin., Information About Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation (2023) [hereinafter Information About Mifepristone], https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.

[197] Pam Belluck, *CVS and Walgreens Plan to Offer Abortion Pills Where Abortion is Legal*, N.Y. TIMES (Jan. 5, 2023), https://www.nytimes.com/2023/01/05/health/abortion-pills-cvs-walgreens.html.

[198] *See, e.g.*, Celine Castronuovo, *FDA Defends Abortion Pill Approval in Response to Texas Lawsuit* (Jan. 18, 2023), https://news.bloomberglaw.com/health-law-and-business/fda-defends-abortion-pill-approval-in-response-to-texas-lawsuit; *see generally* Complaint, Alliance for Hippocratic Med. v. U.S. Food & Drug Admin., No. 2:22-cv-00223-Z (N.D. Tex. Nov. 18, 2022) (filed by anti-abortion organizations and pending in the Federal District Court for Northern Texas); Brief in Opposition, Alliance for Hippocratic Med. v. U.S. Food & Drug Admin., No. 2:22-cv-00223-Z (N.D. Tex. Jan. 13, 2023).

generally.[199] It may initially succeed simply because it was filed in Amarillo, Texas and will be decided by District Court Judge Matthew Kacsmaryk, who strongly opposes abortion and has been a reliable judge for conservative causes.[200] But the case cannot eliminate medication abortions because the misoprostol-only method is also very effective. Although it has more side-effects than the two-drug regime, abortion providers are already preparing for that possibility.[201]

Meanwhile, the attorneys general of twelve liberal states have filed a competing lawsuit against the FDA, arguing that it has been too strict in its regulation of mifepristone. They have asked a federal judge in the Eastern District of Washington State to declare that the approval of mifepristone in 2000 was lawful and to invalidate the mifepristone REMS and enjoin the FDA from taking any action to remove mifepristone from the market or reduce its availability.[202] Of course, if two federal district courts issue conflicting rulings, then the FDA would have a strong argument for simply maintaining the existing regulatory framework while the cases work their way up the chain of appeal.[203] State-level restrictions on abortion medication have also been challenged. For example, GenBioPro (which developed a generic version of mifepristone) has filed a case against West Virginia's anti-abortion legislation, arguing that the state law is preempted by federal law

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[199] Patricia J. Zettler, Eli Y. Adashi & I. Glenn Cohen, *Alliance for Hippocratic Medicine v. FDA – Dobbs's Collateral Consequences for Pharmaceutical Regulation*, NEW ENG. J. MED. (Feb. 23, 2023), https://www.nejm.org/doi/full/10.1056/NEJMp2301813 (noting that the lawsuit could "chill pharmaceutical research by creating uncertainty about the meaning of FDA approval and the regulatory environment in which any approved product would be marketed"); *see also* David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 12–16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335735.

[200] Caroline Kitchener & Ann E. Marimo, *The Texas Judge Who Could Take Down the Abortion Pill*, WASH. POST (Feb. 25, 2023), https://www.washingtonpost.com/politics/2023/02/25/texas-judge-abortion-pill-decision/.

[201] Sarah McCammon, *Why an Ulcer Drug Could Be the Last Option for Many Abortion Patients*, NPR (Feb. 24, 2023), https://www.npr.org/2023/02/24/1159075709/abortion-drug-mifepristone-misoprostol-texas-case.

[202] *See generally* Complaint, Washington v. U.S. Food & Drug Admin., No. 1:23-cv-03026 (E.D. Wash. Feb. 23, 2023), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Mifepristone%20Complaint.pdf.

[203] Pam Belluck, *12 States Sue F.D.A. Seeking Removal of Special Restrictions on Abortion Pill*, N.Y. TIMES (Feb. 24, 2023), https://www.nytimes.com/2023/02/24/health/abortion-pills-fda-lawsuit.html.

and that it is unconstitutional for a state to try to bar access to a medication that has been approved by the federal government.[204]

Even in states that currently ban abortion, pregnant persons are finding ways to obtain abortion pills – by traveling to a state where abortion is legal, by using a mail forwarding service, or by simply ordering the medications from a foreign provider.[205] For a woman who has access to the internet, there are many websites to guide them through the process, including Plan C,[206] Women on the Web,[207] and Aid Access.[208] The ready supply of pills from overseas makes it unlikely that the number of abortions in the United States will decrease significantly for women in early pregnancy.[209] The anti-abortion movement is trying to counter this trend by warning women about the dangers of "chemical abortion."[210] But women who are active users of the internet will quickly learn that those claims are spurious and that medication abortion is almost always safe in early pregnancy.[211] Even mainstream medical organizations (such as Doctors Without Borders) have posted advice to this effect, including very accessible videos and answers to common questions about how to take the medication.[212]

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[204] Pam Belluck, *New Lawsuit Challenges State Bans on Abortion Pills*, N.Y. TIMES (Jan. 25, 2023), https://www.nytimes.com/2023/01/25/health/abortion-pills-ban-genbiopro.html; *see generally* Complaint, Genbiopro, Inc. v. Sorsaia, No. 2:23-cv-11111 (Jan. 25, 2023), https://democracyforward.org/wp-content/uploads/2023/01/33-0-Complaint.pdf.

[205] Emily Bazalon, *Risking Everything to Offer Abortions Across State Lines*, N.Y. TIMES (Oct. 4, 2022), https://www.nytimes.com/2022/10/04/magazine/abortion-interstate-travel-post-roe.html; David Leonhardt & Ian Prasad Philbrick, *The Next Abortion Fight: Mailing Pills*, N.Y. TIMES (July 28, 2022), https://www.nytimes.com/2022/07/25/briefing/abortion-pills-mail-roe-v-wade.html.

[206] *A Safe at Home Abortion is Here*, PLAN C, https://www.plancpills.org/ (last visited Feb. 12, 2023).

[207] *Abortion Pill Access by Mail*, WOMEN ON WEB, https://www.womenonweb.org/en/ (last visited Feb. 12, 2023).

[208] *Order Abortion Pills Online*, AIDACCESS, https://aidaccess.org/en/ (last visited Feb. 12, 2023).

[209] Aatish Bhatia, Claire Cain Miller, & Margot Sanger-Katz, *A Surge of Overseas Abortion Pills Blunted the Effect of State Abortion Laws*, N.Y. TIMES (Nov. 1, 2022), https://www.nytimes.com/2022/11/01/upshot/abortion-pills-mail-overseas.html.

[210] *Important Truths Women are Not Told About Chemical Abortions*, OPTIONS NOW (Apr. 28, 2020), https://optionsnow.org/truths-about-chemical-abortions/.

[211] *Medication Abortion*, GUTTMACHER INST. (Feb. 1, 2021), https://www.guttmacher.org/evidence-you-can-use/medication-abortion.

[212] *How to Ensure a Safe Abortion with Pills*, DRS. WITHOUT BORDERS (Sept. 28, 2021), https://www.doctorswithoutborders.org/latest/how-ensure-safe-abortion-pills.

The United States Department of Justice has facilitated this flow of abortion medications by issuing a legal opinion[213] for the United States Postal Service on the application of the Comstock Act. The memo confirms that the mailing of abortion pills to a state that restricts access to abortion is not a sufficient basis for the Postal Service to refuse to deliver the package.[214] Restrictive states are not happy about this, but there is little that they can do to change the situation as long as Democrats control the Senate and the White House. Traditionally, anti-abortion states have targeted the doctors and clinics that provide abortions. However, if states cannot prevent women from obtaining pills and cannot locate a "provider" to prosecute, then some states may resort to prosecuting women who obtain and use abortion pills.[215]

Anti-abortion states are also challenging the July 2022 Guidance Document regarding the enforcement of the federal Emergency Medical Treatment and Active Labor Act (EMTALA), which applies to every hospital that has an emergency department and participates in Medicare.[216] The Guidance Document interprets the EMTALA as providing that if a physician believes that a pregnant patient is experiencing an emergency medical condition and that an abortion is the stabilizing treatment necessary to resolve that condition then the physician must provide that treatment.[217] The Guidance expressly states that the EMTALA preempts state abortion restrictions to the extent that they conflict with the EMTALA. On this basis, the federal government obtained a preliminary injunction blocking enforcement of Idaho's ban on abortion, which lacks an explicit exemption for the provision of emergency care.[218]

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[213] For the text of the legal opinion (dated December 2022), *see* Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C. (2022), https://www.justice.gov/olc/opinion/file/1560596/download.

[214] *Id.*

[215] *See, e.g.*, Nathaniel Weixel, *Alabama AG Says Women Could be Prosecuted for Taking Abortion Pills*, HILL (Jan. 11, 2023, 4:13 PM), https://thehill.com/policy/healthcare/3809346-alabama-ag-says-women-could-be-prosecuted-for-taking-abortion-pills/.

[216] *See* Emergency Medical Treatment and Active Labor Act (EMTALA), CTR. FOR MEDICARE & MEDICAID SERVS. (Dec. 5, 2022) [hereinafter EMTALA Guidance Document], https://www.cms.gov/regulations-and-guidance/legislation/emtala (for text of the EMTALA and Guidance Document); *but see* EMTALA Emergency Abortion Care Litigation: Overview and Initial Observations (Part II of II), CONGRESSIONAL RSCH. SERV. (Nov. 1, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10851 (for an overview of the litigation challenging the Guidance Document).

[217] EMTALA Guidance Document, *supra* note 216, at 4.

[218] U.S. v. Idaho, No. 1:22-cv-00329-BLW, 2022 WL 3692618, at *10 (D. Idaho Aug. 24, 2022) (holding that the statute obstructed EMTALA's purpose because it provided only an affirmative defense and not an express exception for emergency care). As of this writing,

Disputes are also likely to arise between states. Many liberal states have adopted laws and executive orders designed to shield abortion providers and patients from out-of-state prosecutions and lawsuits.[219] Hawai'i is just one example of the many states in which governors pledged not to cooperate with restrictive states' enforcement measures.[220] As noted above, the Hawai'i State Legislature recently codified this policy.[221] One purpose of the legislation is to protect against the possibility that anti-abortion states may attempt to enforce their bans on abortion extraterritorially (e.g. by prosecuting women who cross state lines to obtain an abortion or by authorizing private citizens to file lawsuits against physicians who perform abortions or prescribe pills for patients who live in states where abortion is banned).[222] The shield provisions adopted in Hawai'i and other states typically provide that a state will not cooperate with subpoenas, summons,

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Idaho's motion for reconsideration of the preliminary injunction was still pending. For a record of the docket, *see* United States v. Idaho, No. 1:22-cv-00329-BLW (D. Idaho Aug. 2, 2022), https://clearinghouse.net/case/43417/?docket_page=2#docket.

[219] Elizabeth Nash & Peter Ephross, *State Policy Trends 2022: In a Devastating Year, U.S Supreme Court's Decision to Overturn Roe Leads to Bans, Confusion and Chaos*, GUTTMACHER INST. (Dec. 19, 2022), https://www.guttmacher.org/2022/12/state-policy-trends-2022-devastating-year-us-supreme-courts-decision-overturn-roe-leads (noting that fourteen states had adopted measures to shield abortion providers and patients from investigation by officials in states that ban abortion).

[220] Cassie Ordonio, *Abortion In Hawaii: Ige Orders Legal Safeguards for Women Traveling from Other States*, CIV. BEAT (Oct. 11, 2022), https://www.civilbeat.org/2022/10/abortion-in-hawaii-ige-orders-legal-safeguards-for-women-traveling-from-other-states/ (quoting then Governor Ige as stating "We will not cooperate with any other state that tries to prosecute women who receive an abortion in Hawaii, and we will not cooperate with any other state that tries to sanction medical professionals who provide abortion in Hawaii"). *See also State Leaders Take Bold Action to Protect Abortion Access Following the Overturning of* Roe, PLANNED PARENTHOOD (July 21, 2022), https://www.plannedparenthoodaction.org/pressroom/state-leaders-take-bold-action-to-protect-abortion-access-following-the-overturning-of-roe.

[221] *See, e.g.*, S.B. 1, 32d Leg., Reg. Sess. (Haw. 2023), https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=1&year=2023 (declaring certain anti-abortion laws of other states to be "contrary to the public policy" and prohibiting the State of Hawai'i from assisting in enforcement of certain civil and criminal actions from another state); S.B. 604, 32d Leg., Reg. Sess. (Haw. 2023), https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=604&year=2023 (prohibiting state officials from providing any assistance to another state's civil, criminal, or disciplinary proceedings arising from the provision of reproductive health care).

[222] S.B. 1; S.B. 604.

or extradition requests from other states if they are related to the provision of reproductive health care.[223] The case law is very unsettled in this area and the shield laws raise important legal questions. As one article asked, "[I]f Illinois refuses to extradite an abortion provider to Kentucky, will Kentucky retaliate and refuse to extradite a gun dealer to Illinois?"[224] Thus, the shield provisions could intensify interstate conflict in fields well beyond abortion. The shield provisions also raise important constitutional issues. For example, California enacted a law barring enforcement of judgments obtained under Texas Senate Bill 8 (which bans abortion at six weeks of pregnancy and authorizes private lawsuits as a means of enforcement).[225] It is perfectly understandable that California would not want its doctors to face crippling liability because they provided abortion care (or prescribed abortion pills) to patients in Texas. But California's law could be challenged under the Full Faith and Credit Clause of Article IV. "rais[ing] a wealth of questions about conflict of laws, interstate relations, horizontal federalism, and the federal Constitution."[226]

Of course, if the Republican Party were to gain control of both houses of Congress and the White House, then it might try to ban the distribution of abortion pills or even to enact a nationwide ban on abortion.[227] But the strong negative reaction to Senator Lindsey Graham's proposed bill (for a national ban on abortion after fifteen weeks), demonstrates the political costs of taking

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[223] *See* H.B. 4664, 102nd Gen. Assemb., (Ill. 2023), https://ilga.gov/legislation/102/HB/PDF/10200HB4664lv.pdf. Even before *Dobbs*, Illinois typically provided abortion care to 10,000 out-of-state patients each year; that number is expected to increase to over 45,000 per year as a result of the *Dobbs* decision. *See* Andy Grimm, *What's Next After Supreme Court's* Dobbs *Ruling?*, Chi. Sun Times (June 24, 2022, 5:54 AM), https://chicago.suntimes.com/2022/6/24/23180802/abortion-rights-supreme-court-dobbs-illinois-whats-next.

[224] David S. Cohen et al., *supra* note 163, at 52.

[225] Cal. Health & Safety Code § 123467.5; Tex. Health & Safety Code § 171.208(a)(2). Texas S.B. 8 went into force even before *Dobbs* was decided because it was deliberately drafted to be enforceable without any state action and relies entirely on private lawsuits. Plaintiffs are incentivized by the possibility of a $10,000 reward and do not have to pay the doctor's legal fees, even if the lawsuit is unsuccessful.

[226] Diego A. Zambrano, Mariah Mastrodimos & Sergio Valente, *The Full Faith and Credit Clause and the Puzzle of Abortion Laws*, (Oct. 4, 2022) (manuscript at 2); U.S. Const. art. IV §. 1.

[227] Melanie Zanona & Manu Raju, *House Republicans Eye 15-week Abortion Ban after Roe Ruling*, CNN (June 24, 2022, 4:27 PM), https://www.cnn.com/2022/06/24/politics/republican-reaction-abortion-congress/index.html. For analysis of the extent to which Congress has authority to regulate abortion, *see* Cong. Rsch. Servs., LSB10787, Congressional Auth. to Regulate Abortion (July 8, 2022).

such a position.[228] Moreover, even if a national ban were enacted, foreign providers would still send abortion pills to the United States and it would be very difficult for law enforcement to detect those packages. Even countries with very strict national bans have a high rate of medication abortion because it is so easy to obtain the pills, either through the international mail or by purchasing them on the street.[229]

C. Increased Inequality and Maternal Mortality

Unfortunately, the widespread availability of abortion pills will not enable all women to blunt the impact of *Dobbs*. Most abortions in the United States are obtained by women living in poverty or very close to poverty.[230] Many of these women will not have access to the internet (or a credit card or other electronic means of purchasing pills). Thus, they may resort to black market pills, which may not be as safe and effective. If they require follow-up care (for example, if the medication abortion is incomplete or bleeding does not stop when expected) then they may place themselves at risk of prosecution. When abortion pills are taken orally, the abortion is generally indistinguishable from a spontaneous miscarriage.[231] But a doctor who is suspicious may report the woman to the authorities. Once alerted, police may subject her to rigorous questioning and try to gather digital evidence (e.g. text messages) to prove that she purchased abortion pills.[232]

One thing is certain: the people who will be targeted for this type of investigation will be women living at or near the poverty line, and women of color. Even before *Dobbs* was decided, police, prosecutors, and other state actors often targeted pregnant women and women who experienced pregnancy loss.[233] The National Advocates for Pregnant Women has tracked

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[228] Annie Karni, *Graham Proposes 15-Week Abortion Ban, Splitting Republicans*, N.Y. TIMES (Sept. 13, 2022), https://www.nytimes.com/2022/09/13/us/politics/lindsey-graham-abortion.html.

[229] *See* Michelle Oberman, *What Will and Won't Happen when Abortion is Banned*, 9 J. L. & BIOSCIENCES 1, 7 (2022), https://academic.oup.com/jlb/article/9/1/lsac011/6575467.

[230] *See id.* at 4 nn.11–13.

[231] *Are There Other Ways to Use Misoprostol?*, WOMEN ON WEB, https://www.womenonweb.org/en/page/985/are-there-other-ways-to-use-the-misoprostol (last visited Feb. 12, 2023).

[232] Bobby Allyn, *Where Abortion is Banned, Someone's Phone Activity Could Be Used As Criminal Evidence*, NPR (June 30, 2022), https://www.npr.org/2022/06/30/1109051837/where-abortion-is-banned-someones-phone-activity-could-be-used-as-criminal-evide.

[233] Oberman, *supra* note 229, at 15–16.

1,600 such cases since 1973 and found that the victims of this abuse were "overwhelmingly low income, and disproportionately Black and Brown."[234] A similar pattern will occur if local law officials decide to enforce the new abortion bans against women who terminate their own pregnancies or are merely suspected of doing so. The state will "target the most marginalized, vulnerable members of society – those whom prosecutors view, or at least believe others will be willing to view, not as victims but rather, as villains."[235]

Rigorous enforcement of state bans on abortion will also disproportionately impact women living with disabilities and women who require surgical abortion care. Abortion pills will not resolve an ectopic pregnancy, which can be life-threatening if not promptly treated.[236] Some women also cannot take abortion medications due to underlying health conditions (such as long-term steroid use, adrenal problems, or bleeding disorders).[237] Other women will not know that they require an abortion until it is too late in the pregnancy for a medication abortion. Depending on a woman's physical condition and financial resources, it may not be possible for her to travel to another state to obtain a legal surgical abortion. Thus, it is not surprising that researchers predict a substantial increase in maternal deaths due to abortion bans.[238] Black women will suffer disproportionately, as they have much higher rates of maternal mortality. [239]

Texas has a particularly high rate of maternal mortality among Black women.[240] It also provides a snapshot of what is likely to occur in states that have banned abortion because a novel Texas anti-abortion statute (based upon private enforcement rather than state enforcement) came into force

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[234] Brief of National Advocates for Pregnant Women et al. as Amici Curiae Supporting Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4441207, at *6–7.

[235] Oberman, *supra* note 229, at 17.

[236] *See* Neha Singh et al., *Ectopic Pregnancy and Unsupervised Abortion Pills: The Hidden Truth*, 11 INT'L J. REPRODUCTION, CONTRACEPTION, OBSTETRICS & GYNECOLOGY 469, 471–72 (2022).

[237] *See* INFORMATION ABOUT MIFEPRISTONE, *supra* note 196, ¶ 3.

[238] Nicole Mueksch, *Abortion Bans to Increase Maternal Mortality Even More, Study Shows*, CU BOULDER TODAY (June 30, 2022), https://www.colorado.edu/today/2022/06/30/abortion-bans-increase-maternal-mortality-even-more-study-shows.

[239] *Id.*; *see also* Amy Roeder, *America is Failing its Black Mothers*, HARV. PUB. HEALTH (2019), https://www.hsph.harvard.edu/magazine/magazine_article/america-is-failing-its-black-mothers/ (reporting that maternal mortality rates have risen substantially in the United States and are markedly higher for Black women).

[240] *See* Eleanor Klibanoff, *Why are Pregnancy and Childbirth Killing so Many Black Women in Texas?*, TEX. TRIB. (Dec. 17, 2022), https://www.texastribune.org/2022/12/17/texas-maternal-mortality-black-women/.

some months before *Dobbs* was decided.[241] The law incentivizes private citizens to enforce the ban by promising them a $10,000 cash bounty if they succeed in suing a doctor, abortion provider, or anyone else who has helped a person to obtain an illegal abortion.[242] Even if a defendant wins the lawsuit, the defendant would still have to pay their own legal fees, which can be substantial.[243] After *Dobbs* was decided, Texas law also criminalized abortion in almost all circumstances, meaning doctors can be sentenced to life imprisonment if they are successfully prosecuted for performing an illegal abortion.[244] Not surprisingly, Texas doctors, and the nurses who assist them, are now afraid to provide timely abortion care, even when a woman needs a surgical abortion to preserve her life or her health.[245] Several women have now reported that they have not been able to obtain medically necessary abortions on a timely basis in Texas.[246] One woman had to travel ten hours to another state to obtain a life-saving abortion.[247] Another woman developed life-threatening sepsis because doctors determined that they could not legally terminate her pregnancy, even though her water had broken at eighteen weeks and the doctors knew that she would inevitably miscarry.[248] Instead,

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[241] For the complex history of Texas' abortion statutes (both pre-*Dobbs* and post-*Dobbs*) *see History of Abortion Laws*, TEX. STATE L. LIBR., https://guides.sll.texas.gov/abortion-laws/history-of-abortion-laws (last accessed Feb. 12, 2023).

[242] TEX. HEALTH & SAFETY CODE ANN. § 171.018 (West 2003); *see also* Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, 5:00 AM), https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law#:~:text=The%20law%20makes%20no%20exceptions,%2410%2C000%20in%20damages%20from%20defendants.

[243] *Id.*

[244] TEX. HEALTH & SAFETY CODE ANN. §§ 170A.002, 170A.004 (West 2022); *Trigger Laws*, TEX. STATE L. LIBR., https://guides.sll.texas.gov/abortion-laws/trigger-laws (last updated Jan. 5, 2023, 1:33 PM).

[245] Carrie Feibel, *Because of Texas' Abortion Law, Her Wanted Pregnancy Became a Medical Nightmare*, NPR (July 26, 2022, 5:04 AM), https://www.npr.org/sections/health-shots/2022/07/26/1111280165/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare.

[246] *Id.*

[247] *See, e.g.*, Elizabeth Cohen & Danielle Herman, *Why a Woman's Doctor Warned Her Not to Get Pregnant in Texas*, CNN (Sept. 10, 2022, 8:12 PM), https://www.cnn.com/2022/09/09/health/abortion-restrictions-texas/index.html.

[248] Elizabeth Cohen & John Bonifield, *Texas Woman Almost Dies Because She Couldn't Get an Abortion*, CNN HEALTH (Nov. 16, 2022, 9:44 PM), https://www.cnn.com/2022/11/16/health/abortion-texas-

she was told to go home and "wait it out" while she and her husband watched for signs of infection; yet despite their attention to any indications of sepsis, her infection developed so suddenly and rapidly that it almost killed her.[249]

In theory, Texas law allows an abortion when it is necessary to preserve a pregnant person's life. But the law is drafted so strictly that doctors do not feel legally safe until a woman is in a true state of emergency.[250] At that point she will have suffered enormously and may have been exposed to significant health risks.[251] There will be tragedies unless legislators can be persuaded to add compassionate exceptions to abortion bans, including language that gives doctors the necessary confidence that they will not be prosecuted by the state or sued by a vigilante.

V. Conclusion

Dobbs clearly did not take the issue of abortion entirely out of the federal courts. It has simply created new conflicts, at least some of which may eventually work their way to the Supreme Court. It is, however, clear that the current majority on the Court will not be receptive to arguments grounding a woman's right to reproductive autonomy in the federal Constitution. Thus, advocates for reproductive autonomy must rely primarily on state courts, state constitutions, and the ordinary political process. But these avenues may be more productive than previously expected. It is particularly encouraging that so many voters have supported access to abortion, not only in liberal states like California, but also in a conservative state (Kansas) and a swing state (Michigan). These successes have already inspired activists in many other states to campaign for amendments to state constitutions.[252]

Even in states that have anti-abortion majorities, there may be opportunities to lobby for legislation to reduce the negative – and highly discriminatory – impact of *Dobbs*. If those who claim to be "pro-life" are

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sepsis/index.html#:~:text=Texas%20law%20allows%20for%20abortion,of%20a%20major%20bodily%20function.%E2%80%9D.

[249] *Id.*

[250] Eleanor Klibanoff, *Doctors Report Compromising Care Out of Fear of Texas Abortion Law*, Tex. Trib. (June 23, 2022, 5:00 PM), https://www.texastribune.org/2022/06/23/texas-abortion-law-doctors-delay-care/.

[251] *See* Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans – Texas Senate Bill 8*, 387 New Engl. J. Med. 388–90 (Aug. 4, 2022), https://www.nejm.org/doi/full/10.1056/NEJMp2207423.

[252] Adam Edelman, *Abortion Rights Groups Look to Build on Their Victories with New Ballot Measures*, NBC News (Dec. 22, 2022, 2:00 AM), https://www.nbcnews.com/politics/politics-news/abortion-rights-groups-look-new-ballot-measures-2023-2024-rcna61317 (reporting that efforts are underway to enshrine a right to abortion in the state constitutions of ten states).

serious about their mission then they should be willing to agree to additional funding for maternal health and for clearly-worded exceptions for situations in which a pregnancy threatens a woman's physical or mental health. The Republican Party is well aware of the role that *Dobbs* played in the midterm elections in 2022, and some Republican candidates have already modified their public positions on abortion in anticipation of the 2024 elections.[253] This may provide an opportunity to negotiate statutory language that pregnant women (and those who care for them) can rely upon. There are many examples around the world that legislators could borrow from, including the United Kingdom's Abortion Act 1967.[254] It provides a broad range of compassionate exceptions to the general ban on abortion and gives doctors the discretion to determine when those exceptions have been met. In the early 1990s, when I first began to research comparative legal frameworks, I criticized the British model because it is inherently patronizing and does not recognize any *right* to reproductive autonomy.[255] But years later, I have come to appreciate its practical benefits, particularly the fact that the British National Health Service (NHS) pays for abortions, just like other forms of health care.[256] In the short term, the British model may represent the best "worst-case scenario" for women living in the most conservative parts of post-*Roe* America. In the longer term, the United States hopefully will become more supportive of women's right to equal citizenship and rejoin the global movement for reproductive autonomy, reproductive health and reproductive justice.[257]

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[253] *See* Julia Manchester, *Republicans Rethink Abortion Strategy After Bruising Midterms*, HILL (Dec. 29, 2022, 6:00 AM), https://thehill.com/homenews/campaign/3786449-republicans-rethink-abortion-strategy-after-bruising-midterms/.

[254] Abortion Act 1967 ch. 87 (U.K.), https://www.legislation.gov.uk/ukpga/1967/87/data.pdf.

[255] Carole J. Petersen, *Reproduction and Family Planning: Individual Right or Public Policy?*, *in* HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY, 261, 274–77 (Raymond Wacks ed., 1993).

[256] *See Overview: Abortion*, NAT'L. HEALTH SERV. (Apr. 24, 2020), https://www.nhs.uk/conditions/abortion/ (noting that women can obtain abortion care privately or through the National Health Service).

[257] *See generally* Lynn M. Morgan, *Global Reproductive Governance after* Dobbs, 122 CUR. HIST. 22 (2023).