Dobbs v. Jackson Women's Health and the Post-*Roe* Landscape

by
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Introduction

On June 24, 2022, the Supreme Court handed down its long awaited decision in *Dobbs v. Jackson Women's Health Organization*,[1] stating that *Roe* "was egregiously wrong from the start" and that "[i]t is time to heed the Constitution and return the issue of abortion to the people's elected representatives."[2] A draft of the opinion had been leaked nearly eight weeks earlier,[3] but that preview did little to blunt the impact of the Court's ruling.[4] The decision, authored by Justice Alito, was made possible by the three newest Trump-appointed justices, Brett Kavanaugh, Neil Gorsuch, and Amy Coney Barrett who voted in the 6-3 conservative majority. Justices Thomas and Kavanaugh and Chief Justice Roberts filed concurring opinions. A jointly drafted dissent—a rarity in constitutional cases—was filed by Justices Breyer, Sotomayor, and Kagan.

The Supreme Court held that there is no constitutional right to abortion, reasoning that abortion is not specifically mentioned in the U.S. Constitution and that there is no other rationale for finding that such a right can be implied from the language of the Constitution because abortion is not rooted in the nation's his-

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1 142 S. Ct. 2228 (2022).

2 *Id.* at 2243.

3 *Read Justice Alito's Initial Draft Abortion Opinion Which Would Overturn* Roe v. Wade, POLITICO (May 2, 2022), https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504.

4 142 S. Ct. at 2316 (Roberts, C.J., concurring) (describing the overturn of *Roe* and *Casey* as "a serious jolt to the legal system—regardless of how you view these cases.").

tory and traditions and is not an essential component of "ordered liberty."[5] As a result, the constitutional floor that has protected the abortion right for fifty years has been removed and states may now regulate, restrict, criminalize, or protect abortion at the state-level. The result will be a patchwork of state-level abortion laws across the nation. It is estimated that 26 states will ban abortion, either through trigger laws like Missouri's that took effect immediately after the *Dobbs* decision,[6] or by enforcing pre-*Roe* era criminal abortion laws that are still on the books.[7] Sixteen states protect abortion in their own state constitutions or by judicial or legislative act.[8] The rest will be in-between, restricting but not outright banning the procedure.[9]

This Article examines some of the important takeaways of the decision itself and the likely reverberations it will have on other areas of law and reproductive healthcare more broadly. The Article proceeds in three parts. Part I examines the majority, concurring, and dissenting opinions to consider what they reveal about the new standard of review for abortion, the shift in power among the members of the Court itself, as well as what the opin-

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5 *Id.* at 2242 (stating, "We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision. . .").

6 *13 States Have Abortion Trigger Bans—Here's What Happens When* Roe *Is Overturned,* Guttmacher Inst. (June 6, 2022), https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned.

7 *See 26 States Are Certain or Likely to Ban Abortion Without* Roe*: Here's Which Ones and Why,* Guttmacher Inst. (Apr. 19, 2022), https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why.

8 Becky Sullivan, *With* Roe *Overturned, State Constitutions Are Now at the Center of the Abortion Fight,* NPR News (June 29, 2022), https://www.npr.org/2022/06/29/1108251712/roe-v-wade-abortion-ruling-state-constitutions (noting that eleven states explicitly guarantee a right to privacy in their state constitutions, thereby providing the legal underpinning of *Roe)*; *Abortion Policy in the Absence of* Roe, Guttmacher Inst. (Aug. 1, 2022), https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe (describing that sixteen states and the District of Columbia have laws that protect the right to abortion).

9 Sarah Ewall-Wice & Melissa Quinn, *With* Roe *Overturned, Which States Would Restrict or Protect Abortion Rights?*, CBS News (Aug. 6, 2022), https://www.cbsnews.com/news/roe-v-wade-overturn-trigger-laws-supreme-court-abortion-states-rights/.

ion signals might come next. Part II explores the future of abortion in a post-*Roe* landscape as the abortion rights movement moves from the defensive to the offensive posture. The section briefly discusses emerging constitutional theories for sourcing the abortion right, as well as federal and state executive and legislative actions to protect abortion access. Part III briefly assesses the potential impact of the end of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* on criminalization of abortion and self-managed care, the surveillance of pregnant people, and adjacent issues, including reproductive health and assisted reproductive technology.

I. The Dobbs Opinion

The Mississippi law at the center of the *Dobbs* case banned abortion past fifteen weeks gestation except in cases of medical emergency or severe fetal anomaly.[10] The law presented a direct challenge to the holdings of *Roe v. Wade* [11] and *Planned Parenthood v. Casey*[12] because while those cases varied on the standard of review in abortion cases, they held a firm line that abortion could be *regulated* but could not be *banned* before fetal viability,[13] generally at 23-24 weeks gestation.[14] A fifteen week ban, therefore, directly challenged the central holding of abor-

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10 Miss. Code Ann. § 41-41-191 (providing that "[e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.").

11 410 U.S. 113 (1973).

12 505 U.S. 833 (1992).

13 Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 869, 871 (1992) (holding that "[t]he woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce."); *see also* Webster v. Reproductive Health Servs., 492 U.S. 490, 529 (1989)(O'Connor, J., concurring in part and concurring in the judgment)(stating that "viability remains the 'critical point.'"); June Med. Servs. v. Russo, 140 S. Ct. 2103, 2135 (Roberts, C.J., concurring in the judgment)(stating that *Casey* reaffirmed "the most central principle of *Roe v. Wade,* 'a woman's right to terminate her pregnancy before viability.'").

14 *Dobbs*, 142 S. Ct. at 2269-70 (citing Brief for Respondents at 8 and noting that viability has changed over time due to advances in technology of neonatal care and that "viability is not really a hard-and-fast line." *Id.* at 2270).

tion precedent by banning abortion seven weeks before viability and opening the door to pre-viability bans in direct conflict with fifty years of precedent protecting the constitutional abortion right. The majority opinion penned by Justice Samuel Alito overruled *Roe* and *Casey,* explaining that "[t]he Constitution does not confer a constitutional right to abortion, *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."[15]

The Supreme Court has held that the term "liberty" in the Due Process Clause of the Fourteenth Amendment may protect those rights that, while not specifically named in the Constitution, are implicit in its text because they are "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty."[16] The *Dobbs* Court notes that this very claim—that the Fourteenth Amendment protects substantive rights and not merely procedural rights, or substantive due process—is one that has long been "controversial."[17] Nevertheless, the Court argues that applying the test of substantive due process, abortion is not a right deeply rooted in the nation's history[18] and is not implicit in the concept of ordered liberty because there was no support in either federal or state law, for a constitutional right to abortion.[19] The Court's historical analysis in the *Dobbs* decision is deeply contested, by the *Roe* Court's own lengthy historical inquiry and by the dissent[20] and the analysis of legal historians in their amicus brief.[21] The *Dobbs* majority noted that abortion was

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15 *Id.* at 2279.

16 *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

17 *Id.* at 2246 (noting that the Court has been "reluctant" to recognize rights that are not specifically mentioned in the Constitution. *Id.* at 2247).

18 *See id.* at 1148-54.

19 *Id.* at 2242, 2251-54.

20 *Id.* at 2324-25 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting)(describing that common law authorities did not treat abortion as a crime before quickening and early American law followed the common law rule.).

21 *Roe,* 410 U.S. at 140 (concluding that, for much of history and particularly during the nineteenth century "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today."). *See, e.g.*, Brief for United States, at 26-27, Dobbs v. Jackson Women's Health (describing that "at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages."); Brief for Respondents at 21,

a crime in three-quarters of the states at the time the Fourteenth Amendment was adopted and thirty states banned all abortions at the time *Roe* was decided.[22] The Court argued that abortion jurisprudence has failed to adequately source the abortion right,[23] rejecting *Roe*'s reasoning that abortion flowed from a right of privacy[24] and the *Casey* Court's description that abortion falls within the "liberty" protected by the Fourteenth Amendment, and gestures in that case toward Equal Protection.[25] Further, the Court argued that the cases upon which *Roe* and its progeny have relied—those involving intimate sexual relations, contraception, and marriage—are inapplicable to the abortion context because abortion is unique in that it destroys "potential life."[26]

A. *Health & Welfare Regulations and Rational Basis Review*

The majority held that abortion is not a fundamental right, but a "health and welfare" regulation subject only to rational basis review.[27] Accordingly, abortion is not constitutionally protected at the federal level and the authority to regulate abortion must be returned to the people and their elected representa-

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Dobbs v. Jackson Women's Health (describing that "the common law permitted abortion up to a certain point in pregnancy, and many states maintained that common law tradition as of the late 1850s); Brief for American Historical Association, et al., as Amici Curiae Dobbs v. Jackson Women's Health. The *Dobbs* Court dismissed this analysis, saying simply that "*Roe* either ignored or misstated this history." *Dobbs*, 142 S. Ct. at 2249.

22 *Id.* at 2241, 2253, 2260.

23 *Id.* at 2245 (describing about the *Roe* opinion "its message seemed to be that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance.")(emphasis in the original).

24 *Roe*, 410 U.S. at 152-54.

25 *Dobbs*, 142 S. Ct. at 2245 (holding that equal protection "is squarely foreclosed by our precedents" as a basis for protecting the abortion right."). *But see Casey*, 505 U.S. at 856 (observing that "[t]he 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.").

26 *Dobbs*, 142 S. Ct. at 2241, 2258 (describing that because abortion alone destroys a "potential human life," "[n]one of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite.").

27 *Id.* at 2284.

tives.[28] Abortion restrictions passed by state legislatures will be subjected to only rational basis review by courts, the lowest standard of review that gives "a strong presumption of validity" to state legislatures to regulate or ban the procedure requiring only that the regulation be rationally related to a legitimate governmental interest.[29] Under this standard, a law "must be sustained if there is a rational basis on which the legislature *could have thought* that it would serve legitimate state interests."[30]

B. *"[S]tare decisis is not a straitjacket"*[31]

The Court engaged in a five-factor test to reach its decision to overturn fifty years of legal precedent and justify its failure to adhere to the guiding principle of *stare decisis,* or the rule that courts are bound to decide cases in a like manner to previous cases that present similar facts.[32] *Stare decisis* is designed to preserve the integrity of the Court and protect reliance and predictability of legal rights.[33] After applying the five-factor test to abortion jurisprudence, the opinion concluded that the underlying precedent was not sufficiently strong to bind the Court. First, the Court examined the nature of the Court's error in the *Roe* and *Casey* decisions. Here the Court found that *Roe* was "egregiously wrong" from inception and "short-circuited the democratic process."[34] Citing Justice Byron White's dissent in *Roe,* the Court described the *Roe* decision as an "exercise of raw judicial

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28 *Id.* at 2243.

29 *Id.* at 2284 (stating that rational basis review requires that "[a] law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'" *Id.* (citing Heller v. Doe, 509 U.S. 312, 319 (1993)).

30 *Dobbs*, 142 S. Ct. at 2284 (citing Heller v. Doe, 509 U.S. 312, 320 (1993)(emphasis added).

31 *Dobbs*, 142 S. Ct. at 2280.

32 *Id.* at 39 (describing stare decisis as "requiring that like cases be decided in a like manner" but noting that "stare decisis is not an inexorable command." *Id.* (citing Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

33 *Dobbs*, 142 S. Ct. at 2262 (remarking that stare decisis "fosters 'even-handed' decisionmaking," "contributes to the actual and perceived integrity of the judicial process," and "restrains judicial hubris." *Id.* (citing Payne v. Tennessee, 501 U.S. 808, 827-28 (1991)).

34 *Dobbs,* 142 S. Ct. at 2243, 2265 (describing the *Roe* decision as "egregiously wrong and deeply damaging" and "on a collision course with the Constitution from the day it was decided." *Id.* at 2265).

power."[35] Second, the Court found that the quality of the *Roe* Court's reasoning was not grounded in constitutional text, history, or precedent, and none of the cases relied upon by the *Roe* Court to find the right of privacy reflected the interest at stake in *Roe,* potential fetal life.[36] Instead, the majority described that the *Roe* decision read like legislation—with the trimester framework providing the prime example—rather than like a judicial decision.[37] Third, the abortion cases fail the workability test because *Casey*'s "undue burden" test has proven unworkable[38] since the "'line between' permissible and unconstitutional restrictions 'has proved to be impossible to draw with precision.'"[39] Fourth, the *Roe* and *Casey* decisions have impacted negatively other areas of law.[40]

Fifth, and finally, according to the Court, overruling *Roe* will not upend the type of "concrete" reliance interests engaged by other types of holdings involving property and contractual rights[41] because abortion is not a planned for event and therefore can "take virtually immediate account of any sudden restoration of state authority to ban abortions."[42] The Court dismissed as

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35 *Id.*at 2241 (citing *Roe*, 410 U.S. at 222 (J. White dissenting)). .

36 *Dobbs*, 142 S. Ct. at 2237-41.

37 *Id.* at 2267 (describing that "without any grounding in the constitutional text, history, or precedent, [*Roe*] imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation." *Id.* at 2266.). The Court cited John Hart Ely's famous law review article, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L. J. 920, 926, 947 (1973)(calling the *Roe* decision one that would be drafted by a legislator).

38 *See Dobbs*, 142 S. Ct. at 2271-75.

39 *Id.* at 2274 (citing Janus v. State, County, & Mun. Employees, 585 U.S. __ (2018) (slip opinion at 38)).

40 *See Dobbs* at 2275-76 (saying that the abortion cases have "diluted" standards for constitutional facial challenges and third party standing, for example. *Id.* at 2276). Here the Court is signaling its willingness to entertain future challenges that abortion providers and individual doctors who provide abortion lack standing to sue to enjoin enforcement of a state's restrictive abortion laws. *See* Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (Thomas, J., dissenting)(describing that "This suit is possible only because the Court has allowed abortion clinics and physicians to invoke a putative constitutional right that does not belong to them—a woman's right to abortion.").

41 *Dobbs* at 2276.

42 *Id.* (citing *Casey,* 505 U.S. at 856).

"novel and intangible" the reliance interest famously expressed by the *Casey* Court in upholding *Roe*,

> for two decades [people] have organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail. 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.[43]

Instead, the Court argued that while property and contract claims involved "concrete" reliance interests, abortion provided only an "intangible" form of reliance.[44] Several amici cited extensive social science research quantifying the impact of abortion access on women's financial and educational attainment, with an amicus brief submitted by economists providing a powerful measure of the effect of abortion access on women's birth rates, marriage, educational attainment, occupations, earnings, and financial stability.[45] Despite this extensive research, the Court stated "[t]hat form of reliance depends on an empirical question

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43 *Casey,* 505 U.S. at 856.

44 *Dobbs*, 142 S. Ct. at 2272.

45 *See* Brief of Amici Curiae Economists in Support of Respondents 6-16 (using causal inference to measure the effects of abortion access on birth rates, marriage, educational attainment, occupations, earnings, and financial stability). *See also* Brief for Respondents, at 36-41 (exploring social science research and federal jurisprudence that proves that women's economic stability depends upon access to abortion); Brief of Social Science Experts as Amici Curiae in Support of Respondents at 28-32; Christine Dehlendorf, et al., *Disparities in Abortion Rates: A Public Health Approach*, 103 Am. J. Pub. Health 1772, 1775 (2013) ("[U]nintended childbirth is associated with decreased opportunities for education and paid employment . . . "); Diana Greene Foster, et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. Pediatrics 183–89 (2019); Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the U.S.*, 108 Am. J. Pub. Health 407, 409, 412–13 (2018); Sarah Miller, *The Economic Consequences of Being Denied an Abortion*, Nat'l Bur. Econ. Res. Working Paper 26662 (2020), https://perma.cc/PB6H-4UEG; Lauren J. Ralph et al., *A Prospective Cohort Study of the Effect of Receiving Versus Being Denied an Abortion on Educational Attainment*, 29 Women's Health Issues 455–64 (2019) (among high school graduates, people denied a wanted abortion were less likely to complete postsecondary degrees compared to those who received a wanted abortion); Adam Sonfield, et al., *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children* 14–15, Guttmacher Inst. (Mar. 2013), https://perma.cc/TKD3-6YV3.

that is hard for anyone—and in particular for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women."[46] Professors Kate Shaw and Steven Mazie responded to the argument in the majority opinion by providing concrete examples of how abortion access can constitute a "reliance interest."[47] They describe two hypothetical examples: a couple that moves to Tulsa, Oklahoma and purchases a home with the expectation, "so engrained that [they] may not have even given it a thought," that they would not be forced to bear a child in the event of a contraceptive failure; and a high-school senior who accepts admission at an Ohio liberal arts college before the *Dobbs* decision, when after the decision the Ohio legislature passes a total abortion ban and the student is now consigned to attend four years of college in a state where she will have no access to abortion in the event of a sexual assault or contraceptive failure.[48] These scenarios, the authors argue, are examples of a reliance interest on access to abortion.

C. *The Future of Substantive Due Process*

The majority sought to cabin their opinion to overturn the abortion precedents while leaving intact the other lines of substantive due process cases upon which *Roe* relied and which relied on *Roe.* The majority opinion specifically stated that the decision would not affect other rights that are based upon substantive due process, like same sex marriage and contraceptives, arguing those precedents are not affected by this decision since *Roe* is unique because it alone involves "potential life" in balancing the state's interest.[49] Justice Kavanaugh reiterated in his concurring opinion that the *Dobbs* decision would not impact other cases, stating, "I emphasize what the Court today states: Over-

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46 *Dobbs*, 142 S. Ct. at 2277.

47 *See* Kate Shaw & Steven Mazie, *There's a Glaring Weakness in Justice Alito's Case Against* Roe v. Wade, TIME (May 27, 2022).

48 *Id.*

49 *Dobbs*, 142 S. Ct. at 2277-78 (describing that "we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."). The Court argued that the dissent's claim that the decision puts *Griswold, Wisenstadt, Lawrence,* and *Obergefell* in jeopardy is incorrect because of the Court's "unequivocal" assertion that the decision casts doubt on those precedents that do not involve abortion. *Id.* at 2280.

turning *Roe* does *not* mean the overruling of those precedents [*Griswold, Eisenstadt,* and *Obergefell*], and does *not* threaten or cast doubt on those precedents."[50]

However, Justice Thomas' concurrence calls this claim into question, arguing that substantive due process does not exist under the Constitution, explaining that "substantive due process is an oxymoron that lacks any basis in the Constitution.'"[51] Because Justice Thomas believes that the Due Process Clause only extends procedural protections, not substantive protections, he argues that "in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell.*"[52] He describes that "any substantive due process decision is demonstrably erroneous" and therefore the Court has a duty to correct the error established in those precedents.[53] The dissent raised the same concerns, explaining that the constitutional right to abortion "does not stand alone,"[54] but rather its past rulings—*Griswold, Lawrence*, and *Obergefell*—"are all part of the same constitutional fabric."[55] In short, the dissent points out that it is not possible to square the *Dobbs* decision with upholding other substantive due process cases. *Stare decisis* dictates that those cases cannot stand without the foundation of *Roe* because "the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation."[56] The dissent provided an apt analogy, that the *Dobbs* decision is like a Jenga game in which one of the foundational blocks has been removed from the tower and the entire substantive due process architecture has been destabilized and is in peril of falling.[57] Just as the majority wrote about how abortion is not deeply rooted in the nation's history or tradition, the same could be said of each of the other rights—"The majority could write just as long an opinion showing, for example, that until the mid-twentieth century, 'there was no sup-

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50 *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

51 *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

52 *Id*.

53 *Id*.

54 *Dobbs*, 142 S. Ct. at 2319 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting).

55 *Id*.

56 *Id*.

57 *Id*. at 2330.

port in American law for a constitutional right to obtain [contraception].'"[58]

A. *Public Opinion and the Court's Legitimacy*

Chief Justice Roberts' concurrence sought a "measured course"[59] that would "leave for another day whether to reject any right to an abortion at all"[60] but would instead uphold the Mississippi 15-week pre-viability ban. He argued for revising the legal standard applied in abortion cases from the previous "undue burden" test with a "reasonable opportunity test" that provides that states can ban abortion before viability so long as a woman has had a reasonable opportunity to obtain an abortion.[61] The previous test, the undue burden standard, provided that state laws that regulate pre-viability abortions are invalid if the purpose or effect of the law is to place a substantial obstacle in the path of a woman seeking abortion such that the state had imposed an undue burden on access to abortion.[62] Chief Justice Roberts' attempt to reach a middle ground solidifies his role on the Court as a moderate incrementalist guided by the "fundamental principle of judicial restraint."[63] Chief Justice Roberts' decision to provide the fifth vote in a separate concurrence in *June Medical Services, L.L.C v. Russo,*[64] revealed his commitment to adhere to the precedent set in *Whole Woman's Health v. Hellerstedt,*[65] a case in which he was in the dissent, to strike down a restrictive abortion law that was nearly identical to the provision struck down less than four years earlier in *Whole Woman's*

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58 *Id*. at 2319 .

59 *Dobbs*, 142 S. Ct. at 2310 (Roberts, C.J. concurring).

60 *Id*. at 2314.

61 *Id*. at 2314-15.

62 Casey, 505 U.S. at 877 (ruling that before viability, a State could regulate abortion but could not impose a "substantial obstacle" in the path of a woman seeking abortion); *Whole Women's Health*, 579 U.S. at 589-90.

63 *Dobbs*, 142 S. Ct. at 2311 (Roberts, C.J. concurring). *See* Marc Spindelman, *Embracing* Casey: June Medical Services L.L.C. v. Rullo *and the Constitutionality of Reason-Based Abortion Bans,* 109 GEO. L. J. ONLINE 115 (2020).

64 140 S. Ct. 2103 (2020).

65 136 S. Ct. 2292 (2016).

Health.[66] In his *June Medical Services* concurrence he described, "I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided. The question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case."[67]

On the eve of the *Dobbs* decision public confidence in the Supreme Court was at a historic low, with just 25% of Americans polled expressing confidence in the Supreme Court.[68] A Quinnipiac poll conducted in 2021 found that 61% of Americans believed the Supreme Court is motivated mainly by partisan politics—an opinion shared among respondents of both political parties, with 67% of Democrats and 56% of Republicans responding.[69] The majority opinion in *Dobbs* addressed the issue of public perception and confidence in the Court, explaining that "we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work."[70] Rather, the Court described, the judicial branch must be guided by the Constitution and not public opinion.[71] Indeed, polling reveals that the majority of Americans, 61%, say that abortion should be legal in all or most cases,[72] with the percentage remaining relatively unchanged over a three-decade period.[73]

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66 *See* Spindelman, *supra* note 62 (describing Chief Justice Robert's concurrence in *June Medical* as expressing a jurisprudential commitment to stare decisis).

67 *June Med. Servs*., 140 S. Ct. at 2133, 2141-42 (Roberts, C.J., concurring).

68 Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low,* GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx (noting that the 25% confidence reading is five percentage points below the previous record low).

69 *Majority Say Supreme Court Motivated By Politics, Not the Law, Quinnipiac University National Poll Finds; Support for Stricter Gun Laws Fails,* QUINNIPIAC POLL (Nov. 19, 2021), https://poll.qu.edu/poll-release?releaseid=3828.

70 *Dobbs,* 142 S. Ct. at 2278.

71 *Id.*

72 *Public Opinion on Abortion,* PEW RSCH. CTR. (May 17, 2022), https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/.

73 Lydia Saad, *Americans Still Oppose Overturning* Roe v. Wade, GALLUP (June 9, 2021), https://news.gallup.com/poll/350804/americans-opposed-overturning-roe-wade.aspx (finding that 58% of Americans oppose overturning *Roe*

The dissent touched upon this aspect of the majority's opinion, observing that

> [i]t makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them and now it has the votes to discard them. The majority thereby substitutes the rule by judges for the rule of law.[74]

With respect to the majority's decision not to follow precedent, the dissent argued that "the American public . . . should never conclude that its constitutional protections hung by a thread—that a new majority, adhering to a new 'doctrinal school,' could by 'dint of numbers' alone, expunge their rights."[75] Polling conducted in the wake of *Dobbs* found that 62% of Americans disapproved of the *Dobbs* decision overturning *Roe*.[76]

High profile battles in both judicial appointments and confirmations[77] under the Trump Administration and the pace at which significant cases were decided under the newly-comprised conservative majority, decreased public confidence in the High Court and added to the public perception that the Supreme Court is a political body, whose decisions are driven by ideology rather than objective legal analysis and judicial restraint.[78] The

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and that that support "roughly matches the overage over that three-decade period.").

74 *Dobbs*, 142 S. Ct. at 2335 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting).

75 *Id.* at 2350 (citing *Casey*, 505 U.S. at 864).

76 *Majority of Public Disapproves of Supreme Court's Decision to Overturn* Roe v. Wade, Pew Rsch. Ctr. (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/.

77 Emerging evidence suggests that the FBI did not fully investigate allegations against Justice Kavanaugh during his confirmation process. Kate Kelly, *Details on F.B.I. Inquiry into Kavanaugh Draw Fire from Democrats,* N.Y. Times (July 22, 2021); Stephanie Kirchgaessner, *FBI Director Faces New Scrutiny over Investigation of Brett Kavanaugh,* Guardian (Sept. 14, 2021)(describing investigations into statements made by the FBI director that the bureau lacked the authority to conduct a further investigation in the background of Brett Kavanaugh during its investigation of the nominee as part of his confirmation process).

78 Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low,* Gallup (Sept. 23, 2021), https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx (suggesting that the steep decline in confidence in judiciary over a year ago was likely the result of political

Court's reputation had been tarnished by political maneuvering by Republicans that allowed President Donald Trump to nominate three conservative justices in his four-year term.[79] The first of President Trump's appointees was nominated after the Republican-led Senate refused to consider President Obama's nomination of Merrick Garland eight months before the 2016 election, citing the upcoming presidential election,[80] but then confirmed Amy Coney Barrett only one week before the 2020 election in a rushed confirmation process after the death of Justice Ruth Bader Ginsburg and with millions of election votes already cast.[81] The Court's low approval rating was also impacted by the swiftness with which the Court, newly comprised with Republican-appointed justices, made decisions in high-profile cases that included weakening the Voting Rights Act, the rights of labor unions, COVID lockdown orders, and the perceived over-use of the "shadow docket" in cases including the one to allow Texas' SB8 antiabortion civil bounty law to remain in effect.[82] The low

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maneuverings that allowed President Trump to nominate three conservative justices in four years after the Republican led Senate refused to hold hearings for President Obama's nominee citing the upcoming presidential election.).

79 *Id.*

80 President Obama nominated Merrick Garland in March 2016, upon the death of Antonin Scalia, but Senate Majority Leader Mitch McConnell declared that any appointment by a sitting president would be null and void and the new justice should be nominated by the winner of the presidential election taking place in eight months. The eleven Republican members of the Senate Judiciary Committee signed a letter saying they would not consent to a nominee by President Obama and no proceedings were held on Garland's nomination. *See* Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now,* NPR NEWS (June 29, 2018), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

81 Jennifer Haberkorn, *Amy Coney Barrett Confirmed to Supreme Court by GOP Senators,* L.A. TIMES (Oct. 26, 2020)(describing it as "the most partisan confirmation vote for a justice in modern history" and the first time in U.S. history that a nominee has not received any votes from the opposing party); Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath,* NPR NEWS (Oct. 26, 2020), https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court.

82 The shadow docket refers to emergency orders that the Court issues outside of its regular schedule and that permits only limited briefing, no oral arguments, and unsigned and limited opinions. *See* Adam Liptak, *Missing from Supreme Court's Election Cases: Reasons for Its Rulings,* N.Y. TIMES (Oct. 26,

approval and public confidence polling led several of the justices to address the issue in a series of speeches.[83] Standing on stage with Mitch McConnell at the McConnell Center at the University of Louisville, Justice Amy Coney Barrett told the audience that her goal was "to convince you that the Court is not composed of a bunch of partisan hacks."[84]

E. *Selective Use of Equal Protection*

The Court held that equal protection "is squarely foreclosed by our precedents" as a basis for protecting the abortion right[85] but employed it instead to describe a legitimate state interest in preventing discrimination inherent in passing "reason-based" bans on abortion. The Court rejected *Casey*'s argument that the abortion right is necessary to ensure women's equal participation as citizens.[86] By contrast, the dissent relied several times on equal protection arguments, stating, "Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions."[87] Several amicus briefs also raised the

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2020), https://www.nytimes.com/2020/10/26/us/supreme-court-election-cases.html. *See also* Steven Vladeck, *Symposium: The Solicitor General, the Shadow Docket, and the Kennedy Effect,* SCOTUSBLOG (Oct. 22, 2020), https://www.scotusblog.com/2020/10/symposium-the-solicitor-general-the-shadow-docket-and-the-kennedy-effect/ (remarking that the Trump Administration filed 36 emergency applications to the Supreme Court in three and a half years, while the administrations of George W. Bush and Barak Obama filed just eight over sixteen years).

83 Justice Samuel Alito delivered a speech at University of Notre Dame in which he implored that the Court is not "a dangerous cabal" that is "deciding important issues in a novel, secretive, improper way, in the middle of the night, hidden from public view." *Alito Rebuffs Criticism of Supreme Court's "Shadow Docket" and Says Justices Aren't "Dangerous Cabal,"* CBS NEWS (Oct. 1, 2021), https://www.cbsnews.com/news/samuel-alito-supreme-court-shadow-docket-dangerous-cabal/.

84 Melissa Quinn, *Amy Coney Barrett Says Supreme Court Justices Aren't "Partisan Hacks,"* CBS NEWS (Sept. 13, 2021), https://www.cbsnews.com/news/amy-coney-barrett-supreme-court-justices-partisan-hacks/.

85 *Dobbs*, 142 S. Ct. at 2245.

86 *Casey*, 505 U.S. at 856 (stating that "[t]he 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.").

87 *Dobbs*, 142 S. Ct. at 2317 (joint opinion of Breyer, Sotomayor, and Kagan, JJ).

argument of equal protection as a basis for sourcing the abortion right and the claim is one that had also long been championed by Justice Ruth Bader Ginsberg.[88] The majority opinion described that a state's regulation of abortion "is not sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications."[89] What is more, the majority went on to explain, society has changed in ways that do not require women to have access to abortion to participate equally in society because unwed motherhood is no longer stigmatized, bans on pregnancy discrimination in the workplace have been passed, and there is widespread availability of contraception, unpaid leave, and adoption.[90] The Court also reiterated a claim made by Justice Barrett during oral arguments,[91] that the availability of safe haven laws, that is laws that allow people to leave newborns at safe locations like fire stations without fear of legal consequences, is another way that women who are forced to carry a pregnancy to term can be relieved of the burden of parenting and still be able to fully participate in work and public life.[92]

While the Court rejected the long-standing argument that abortion should fall within the Equal Protection Clause, it

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88 *See, e.g.*, Brief for United States as Amicus Curiae at 24; Brief for Equal Protection Constitutional Law Scholars as Amici Curiae. *See* Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting)(describing that "[Le]gal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship."). Ginsburg had hoped to advance the equal protection argument for abortion rights in a case she was litigating as an ACLU lawyer, Struck v. Secretary of Defense, 409 U.S. 947 (1972), in which she represented an Air Force captain, Susan Struck, who when she learned she was pregnant was given only two options, to have an abortion or to quit the Air Force. Struck wanted to keep her job and the baby and Ginsburg hope to advance an equal protection argument but the case was rendered moot when the Air Force changed its policy. *Struck v. Secretary of Defense,* 409 U.S. 1071 (1972) (rendering the case moot in light of the government's new position).

89 *Dobbs*, 142 S. Ct. at 2245.

90 *Id.* at 2258-59.

91 *See* Transcript of Oral Argument, Dobbs v. Jackson Whole Women's Health at 56-57, 141 S. Ct. 2619 (2021) (No. 19-1392) (Justice Barrett posed the following question to the attorney representing the Mississippi clinic, "*Roe* and *Casey* emphasize the burdens of parenting, . . . Why don't the safe haven laws take care of that problem?").

92 *Dobbs*, 142 S. Ct. at 2259.

adopted a novel equal protection argument put forth by abortion opponents, that "reason based" bans such as prohibiting abortion based on sex, race, or disability, are a legitimate equal protection concern.[93] In the past, both Justices Amy Coney Barrett and Clarence Thomas have espoused the view that reason-based abortion bans prevent eugenics.[94] In his concurring opinion denying certiorari in *Box v. Planned Parenthood,* Justice Thomas argued that reason-based bans "promote a State's compelling interest in preventing an abortion from becoming a tool of modern-day eugenics"[95] and maintained that the abortion right did not require the state to permit "eugenic abortions."[96] The claim has been strongly rejected by members of the black community and the reproductive justice community.[97] Eugenics is state spon-

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93 *Id.* at 2284 (saying that states may ban or restrict abortion based on legitimate interests that may include "the prevention of discrimination on the basis of race, sex, or disability.").

94 *See* Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1782 (2019) (Thomas, J. concurring) (stating that when a woman aborts based on a fetus' gender, disability, or race, she is engaging in eugenics); Planned Parenthood of Ind. & Ky. v. Comm'r Ind. State Dep't Health, 917 F.3d 532, 536 (7th Cir. 2018) (J. Barrett dissenting) (dissenting from the denial of en banc review arguing that the law allows people to "[use] abortion to promote eugenic goals." *Id.* at 536). *See also* Little Rock Family Planning Servs. v. Rutledge, 984 F.3d 682, 694 (8th Cir. 2021) (Judges Erickson and Shepherd framed the reason-based bans as anti-eugenics statutes); Preterm-Cleveland v. McCloud, 994 F.3d 512, 536, 547, 549-50 (6th Cir. 2021) (en banc) (Judges Sutton, Griffin, and Bush arguing the prohibition on termination of pregnancies on the basis of Down syndrome is an anti-eugenics statute and furthers a compelling state interest).

95 *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring) (*cert. denied*).

96 *Id*. at 1792-93.

97 *See* Melissa Murray, *Race-ing* Roe: *Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025 (2021) (maintaining that eugenics and equal protection arguments are designed to provide constitutionally permissible grounds for overturning *Roe); see also* Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 HARV. L. & POL'Y REV. 273, 276 (2020) (arguing that Justice Thomas' *Box* concurrence distorts history and tries to "weaponize" disability rights against abortion); Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, ATLANTIC (May 20, 2019), https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-againstabortion/590455/. For further critiques of Justice Thomas' concurring opinion equating abortion with eugenics, see Mary Ziegler, *Bad Effects: The Misuses of History in* Box v. Planned Parenthood, 105 CORNELL L. REV. 165, 196–202 (2020) (critiquing the historical arguments in Justice Thomas's *Box* concurrence); *see also* Joanna L. Grossman & Lawrence M. Friedman,

sored reproductive oppression, when the state sterilizes people against their will, for example. Eugenics is not the state stripping people's rights to control their *own* reproductive destiny.

F. *"Potential Life" and "Unborn Human Beings": Signaling Fetal Personhood*

The Court did not reach the issue of fetal personhood in *Dobbs,* specifically noting that "[o]ur opinion is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests."[98] However, the possibility of a fetal personhood law being passed at the federal level in a Congress under Republican party control casts a long shadow over the decision. As the dissent points out, "[m]ost threatening of all, no language in today's decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest. If that happens, '[t]he views of [an individual State's] citizens will not matter."[99] Justice Kavanaugh's concurrence also noted this possibility, asserting that, "the Court's decision today *does not outlaw* abortion throughout the United States."[100] Critically, if fetal personhood is passed at the federal level, either by federal legislation or a Constitutional amendment, abortion could be banned across the nation.[101] Amici in *Dobbs* urged the Court to overturn *Roe* by finding that fetuses are protected persons under

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Junk Science, Junk Law: Eugenics and the Struggle over Abortion Rights, VERDICT: LEGAL ANALYSIS & COMMENTARY FROM JUSTIA (June 25, 2019), https://verdict.justia.com/2019/06/25/junk-science-junk-law-eugenicsand-the-struggle-over-abortion-rights.

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

99 *Dobbs,* 142 S. Ct. at 2318 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting).

100 *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring)(emphasis in the original).

101 A federal fetal personhood bill, the Life at Conception Act, was introduced last year in both chambers of Congress that would extend a constitutional "right to life" at the moment of conception. H.R. 1011, Life at Conception Act, 117th Cong. (2021-2022), https://www.congress.gov/bill/117th-congress/house-bill/1011/cosponsors. *See* Madeleine Carlisle, *Fetal Personhood Laws Are the New Frontier in the Battle over Reproductive Rights*, TIME (June 28, 2022), https://time.com/6191886/fetal-personhood-laws-roe-abortion/ (describing that the Life at Conception Act currently has 164 cosponsors in the House of Representatives).

the Fourteenth Amendment which could have outlawed abortion nationwide.[102] After the *Dobbs* decision was released, former Vice-President Mike Pence echoed the call for a national ban in all fifty states signaling the broader strategy of the antiabortion movement and that a fetal personhood initiative is the next goal.[103] Mitch McConnell, the Senate minority leader, has also stated that a national abortion ban is a possibility.[104]

Fetal personhood laws recognize fetuses as "persons" under the law, from the moment of fertilization, and vest fetuses with constitutional rights such that abortion is tantamount to murder.[105] Georgia, Arizona, and Alabama already has passed a fetal personhood law that will likely take effect now that *Roe* has been overturned.[106] In total, eight states have introduced laws banning abortion by establishing fetal personhood.[107] A bill recently defeated in Louisiana's legislature, for example, would have allowed prosecutors to charge those having abortions with

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102 Brief Amici Curiae for Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners, Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (No. 19-1392).

103 Nikki McCann Ramirez, *Mike Pence Calls for National Abortion Ban,* Rolling Stone (June 24, 2022)(describing remarks by Pence after the *Dobbs* decision, that "we must not rest and must not relent until the sanctity of life is restored to the center of American law in every state in the land.").

104 Andrew Stanton, *National Abortion Ban Possible if* Roe v. Wade *Overturned: Mitch McConnell,* Newsweek (May 7, 2022).

105 *See* Lynn Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 Albany L. Rev. 999, 1000 (1999).

106 *State Legislation Tracker: Abortion Bans by Establishing Fetal Personhood,* Guttmacher Inst. (Aug. 1, 2022), https://www.guttmacher.org/state-policy; *see, e.g.,* The Alabama Human Life Protection Act, Ala. Code § 26-23H-1-8 (2019) (enjoined by *Robinson v. Marshall*, 415 F. Supp. 3d 1053 (M.D. Ala. 2019)) redefines an "unborn child, child or person" as "[a] human being, specifically including an unborn child in utero at any stage of development, regardless of viability." *Id*. at § 26-23H-3. Under the law, a doctor who performs an abortion could be criminally prosecuted and sentenced to as many as ninety-nine years in prison. *Id.* at § 26-23H-6. Regarding Georgia's fetal personhood law, see Carlisle, *supra* note 100 (noting that Georgia's fetal personhood law, HB 481, which includes language that states "natural persons include an unborn child," was struck down in 2020, but after the *Dobbs* decision Georgia's attorney general filed a notice requesting the decision be reversed).

107 *State Legislation Tracker*, *supra* note 105. .

homicide.[108] The *Dobbs* opinion leaves the decision of passing fetal personhood laws to the states to legislate whether having an abortion itself is criminal activity.[109] Notably, the Supreme Court downgraded abortion from a fundamental right to a "health and welfare regulation" that can be regulated by the states and those regulations will receive only rational basis review if challenged in court.[110] Rational basis is the most deferential standard of review.

Fetal personhood is a significant change in the legal landscape of abortion. While fetal rights have gained some traction in other areas such as child abuse or tort law,[111] fetal personhood laws have frequently been rejected by voters because of their far-reaching impacts on criminalizing pregnant women themselves for poor pregnancy outcomes and the impact on assisted reproductive technology.[112] Abortion opponents have historically

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108 *See* Caroline Kitchner, *Louisiana Republicans Advance Bill That Would Charge Abortion as Homicide,* WASH. POST (May 5, 2022) (discussing a bill that passed through a committee vote that would have amended the crime of homicide and the crime of criminal battery to enable the state to charge people, including the pregnant mother, at any stage of fertilization); Rick Rojas & Tariro Mzezewa, *After Tense Debate, Louisiana Scraps Plan to Classify Abortion as Homicide,* N.Y. TIMES (May 12, 2022).

109 *See Dobbs*, 142 S. Ct. at 2257 (saying that voters "may wish to impose tight restriction based on their belief that abortion destroys an 'unborn human being." *Id.* (citing MISS. CODE ANN § 41-41-191(4)(b)..

110 *See supra* discussion in text at notes 27-30.

111 *See* Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Legal Personhood,* 75 VAND. L. REV. __ (forthcoming 2023) (manuscript at 8), https://ssrn.com/abstract=4125492 at 8 (explaining the antiabortion strategy to establish fetal personhood across a broad range laws to establish fetal personhood under the Fourteenth Amendment); Kenneth De Ville & Loretta Kopelman, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. MED. & ETHICS 332, 335 (1999) (describing the "long term, end-game strategy of pro-life forces" to establish fetal personhood in child abuse and criminal homicide laws to secure recognition of fetal personhood under the Fourteenth Amendment).

112 *See* Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health,* 74 OHIO ST. L.J. 75, 78 (2013)(pointing out that personhood laws have been defeated in a number of states because reproductive rights advocates have successfully linked personhood with broader impacts on women's health and access to assisted reproductive technology that would likely be outlawed by recognition of zygote personhood.).

adopted a strategy of enforcing abortion restrictions against providers and those who aid and abet abortion but have stopped short of imposing punishment on the abortion patients themselves.[113] However, with the new conservative majority on the Supreme Court, abortion opponents have begun to argue for prosecuting pregnant people who obtain abortion.[114] Fetal personhood laws would allow prosecutors to pursue criminal homicide charges against people seeking abortion. It would also likely embolden states to pass laws that prevent their pregnant residents from seeking out of state abortions on the claim that the state is protecting its fetal residents.[115]

G. Dobbs *and Future Interjurisdictional Abortion Battles*

Justice Kavanaugh's concurrence argued that while the decision was returning the issue of regulating abortion to state legislatures, "other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter."[116] However, as scholars have described, in the post-*Roe* legal landscape, states hostile to abortion may seek to ban abortions that have any relationship to their state and extend the reach of their abortion bans to prohibit their residents traveling to neighboring states to seek abortion.[117] Justice Kavanaugh dismissed this looming concern in his concurrence, asking, "May a state bar a resident from travelling out of state to obtain an abortion? In my view no because of the constitutional right to travel."[118] Legal

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113 *See* J.C. Willke, *The Woman Should Not Be Punished,* NAT'L RIGHT TO LIFE NEWS 3 (June 6, 1989); Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion,* 26 WM. & MARY BILL RTS. J 735, 738 (2018)(explaining that in the 1980's, the pro-life strategy changed to be "woman protective" and pro-lifers emphasized punishing providers but not women.).

114 *See* Caroline Kitchner, *Louisiana Republicans Advance Bill That Would Charge Abortion as Homicide,* WASH. POST (May 5, 2022)(discussing a bill that passed through a committee vote that would have amended the crime of homicide and the crime of criminal battery to enable the state to charge people, including the pregnant mother, at any stage of fertilization.)

115 *See* David Cohen, Greer Donley, & Rachel Rebouché, *The New Abortion Battleground*, 124 COLUM. L. REV. __ (2023) (Aug. 4, 2022 draft) (manuscript at 25-26), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4032931.

116 *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

117 Cohen, Donley, & Rebouché, *supra* note 114, at ___ (manuscript at 17-18).

118 *Dobbs,* 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

scholars have argued that this question is much more unsettled than Justice Kavanaugh's concurrence suggests. There are instances when a state can criminally prosecute a resident for activity that happens wholly beyond its borders, even if that activity was legal in the other state.[119] Missouri was on the forefront of those looming battles by trying twice to ban out-of-state-abortions on Missouri residents.[120] Both bills died in committee, but these are just the most recent examples of the challenging legal landscape presented by the post-*Roe* landscape [121] States supportive of abortion are gearing up to confront this future reality by passing laws to protect their providers from legal sanctions for helping out-of-state residents from obtaining care. For example, Connecticut and New York have passed laws that prohibit state agencies and courts from participating in any out of state prosecutions or lawsuits.[122] Other states are considering similar laws that will refuse to cooperate with antiabortion lawsuits, including refusing to enforce damage awards or extraditing defendants to face trial or imprisonment.[123] The refusal of one state to honor court orders and legal proceedings in other states strikes at the heart of interstate cooperation that is foundational to our federalist system.[124]And several jurisdictions have passed or are con-

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119 Cohen, Donley, & Rebouché, *supra* note 114, at ___ (manuscript at 17-20).

120 *See,* S.B. 603, 101st Gen. Assemb., Reg. Sess. (Mo. 2021) (applying all Missouri abortion restrictions to conduct occurring "[p]artially within and partially outside this state."); HB 2012, 102d Gen. Assemb., Reg. Sess. (Mo. 2022)(creating the possibility of civil liability on anyone who either performs an abortion on a Missouri resident or who helps Missouri citizens travel out of state for an abortion).

121 *See* Kaia Hubbard, *New Patchwork of Abortion Access Begins to Take Shape in States*, U.S. News (June 27, 2022 2:47 PM), https://www.usnews.com/news/national-news/articles/2022-06-27/new-patchwork-of-abortion-access-begins-to-take-shape-in-states. *See also State Policies on Abortion*, Guttmacher Inst. (Aug. 1, 2022), https://www.guttmacher.org/united-states/abortion/state-policies-abortion.

122 Conn. Pub. Act No. 22-19 §§ 2, 3 (July 1, 2022); Keshia Clukey & Joyce E. Cutler, *New York Abortion Law Shields Patients and Providers from Lawsuits*, Bloomberg (June 13, 2022 11:58 AM CDT), https://www.bloomberg.com/news/articles/2022-06-13/new-york-abortion-laws-shield-patients-providers-from-suits.

123 Clukey & Cutler, *supra* note 121.

124 Politically conservative and politically liberal actors have switched hats in this debate about federalism and the power of the federal government versus

sidering creating a new cause of action allowing people to sue anyone who interferes with reproductive rights and access, including by bringing an SB8 style lawsuit against them.[125] Oregon and New York have announced funds to support abortion patients, including those traveling from out of state because their home state has banned the procedure.[126] Mobile abortion clinics are preparing to sit just across state borders to deliver medication abortion to residents crossing state lines, to meet patients where they are.[127] The dissent described that the *Dobbs* ruling will result in interstate conflicts and a series of novel constitutional questions, concluding that "[f]ar from removing the Court from the abortion issue, the majority puts the Court at the center of the coming 'interjurisdictional abortion wars.'"[128] Thus, a post-*Roe* world will involve travel for abortion care and the coming abortion battles will be fought between states in interjurisdictional abortion battles that will strain interstate comity and the foundations of our federalist system of government.

H. *The Dissent*

Justices Kagan, Sotomayor, and Breyer authored a powerful joint dissenting opinion, which is unusual as traditionally one author drafts an opinion that is signed on to by the others. The

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the rights of the states. Those who want to push back against the Trump Administration's enforcement efforts that try to harness the states are arguing for a limited power on the part of the federal government and broader states' rights. Conservatives want to assert broad federal power to punish states refusing to cooperate in enforcement, which seems contrary to their traditional views on federalism. Andrew F. Moore, *Introduction to the Symposium on Sanctuary Cities: A Brief Review of the Legal Landscape*, 96 U. DET. MERCY L. REV. 1, 17 (2018).

125 *See, e.g.,* The Freedom from Interference with Reproductive and Endocrine Health Advocacy and Travel Exercise Act, S9039A §§ 2, 70-b(1) & (2) (May 4, 2022), https://www.nysenate.gov/legislation/bills/2021/S9039.

126 Casey Parl, *States Pour Millions into Abortion Access,* WASH. POST (May 13, 2022 12:22 PM EDT), https://www.washingtonpost.com/dc-md-va/2022/05/13/oregon-new-york-funding-abortion/.

127 Michela Moscufo & Brad Mielke, *Mobile Abortion Clinics Ramp Up Operations as* Roe v. Wade *Is Overturned,* ABC NEWS (June 29, 2022 6:43 PM), https://abcnews.go.com/US/mobile-abortion-clinics-ramp-operations-roe-wade-overturned/story?id=85789069.

128 *Dobbs*, 142 S. Ct. at 2337 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting)(citing Cohen, et al., *supra* note 114, at 1).

dissent called into question the majority's originalist interpretation of the Constitution in striking down the abortion right. Noting that at the time of passage of the Fourteenth Amendment—the period to which the majority looks to determine if a right is deeply rooted in the nation's history—women were not viewed as equals and did not have rights to vote, own property, or control their bodies. Thus, "[w]hen the majority says that we must read our foundational charter as viewed at the time of ratification . . . it consigns women to second-class citizenship."[129] Instead, the dissent argues, that the Framers drafted the Constitution in broad language that would allow it to endure the ages and respond to changing times.[130] Citing Chief Justice John Marshall's 1819 opinion in *McCulloch v. Maryland,* "our Constitution is 'intended to endure for ages to come,' and must adapt itself to a future 'seen dimly' if at all."[131] The majority's "pinched" view of the Constitution constrains it from responding to new societal understandings and conditions, especially with respect to "construing the majestic but open-ended words of the Fourteenth Amendment—the guarantee of 'liberty' and 'equality' for all."[132]

The dissent described:

> Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the state's will, whatever the circumstances, and whatever the harm it will wreak on her and her family, it takes away her liberty. After today young women will come of age with fewer rights than their mothers and grandmothers had.[133]

The dissent also offered a glimpse of the future, writing that "whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights and their status as free and equal citizens. A state can thus transform what, when freely undertaken, is a wonder, birth, into what when forced is a nightmare."[134] They close with "With sorrow—for this Court, but more, for the many millions of American women who

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129 *Id.* at 2325.
130 *Id.*
131 *Id.*.
132 *Id.* at 2325, 2326.
133 *Id.* at 2346.
134 *Id.* at 2318.

have today lost a fundamental constitutional protection—we dissent."[135]

II. The Future of Abortion in a Post-*Roe* Landscape

In the wake of *Dobbs,* legal scholars, advocates, and policymakers are developing new strategies to protect abortion access. To be sure, the loss of *Roe* and *Casey* is devastating for those who support abortion access because those cases provided a constitutional floor of protection. As advocates and attorneys shift tack from a defensive to an offensive position, they are forging novel constitutional arguments and advancing ways to protect access through federal and state law. This section examines some of the emerging strategies taking place at the federal, state, and municipal levels.

A. *Emerging Constitutional Theories for Sourcing the Abortion Right*

As described earlier, the majority opinion rejected the precedent of *Roe* and *Casey* that sourced the constitutional right of abortion in the "liberty" clause of the Fourteenth Amendment. The Court went further, to reject equal protection as a basis for the abortion right, thus preemptively foreclosing a claim that has not only been asserted for decades by legal scholars[136] and jus-

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135 *Id.* at 2350.

136 *See, e.g.,* Laurence Tribe, American Constitutional Law § 15-10, pp. 1353-59 (2d ed. 1988); Susan Frelich Appleton, *Doctors, Patients and the Constitution: A Theoretical Analysis of the Physician's Role in "Private" Reproductive Decisions*, 63 Wash. U. L.Q. 183, 197-201 (1985); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984) (arguing that abortion restrictions create unconstitutional gender-based discrimination); Catharine MacKinnon, *Reflections on Sex Equality Under the Law*, 100 Yale L.J. 1281, 1308-24 (1991); Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 273-79 (1992); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 Emory L.J. 815 (2007); Cass Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 Colum. L. Rev. 1, 31-44 (1992).

tices,[137] but that has long been a significant rationale for overturning precedent.[138] With both equal protection and substantive due process foreclosed, novel constitutional arguments have been advanced for providing constitutional protection to the abortion right, including First Amendment, Thirteenth and Fourteenth Amendments, and the Takings Clause.[139]

Two cases filed in Florida brought by faith groups argue that the state's fifteen-week abortion ban violates constitutional rights related to religious freedom.[140] In *Pomerantz et al. v. Florida*—a case brought on behalf of religious groups including Reform Judaism, Buddhism, the Episcopal Church, the United Church of Christ, and the Unitarian Universalist Church—the complaint argues that Florida's 15-week ban violates freedom of speech, free exercise of religion, and the separation of church and state.[141] A separate suit filed in Florida by a South Florida Jewish Congrega-

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137 Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. REP. 143, 143-44 (1978); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199-1200 (1992) ("The idea of the woman in control of her destiny and her place in society was less prominent in the *Roe* decision itself, which coupled with the rights of the pregnant woman the free exercise of her physician's medical judgment. The *Roe* decision might have been less of a storm center had it homed in more precisely on the women's equality dimension of the issue." (citations omitted)).

138 *See* Murray, *supra* note 96 (arguing that eugenics and equal protection arguments for upholding reason-based abortion bans are designed to provide constitutionally permissible grounds for overturning *Roe).*

139 *See generally* David S. Cohen, Greer Donley, & Rachel Rebouche, *Re-Thinking Strategy After* Roe, 75 STAN. L. REV. ONLINE (July 8, 2022 draft) (calling upon scholars and advocates to take the offensive from the antiabortion playbook that took novel legal theories "from laughable to legitimate" and test novel legal theories in court—including "privileges and immunities, the right to travel, religious liberty, federal preemption, dormant commerce clause, uncompensated takings, procedural due process, federal jurisdiction, health justice, and vagueness." *Id. at* *6.).

140 Complaint, Pomerantz et al. v. Florida, No. 154464609 (11th Cir. Aug. 1, 2022), https://jayaramlaw.com/wp-content/uploads/2022/08/Complaint_1.pdf; *South Florida Group Challenges State's Abortion Law*, CBS NEWS (June 14, 2022), https://www.cbsnews.com/miami/news/south-florida-group-challenges-states-abortion-law/ (describing a lawsuit filed in Leon County circuit court arguing that Florida's 15-week abortion ban violates religious freedom).

141 Complaint, *Pomerantz et al.*, No. 154464609.

tion claims that the state's 15-week abortion ban violates the state constitution's protection of religious freedom.[142] The complaint describes that, "In Jewish law, abortion is required if necessary to protect the health, mental or physical well-being of the woman, or for many other reasons not permitted under the act. As such, the act prohibits Jewish women from practicing their faith free of government intrusion and thus violates their privacy rights and religious freedom."[143] The complaint also argues that imposing the laws of other religions upon Jewish women violates the separation of church and state and the Jewish family and Jewish people.[144] Members of the Satanic Temple asserted religious liberty arguments under the Religious Freedom Restoration Act to seek religious exemption from Texas' SB8, the civil bounty law that banned abortion at six weeks.[145] The Temple sent a letter to the Food and Drug Administration (FDA) seeking a religious exemption to SB8 so that the religion's members could access medication abortion pills, describing that bodily autonomy and science are sacrosanct beliefs in their religion and the medication is necessary to perform religious abortion rituals.[146]

Scholars have advanced the argument that both the Thirteenth and Fourteenth Amendments—Reconstruction Era amendments passed to abolish slavery and extend equal protection under the law—protect bodily autonomy and reproductive freedom.[147] Professor Michele Goodwin, for example, argues

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142 *South Florida Group Challenges State's Abortion Law, supra* note 139.

143 *Id.*

144 *Id.*

145 Nicole Goodkind, *Why Satanists May Be the Last Hope to Take Down Texas' Abortion Bill,* Fortune (Sept. 3, 2021), https://fortune.com/2021/09/03/why-satanists-may-be-the-last-hope-to-take-down-texass-abortion-bill/. *See also* David S. Cohen, *How the Satanic Temple Could Bring Abortion Rights to the Supreme Court,* Rolling Stone (Aug. 24, 2020).

146 *Id.*

147 *See, e.g.*, Andrew M. Koppelman, *Forced Labor: A Thirteenth Amendment Defense to Abortion*, 84 Nw. U. L. Rev. 480, 483-84 (1990) (arguing that the Thirteenth Amendment provides a constitutional abortion right because to deny a person the right to an abortion subjects them to "involuntary servitude" in service of the fetus); Michele Goodwin, *Opinion: No Justice Alito, Reproductive Justice Is in the Constitution,* N.Y. Times (June 26, 2022), https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html; *See also* Peggy Cooper Davis, *Overturning Abortion Rights Ignores Freedoms Awarded After Slavery's End,* Economist (June 13,

that the Thirteenth Amendment's prohibition on involuntary servitude included reproductive autonomy because the rape and forced reproduction of enslaved women was a central component of slavery.[148] She argues that it is impossible to disentangle reproductive autonomy and justice from the Reconstruction Amendments because "[e]nding the forced sexual and reproductive servitude of Black girls and women was a critical part of the passage of the 13th and 14th Amendments."[149] Those amendments, she argues, did more than simply free Black women from forced labor, but also from rape and forced reproduction.[150]

Drawing comparisons between U.S. law and the regulation of abortion in constitutional democracies around the world, Professor Julie Suk argues that the future of protecting abortion lies in transforming it from a *private* right as it was conceptualized by the *Roe* opinion, to a *public* concern that examines the state's constitutional duties to its citizens who experience unplanned pregnancies.[151] Under this public theory of abortion protections, the right of abortion should be sourced in the Thirteenth Amendment's prohibition on involuntary servitude as well as the Takings Clause based on the argument that forced reproduction is a form of regulatory takings by the state.[152] Professor Suk argues that abortion restrictions are illegitimate "because they manifest the government's failure to properly value the shared public benefit of human reproduction . . . [which] spawn[s] its next generation of citizens and workers to the enrichment of society as a

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2022), https://www.economist.com/by-invitation/2022/06/13/overturning-abortion-rights-ignores-freedoms-awarded-after-slaverys-end-says-peggy-cooper-davis; Peggy Cooper Davis, *A Response to Justice Amy Coney Barrett,* HARV. L. REV. BLOG (June 14, 2022), https://blog.harvardlawreview.org/a-response-to-justice-amy-coney-barrett/ (recounting that the Reconstruction Amendments aspired to a "new birth of freedom" for formerly enslave people that included freedoms denied them as slaves as parents, partners, and laborers, that included freedom with respect to marriage, procreation, and parentage).

148 Goodkind, *supra* note 144.

149 *Id.*

150 *Id.* (mentioning that "Justice Samuel Alito's claim, that there is no enumeration and original meaning in the Constitution related to involuntary sexual subordination and reproduction, misreads and misunderstands American slavery . . . and legal history.").

151 Julie C. Suk, *A World Without* Roe: *The Constitutional Future of Unwanted Pregnancy,* __ WM. & MARY L. REV. __ (forthcoming 2022)(draft).

152 *Id.* (manuscript at 3-4).

whole."[153] Unlike other members of society who are compensated for defending and enriching the state, pregnant people are disproportionately forced to absorb the risks, burdens, and costs of reproduction that benefits society as a whole.[154]

In addition to the emerging constitutional theories and legal challenges, policymakers are developing new approaches to protecting abortion through federal and state laws. The next sections highlight the emerging legal landscape of federal, state, and even municipal laws being considered and passed to protect abortion and shield residents from civil and criminal liability in courts in neighboring states. The emerging legal landscape reveals the types of federal-state preemption issues and interstate conflicts that will strain the foundations of federalism and interstate comity in the post-*Roe* legal landscape.

B. *Federal Action to Protect Abortion*

When the draft of the *Dobbs* decision was leaked, Democratic members of Congress sought to resurrect the Women's Health Protection Act of 2021 which would codify the central holding of *Roe* that states may regulate but not ban abortion before fetal viability and *Casey*'s ruling that states may not unduly burden abortion access.[155] Many are calling on President Biden to temporarily remove the filibuster's sixty-vote threshold in order to pass the Women's Health Protection Act as well as other federal legislation protecting abortion.[156] However, while President Biden has signaled that suspending the filibuster is a move he may be willing to undertake, it is unlikely that Democrats have the sixty votes necessary to suspend the filibuster so such a strategy at the federal level will depend on future Democratic election successes.[157]

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153 *Id.* (manuscript at 3).

154 *Id*.

155 H.R. 3755 Women's Health Protection Act, 117th Congress (2021-2022), H.R. 3755 - 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/house-bill/3755.

156 Rebecca Shabad, *Biden Says He Supports an "Exception" to the Senate's Rules to Allow Democrats to Pass Abortion Protections,* NBC News (June 30, 2022), https://www.nbcnews.com/politics/white-house/biden-says-supports-exception-senate-filibuster-allow-democrats-pass-a-rcna36108.

157 *See* Sahil Kapur, *Democrats Wrestle with How Aggressively to Respond to the End of* Roe, NBC News (June 28, 2022 3:16 PM CDT), https://

Other proposals by scholars and progressive Democrats to protect abortion rights through federal action include declaring a public health emergency as a means of expanding access to medication abortion and over-the-counter access to birth control,[158] using executive orders to make abortion available on federal lands in states where it is outlawed,[159] and adding justices to the Supreme Court to dilute the voting power of the conservative majority.[160] So far the Biden Administration has not been willing to undertake these more aggressive tactics.[161] Democrats are also in the process of drafting federal laws to protect reproductive health data because while HIPAA provides privacy rules for doctors and healthcare organizations in the handling of patient medical records, it does not extend to information collected by healthcare apps.[162] There are at least two federal data privacy laws currently being proposed to address the lack of protection

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www.nbcnews.com/politics/politics-news/democrats-wrestle-aggressively-respond-end-roe-v-wade-rcna35776 (stating that while all fifty Senate Democrats have called for protecting abortion by codifying it in federal law, two of the Democratic Senators, Joe Manchin of West Virginia and Kyrsten Sinema of Arizona, have indicated their support of the filibuster.).

158 Spencer Kimball, *Biden Could Declare a Public Health Emergency to Expand Abortion Access, But It Would Face a Tremendous Legal Fight,* CNBC NEWS (July 15, 2022), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment (describing that more than eighty House Democrats want the President to use the government's emergency public health powers which would unlock resources and authority that states and the federal government can use to meet the surge in demand for reproductive health services).

159 Cohen, Donley, & Rebouché, *supra* note 114, at ___ (manuscript at 63-70) (describing that in certain circumstances federal land is not bound by state law but governed exclusively by federal law.).

160 *See* Kevin Breuninger, *Biden Commission on Supreme Court Reform Is Split on Adding Justices*, CNBC (Oct. 14, 2021 6:25 PM EDT), https://www.cnbc.com/2021/10/14/supreme-court-reform-biden-commission-split-on-adding-justices.html.

161 The White House rejected the idea of using federal lands to provide abortion, calling the idea "well-intentioned" but observing that it would "put women and providers at risk." The Biden Administration has also signaled that expanding the number of justices on the Supreme Court "is not something that he wants to do." The Biden Administration's tepid response has caused conflict with more progressive members of the Democratic party. *See* Kapur, *supra* note 156.

162 *See* Cristiano Lima, *Period Apps Gather Intimate Data, A New Bill Aims to Curb Mass Collection,* WASH. POST (June 2, 2022); Celia Rosas, *The*

of patient health care data on apps.[163] Federal lawmakers are also drafting bills to codify the right to travel for reproductive healthcare.[164]

The Biden Administration's guidelines for abortion care under the Emergency Medical Treatment and Labor Act (EMTALA)[165] clarify that existing federal law requires that hospitals provide treatment to any person who presents at their emergency room with an emergency medical condition.[166] The guideline memo issued by the Department of Health and Human Services reiterates the obligations of hospitals under federal law to "provide the stabilizing necessary" for patients experiencing a medical emergency related to pregnancy and pregnancy loss *regardless* of state laws. The guidelines require hospitals to provide abortion care if necessitated by the emergent situation, including in cases of miscarriage and ectopic pregnancy.[167] The state of Texas has sued the federal government challenging the EMTALA guide-

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Future Is Femtech: Privacy and Data Security Issues Surrounding Femtech Applications, 15 HASTINGS BUS. L.J. 319 (2019).

163 *See* S.24, Protecting Personal Health Data Act, 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/senate-bill/24/text (this legislation would promulgate rules regulating mobile health technologies and health-related apps to allow users to review, change, and delete health data collected by the app companies); the My Body My Data Act, a bill introduced as part of the larger federal data privacy bill being negotiated by lawmakers, would require that technology companies that develop apps that track sexual health to only collect and retain reproductive health information that is "strictly needed" to provide their services unless they have obtained specific informed consent from the user. Lima, *supra* note 161 (explaining that the bill is supported by both Planned Parenthood and the Electronic Frontier Foundation.).

164 *See* letter by House Speaker Nancy Pelosi, *Dear Colleague on Legislative Response to Supreme Court Overturning* Roe (June 22, 2022), https://www.speaker.gov/newsroom/62722-0.

165 Dept. of Health & Human Services, *Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Experiencing Pregnancy Loss* (July 11, 2022), https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and-memos-states-and/reinforcement-emtala-obligations-specific-patients-who-are-pregnant-or-are-experiencing-pregnancy-0.

166 1867 of the Social Security Act, 42 U.S.C. § 1395dd. *See* Greer Donley & Kimberley Chernoby, *How to Save Women's Lives After* Roe, ATLANTIC (June 13, 2022), https://www.theatlantic.com/ideas/archive/2022/06/roe-v-wade-overturn-medically-necessary-abortion/661255./

167 *See infra* discussion in text at notes 214-220.

lines, claiming that the emergency guidelines impose an abortion "mandate" on states as a matter of federal law and in violation of state sovereignty.[168]

Other actions that can be taken at the federal level include expanding access to medication abortion through the Food and Drug Administration.[169] The *Dobbs* majority argued that there have been significant changes in technology of neonatal care, and viability is no longer a workable standard in light of this new technology that keeps shifting viability earlier.[170] But it is also important to note that the technology of abortion care has also changed dramatically in the last twenty years and abortion care is no longer tethered to either states' borders or to doctors. The FDA approved medication abortion in 2000, a two drug regimen that can safely and effectively terminate a pregnancy up to ten weeks gestation.[171] At least twenty-two states permit medication abortion to be prescribed by telehealth providers. The Biden Administration permanently lifted the in-person dispensing requirements in 2021 which has allowed for the medication to be sent through the mail and to pharmacies without an in-person visit to a clinic.[172] Antiabortion legislatures have passed restrictions on the use of telemedicine for abortion and now restrict medication

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168 Texas v. Becerra, No. 5:22-CV-185 (N.D. Tex. (July 14, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/20220714_1-0_Original%20Complaint%20Biden%20Admin.pdf.

169 *See generally* Greer Donley, *Medication Abortion Exceptionalism,* 107 Cornell L. Rev. 627 (2022); Cohen, Donley, & Rebouché, *supra* note 114, at ___ (manuscript at 70-79).

170 *Dobbs,* 142 S. Ct. at 2269-70 (stating that the "obvious problem" with viability is that it is constantly changing and "[d]ue to the development of new equipment and improved practices, the viability line has changed over the years.").

171 *See Questions and Answers on Mifeprex*, Food & Drug Admin. (Dec. 16, 2021), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifeprex.

172 See FDA v. ACOG, 141 S. Ct. 578 (2021) (reinstating the in-person dispensing requirement for Mifepristone, one of the two drugs in the medication abortion regimen, after its in-person dispensing requirement was challenged by providers during the COVID 19 pandemic). The Biden Administration temporarily and then permanently lifted the in-person dispensing requirement in response to ample research of the safety of sending the medication through the mail and dispensing by pharmacies. Donley, *supra* note 168, at 650.

abortion by state law. Texas and Louisiana have made it a crime to mail the pills in the states, and other states could follow.[173] Arguments are being advanced that FDA regulation in this area constitutes federal preemption and states cannot advance competing or stricter laws because federal law preempts state regulation with respect to FDA labelling.[174] Merrick Garland, the U.S. Attorney General, issued a statement that medication abortion is regulated by the FDA whose experts have certified its safety and in so doing he seems to be advancing an argument about federal preemption.[175] The conflict between the states and federal governments—with federal FDA approval of a drug that has been banned or made available at the state level—reveals the types of federal-state conflicts that will occur in the post-*Roe* legal landscape.

C. *State-Level Actions to Protect Abortion*

In the wake of *Dobbs,* the abortion fight will move to state courts and legislatures.[176] State supreme courts will be the new battleground on which abortion rights will be fought, with Florida, Michigan, and Kentucky being the first states in which state supreme courts will be asked to determine if abortion is protected under the state's constitution.[177] In 2019 the Kansas Supreme Court held that abortion was protected under the Kansas constitution and in August abortion opponents put the issue on the ballot, asking Kansas voters to approve an amendment that would specifically provide that abortion was not protected under

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173 Oriana Gonzalez, *Louisiana Governor Signs into Law Bill to Make Mailing Abortion Pills a Crime*, Axios (June 21, 2022), https://www.axios.com/2022/06/03/louisiana-mail-abortion-pill-crime; Ashley Lopez, *Texas Toughens Ban on Medication-by-Mail Abortions with Jail Time and Hefty Fine*, KHN (Dec. 6, 2021), https://khn.org/news/article/texas-medication-abortion-criminal-penalties/.

174 Cohen, Donley, & Rebouché, *supra* note 114, at ___(manuscript at 40-63).

175 *Attorney General Merrick B. Garland Statement on Supreme Court Ruling in* Dobbs v. Jackson Women's Health Organization, Dep't Justice (June 24, 2022), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s.

176 Michael Wines, *Next Front Line in the Abortion Wars: State Supreme Courts,* N.Y. Times (July 6, 2022).

177 *Id.*

the state's constitution.[178] In a surprising upset, voters in Kansas—one of the most red states in the country—voted down the amendment in a landslide victory.[179] When the Iowa Supreme Court ruled in 2018 that abortion was protected under the state's constitution, the legislature revised the judicial nomination process to grant greater control to the Republican governor and Governor Kim Reynolds stacked the court with conservative justices[180] who overturned the 2018 decision only a week before the *Dobbs* ruling.[181] Five other states have abortion on their ballots in the upcoming election.[182] Michigan and Vermont are working toward statewide votes to create constitutional protections for reproductive freedom to essentially override legislatures that do not represent the will of the majority of residents.[183] Missouri also allows residents to put constitutional amendments directly on the ballot and that possibility, of protecting abortion in the state's constitution, is being explored.[184] The *Dobbs* Court returned the issue of abortion to the electorate, to "allow[ ] women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, vot-

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178 *See,* Dylan Lysen, Laura Ziegler, & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR NEWS (Aug. 3, 2022), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment;

179 *Id.*

180 David Pitt, *Iowa Supreme Court Rulings Turn Conservative After Reynold' Appointments—and It May Be Just the Beginning,* DES MOINES REG. (July 3, 2019), https://www.desmoinesregister.com/story/news/crime-and-courts/2019/07/03/iowa-supreme-court-rulings-turn-conservative-after-governor-kim-reynolds-appointments/1638881001/.

181 Planned Parenthood of the Heartland, Inc. v. Reynolds, 975 N.W.2d 710 (Iowa June 17, 2022), *reh'g denied* (July 5, 2022).

182 Grace Panetta, *The States Where Abortion Access Will Be on the Ballot in 2022*, BUS. INSIDER (June 28, 2022 11:32 AM), https://www.businessinsider.com/which-states-have-abortion-ballot-measures-in-2022-2022-5.

183 Tessa Weinberg, *GOP Eyes Amending Missouri Constitution to Ensure no Right to Abortion Exists Post-*Roe, MO. INDEPENDENT (May 3, 2022 3:49 PM), https://missouriindependent.com/2022/05/03/gop-eyes-amending-missouri-constitution-to-ensure-no-right-to-abortion-exists-post-roe/.

184 Summer Ballentine, *Missouri High Court: Referendum Laws Hinder Voters' Rights*, AP NEWS (Feb. 8, 2022), https://apnews.com/article/voting-rights-abortion-health-legislature-missouri-362a4066bfb8766d486cec24c59ab9b9 (describing No Bans on Choice v. Ashcroft, 638 S.W.3d 484 (Mo. 2022)).

ing, and running for office."[185] In the new state-level battlegrounds elections will be crucial in determining abortion access, in races for governor, legislators, and judicial retention votes. Voter suppression and gerrymandering will likely also become significant tools wielded by both parties to secure outcomes that shape courts and legislatures.

States are protecting access to abortion by expanding the use of telehealth for abortion. Online providers like Abortion on Demand operate in twenty-two states and provide abortion medication through telehealth and through the mail, even offering overnight shipping.[186] Massachusetts recently passed a law that expands the state's telehealth rules to allow its providers to care for patients in other states via telehealth, including in states that ban abortion.[187] The new law allows for out-of-state residents to receive telehealth abortion care from a Massachusetts provider—including minors because Massachusetts does not have a parental consent law—and receive medication abortion pills through the mail.[188] States are also passing laws that expand the types of providers who can perform abortions. Advance Practice Registered Nurses (APRNs) are already providing abortion care in California, Illinois, Montana, and New Hampshire.[189] APRNs are less expensive than seeking care from a physician and are often already serving underserved populations that cannot afford to seek care from a private physician.

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185 *Dobbs*, 142 S. Ct. at 65.

186 Abortion on Demand, *Frequently Asked Questions,* https://abortionondemand.org/faq/,

187 An Act Expanding Protections for Reproductive and Gender Affirming Care, Ch. 127, 192nd General Court of the Commonwealth of Massachusetts (2022), https://malegislature.gov/Laws/SessionLaws/Acts/2022/Chapter127.

188 *Id. See* Carrie N. Baker, *Groundbreaking Massachusetts Law Protects Telemedicine Abortion Providers Serving Patients Located in States Banning Abortion,* Ms. Mag. (Aug. 18, 2022), https://msmagazine.com/2022/08/18/massachusetts-abortion-law/?fbclid=IWAR2m9KD8RukAQicVlywjiH_sdRJHNTc3nwEuT-Di68_lM7EhQvN32S-t0jw.

189 Tracy A. Weitz et al., *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver,* 103 Am. J. Pub. Health 454 (Mar. 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3673521/.

Finally, states are passing laws to try to extend their state's abortion laws beyond their state's borders.[190] For example, Missouri introduced legislation in 2022 that would have allowed citizen enforcement suits against any person who provides an abortion to a Missouri resident or aids and abets a person to travel out of state for an abortion.[191] Conversely, the state of New York passed a law designed to protect both abortion patients and providers and includes an exception to extradition rules for abortion-related offenses and prohibits courts and law enforcement from cooperating in out-of-state civil and criminal cases that stem from abortion-related offenses, prohibits professional misconduct charges against healthcare providers for providing reproductive healthcare services for a patient who resides in a state where such services are illegal, prohibits medical malpractice companies from taking adverse action against providers who perform abortions on patients who reside in a different state, and allows abortion providers and patients to enroll in the state's address confidentiality program.[192] Connecticut passed a law that went into effect on July 1, 2022 that prohibits any covered entity from disclosing any communications or information related to a patient's reproductive health care in any civil action unless the patient consents in writing to such disclosure.[193] The law also prohibits any court from issuing a subpoena for reproductive health records pursuant to an out-of-state civil or criminal action involving the provision of reproductive health care or aiding and abetting the same if the lawsuits involve actions that are legal in the state of Connecticut.[194] A bill introduced in California, the Reproductive Privacy Act, similarly enhances privacy protections for medical records relating to reproductive health by prohibiting covered entities from disclosing information related

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190 Cohen, Donley, & Rebouché, *supra* note 114, at ___ (manuscript at17-20); David S. Cohen, Greer Donley, & Rachel Rebouché, *States Want to Ban Abortions Beyond Their Borders. Here's What Pro-Choice States Can Do*, N.Y. TIMES (Mar. 13, 2022), https://www.nytimes.com/2022/03/13/opinion/missouri-abortion-roe-vwade.html.

191 HB 2012, 102nd Gen. Assemb., Reg. Sess. (Mo. 2022).

192 The Freedom from Interference with Reproductive and Endocrine Health Advocacy and Travel Exercise Act, S9039A § 2 (May 4, 2022), https://www.nysenate.gov/legislation/bills/2021/S9039.

193 Conn. Pub. Act No. 22-19 § 2.

194 *Id.* §§ 3 and 4(b).

to reproductive health to out-of-state third parties seeking to enforce abortion bans in courts in other states.[195] Recognition and enforcement of out-of-state lawsuits and damage awards is a foundation of interstate comity that is being undermined with these state laws.[196]

D. *Municipal Actions to Protect Abortion*

Municipalities are also engaging on the issue of abortion at the city-level through passage of resolutions and ordinances on the model of so-called "sanctuary cities."[197] While long a tool of abortion opponents, in the aftermath of *Dobbs,* city councils in red states have taken a page from the antiabortion playbook and passed resolutions to decriminalize abortion within the city limits and defund and deprioritize enforcement of abortion restrictions.[198] The city of St. Louis was sued by the Missouri Attorney

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195 California AB 2091, Assemb. Bill, California 2021-2022 Reg. Sess., https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2091.

196 Cohen, Donley, & Rebouché, *supra* note 114, at ___ (manuscript at 40).

197 *See, e.g.*, Jennifer Brinkley, *Sanctuary Cities and Counties for the Unborn: The Use of Resolutions and Ordinances to Restrict Abortion Access*, 401 N. ILL. L. REV. 63, 64-65 (2020-2021) (explaining that antiabortion sanctuary cities ban abortion services and the sale of Plan B within the city limits, declare abortion murder and create private civil causes of action that allow private citizens to enforce abortion bans within the city). Christopher N. Lasch, et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703 (2018)(describing the rise of immigration sanctuary cities designed to defy immigration enforcement under the Trump Administration); The San Clemente city council in abortion supportive California removed a resolution to become a "sanctuary for life" city after outcry by residents. *San Clemente City Council Rules Out Proposed Abortion Ban Amid Citizen Outrage,* MSN NEWS (Aug. 7, 2022), https://mynewsla.com/orange-county/2022/08/07/san-clemente-council-votes-to-drop-proposed-abortion-ban/.

198 Nicole Narea, *How Blue Cities in Red States Are Resisting Abortion Bans*, VOX (June 29, 2022), https://www.vox.com/policy-andpolitics/2022/6/29/23188737/abortion-bans-austin-cincinnati-phoenix-tucsonraleigh; Scott Wilson, *Democratic Cities in Republican States Seek Ways Around Abortion Bans,* WASH. POST (July 13, 2022), https://www.washingtonpost.com/nation/2022/07/13/abortion-bans-blocked-cities/. The Austin City Council passed the Guarding the Right to Abortion Care for Everyone Act (GRACE Act) that prohibits city funds to be used to collect or share information with governmental agencies who seek information about abortion for criminal investigations and that inves-

General after it used $1.5 million dollars of federal American Rescue Plan Act relief funding to create an abortion fund—the Reproductive Equity Fund—to help fund logistical support for people who are forced to travel out of state for abortion.[199] The City Council of New York City recently introduced a municipal law that creates a private right of action for interference with reproductive medical care which would allow a person to bring a claim when a lawsuit has been brought against them on the basis of seeking reproductive care in the city that is legal in New York City.[200]

III. Broader Implications: Criminalization, Surveillance, and Impacts on Reproductive Health and Assisted Reproductive Technology

As abortion is banned in states, more people will turn to self-managed abortion like in the pre-*Roe* era,[201] but medication

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tigations into abortions would be "the lowest priority for enforcement." *See* Garrett Brnger, *City Council Passes Resolution Supporting Abortion Access,* KSAT.COM (Aug. 2, 2022), https://www.ksat.com/news/local/2022/08/03/city-council-passes-resolution-supporting-abortion-access/ (the policy recommends against spending city money — outside of what is "clearly required" by state and federal law — to catalog, collect or share with other government agencies information on instances of abortion strictly to pursue criminal investigations.); Morgan Severson, *Austin City Council Passes GRACE Act to Decriminalize Abortion Despite Statewide Ban,* DAILY TEXAN (July 25, 2022), https://www.fox7austin.com/news/austin-city-council-passes-grace-act-to-decriminalize-abortion.

199 Katelynn Richardson, *St. Louis Sued After Mayor Signs Bill Using COVID Relief to Fund Abortion Travel Costs,* MSN (July 25, 2022), https://www.msn.com/en-us/news/politics/st-louis-sued-after-mayor-signs-bill-using-covid-relief-to-fund-abortion-travel-costs/ar-AAZWSEu?li=BBnbcA1 (explaining that the funding could be used for funding childcare, travel expenses, and other logistical support needs.).

200 *See* Cause of Action Related to Interference with Reproductive or Endocrine Medical Care, Int. 0475-2022, N.Y. City Council (June 2, 2022), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=5669027&GUID=0DE4E63E-3943-471A-8934-872506189B31&Options=&Search=.

201 The TexPep study found that as many as two hundred thousand people in Texas attempted to self-manage their abortion in the wake of Texas' HB2 that shuttered almost all of the state's abortion clinics. *See* DANIEL GROSSMAN ET AL., TEX. POL'Y EVALUATION PROJECT RESEARCH BRIEF: KNOWLEDGE,

abortion pills make it safer to self-manage abortion than in the pre-*Roe* era of surgical abortion.[202] Access to the internet and the permeability of state borders means it will be easier for people seeking abortion to access it in neighboring states or to obtain it from friends and relatives living in abortion protective states. Evidence of an emerging "abortion underground" suggests that informal groups of community "providers" are getting medication abortion pills to people in abortion restrictive states despite abortion bans.[203] Online sites like Plan C direct patients to international pharmacies that will ship abortion pills to patients in the United States, even in states that ban abortion.[204] In 2018, an international organization, Aid Access, began offering U.S. women access to medication abortion pills through the mail after an online consultation with a doctor, even if they are living in states with abortion bans, and people can order medication abortion pills whether or not they are pregnant, to have them

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OPINION AND EXPERIENCE RELATED TO ABORTION SELF-INDUCTION IN TEXAS 1, 2 (2015) (finding that in the wake of Texas' passage of HB2, one of the most restrictive abortion laws in the country, there has been an increase in the use of self-induction abortion through medication, and estimating that between 100,000 and 240,000 women have attempted to end their own pregnancies); *see also* Erica Hellerstein, *The Rise of the DIY Abortion in Texas*, ATLANTIC (June 27, 2014), https://www.theatlantic.com/health/archive/2014/06/the-rise-of-the-diy-abortion-in-texas/373240/ (describing that in 2015 there were more than 700,000 Google searches using terms related to self-induced abortion in the United States.)

202 The 2022 World Health Organization Guidelines on the current evidence and best practices for quality abortion care, includes for the first time self-management of medication abortion as a fully recommended model of abortion care. Caitlin Gerdts, et al., *Beyond Safety: The 2022 WHO Abortion Guidelines and the Future of Abortion Safety Measures,* BMJ GLOBAL HEALTH (2022). *See also* Yvonne Lindgren, *When Patients Are Their Own Doctors:* Roe v. Wade *in an Era of Self-Managed Care,* 107 CORNELL L. REV. 151 (2021).

203 Jessica Bruder, *The Abortion Underground Is Preparing for the End of* Roe v. Wade, ATLANTIC (Apr. 4, 2022) (describing a covert network of community providers helping individuals self-manage abortion).

204 *See About Us*, PLAN C, https://www.plancpills.org/about; *see also* Patrick Adams, *Spreading Plan C to End Pregnancy,* N.Y. TIMES (Apr. 27, 2017), https://www.nytimes.com/2017/04/27/opinion/spreading-plan-c-to-end-pregnancy.html (discussing the campaign by Francine Coeytaux and others to increase awareness that pills can be used safely at home to terminate a pregnancy).

available if they need them later.[205] But because it is illegal, people seeking to self-manage abortion and those who aid and abet them risk criminal prosecution for accessing abortion care. Legal defense helplines and funds are being created for people seeking information about self-managed abortion and legal advice for those facing possible criminal prosecution for managing their abortion or assisting others to self-managed abortion.[206]

Texas was the first state to deploy the use of a civil enforcement mechanism to enforce a state's abortion ban through private civil suits. Texas' SB8 provides that any person can sue any person who induces or aids and abets a person to have an abortion after six-weeks, thereby deputizing private citizens to enforce the state's restrictive abortion law.[207] The statute provides for $10,000 in statutory damages plus attorneys' fees.[208] Since that time, two other states have passed antiabortion civil bounty laws[209] and antiabortion lawmakers in at least half a dozen states have signaled their intention to pass SB8-style civil bounty laws in their states.[210] While antiabortion civil enforcement provisions

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205 *Who Are We*, AIDACCESS, https://aidaccess.org/en/page/561 (last visited Aug. 19, 2022).

206 REPRO LEGAL HELPLINE, http://www.reprolegalhelpline.org/(last visited Aug. 19, 2022).

207 S.B. 8, 87 Leg., Reg. Sess. (Tex. 2021) (codified as TEX. HEALTH & SAFETY CODE ANN. § 171.208 (2021)).

208 SB8 § 171.208 (b) (providing for "statutory damages in an amount not less than $10,000 for each abortion that the defendant performed or induced" in violation of the statute plus costs and attorneys' fees).

209 *See* IDAHO CODE ANN. § 18-8807(1) (2022) (allowing a suit by "any female upon whom an abortion has been attempted or performed, the father of the preborn child, a grandparent of the preborn child, a sibling of the preborn child, or an aunt or uncle of the preborn child" against "the medical professionals who knowingly or recklessly attempted, performed, or induced the abortion" for not less than $20,000, and costs and attorneys' fees); OKLA. STAT. 63 § 1-745.35 (2022) (allowing "any person" to "bring a civil action against any person" who "aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise" and providing statutory damages of a minimum of $10,000)

210 *See* Meryl Kornfield, et al., *Texas Created a Blueprint for Abortion Restrictions. Republican-Controlled States May Follow Suit,* WASH. POST (Sept. 3, 2021) (reporting that Republican leaders in Arkansas, Florida, South Carolina, South Dakota, Kentucky, and Louisiana have indicated that they are going to try to copy the Texas legislation); Daniel Politi, *At Least Seven GOP-Controlled States Look to Mimic Texas Anti-Abortion Law,* SLATE (Sept. 5, 2021) (stating

are aimed at providers and those who aid and abet a pregnant person seeking abortion, these civil bounty laws will result in increased surveillance of pregnant people by family, friends, coworkers, and disapproving neighbors.[211] The post-*Roe* legal landscape will see a rise in the use of civil suits brought by individuals whose reproductive privacy has been violated by third parties who have been incentivized by antiabortion bounty provisions. New York's governor signed into law a bill that provides a civil cause of action for unlawful interference with reproductive health care to New York residents as well as those who travel to New York for reproductive healthcare.[212] The law allows individuals to sue a person or entity that brings a cause of action in any court in the United States based on allegations that the party accessed or aided and abetted another to access reproductive health care in New York.[213]

Abortion restrictions in the post-*Roe* landscape have already begun to impact the practice of reproductive health care.[214] It is impossible to isolate abortion care from other areas of women's reproductive healthcare, including miscarriage management and treatment for ectopic pregnancies.[215] Abortion is medically indicated when a woman has an ectopic pregnancy, that is a preg-

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that as many as a quarter of states are expected to introduce SB8-style abortion restrictions). A template of the SB8-style Heartbeat Act was issued by the National Association of Christian Lawmakers for state lawmakers to follow, https://christianlawmakers.com/wp-content/themes/nacl-simple-theme/assets/docs/20210722_NACL_NLC_Heartbeat_Model.pdf.

211 *See* Yvonne Lindgren & Nancy Levit, *Civil Law's Potential to Protect Reproductive Privacy*, https://papers.ssrn.com/so13/papers.Cfm?abstract_id=4200590.

212 The Freedom from Interference with Reproductive and Endocrine Health Advocacy and Travel Exercise Act, S9039A § 2 (May 4, 2022), https://www.nysenate.gov/legislation/bills/2021/S9039.

213 *Id.* § 70-b(1) & (2). The cause of action for interference with reproductive health care does not preclude the party from also seeking recovery under other common law claims. *Id.* § 5.

214 *See,* Wendy Bach, Naomi Cahn & Maxine Eichner, *Opinion: Conflicting Abortion Laws Are Making Women's Reproductive Care a Quagmire,* THE HILL (July 27, 2022), https://thehill.com/opinion/healthcare/3574897-conflicting-abortion-laws-are-making-womens-reproductive-care-a-quagmire/ (noting that "with clashing state and federal laws, doctors are worried they might get sued over life-saving care, even in states where abortion is still legal.").

215 Maya Manian, *The Consequences of Abortion Restrictions on Women's Healthcare,* 71 WASH. & LEE L. REV. 1317, 1319 (2014).

nancy that implants in the fallopian tubes or some other location outside of the uterus.[216] An ectopic pregnancy cannot be carried to term, despite fertilization, and if left untreated can rupture or hemorrhage which could be fatal.[217] Approximately one in fifty pregnancies is ectopic and ectopic pregnancy is the leading cause of death for pregnant people in the first trimester.[218] Doctors are unclear if treatment for ectopic pregnancy falls within the vaguely worded "emergency exception" in abortion laws.[219] The lack of clarity has been compounded by the fact that lawmakers have sought to criminalize treatment for ectopic pregnancy under state abortion bans. A Missouri lawmaker introduced a bill that would have made it a felony for a doctor to perform an abortion "on a woman who has an ectopic pregnancy."[220] A similar Ohio bill would require doctors to "reimplant an ectopic pregnancy" into a woman's uterus, which is not a procedure that exists in medical science.[221]

Abortion is also the treatment for an incomplete miscarriage to prevent infection and stop patients from hemorrhaging. Re-

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216 *Tubal Ectopic Pregnancy*, 193 ACOG CLINICAL PRACTICE BULL. (Mar. 2018), https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2018/03/tubal-ectopic-pregnancy?utm_source=redirect&utm_medium=web&utm_campaign=otn.,

217 Anne Marie Nybo Andersen et al., *Maternal Age and Fetal Loss: Population Based Register Linkage Study,* 320 BMJ 1708 (June 24, 2000).

218 Julia Ries, *Ectopic Pregnancies Are Dangerous, Will They Be Affected by Abortion Bans?,* HEALTHLINE (May 11, 2022), https://www.healthline.com/health-news/ectopic-pregnancy-and-abortion-laws-what-to-know.

219 Missouri law describes medical emergency as a condition requiring "immediate abortion" to prevent death "or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman." Arkansas and Oklahoma define medical emergency as when the pregnant person's "life is endangered by a physical disorder, physical illness, or physical injury," while Texas has a medical emergency exception but does not define the term. Olivia Goldhill, *"A Scary Time": Fear of Prosecution Forces Doctors to Choose Between Protecting Themselves or Their Patients,* STAT (July 5, 2022), https://www.statnews.com/2022/07/05/a-scary-time-fear-of-prosecution-forces-doctors-to-choose-between-protecting-themselves-or-their-patients/.

220 HB 2810, 101st Gen. Assemb., 2d Reg. Sess., https://house.mo.gov/billtracking/bills221/hlrbillspdf/5798H.01I.pdf.

221 H.B. 182, 133rd Gen. Assemb. Reg. Sess. (2019-2020), https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/hb182/IN/00?format=pdf.

search on Catholic hospitals reveals that restrictions on abortion in Catholic-owned hospitals forced doctors to delay care or transport miscarrying patients to non-Catholic owned hospitals when fetal heart tones were still present.[222] There was a wide degree of interpretation among Catholic hospital ethics committees about how close to death a woman must be before the abortion procedure would be permissible to preserve the life of the woman.[223] Only days after Texas' SB8 took effect that outlawed abortion after six weeks, a woman in Texas went into premature labor at 19 weeks gestation.[224] Her doctors considered performing an abortion since the pregnancy could not be saved and they feared sepsis if they delayed, but concluded that they could not treat her under Texas' new law because fetal heart tones were still detectable.[225] They found a provider in Colorado and the patient boarded a plane while miscarrying and flew to Colorado to obtain the care she needed.[226] Miscarriage management and treatment of ectopic pregnancy are but two examples of how the *Dobbs* decision, which returns the issue of abortion to the states, recasts essential abortion related healthcare—what the *Roe* Court described as "inherently, and primarily, a medical decision"[227]—into a political question to be negotiated by state legislatures through a political process.

The legal terrain is fraught for doctors treating people suffering from reproductive health complications such as miscarriage and ectopic pregnancy. For example, Missouri's law imposes criminal liability for doctors who violate the state's ban and healthcare providers in the state are unclear about the scope of the law's "medical emergency" exception.[228] In the weeks af-

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222 Lori R. Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals,* 98 Am. J. Pub. Health (Oct. 2008).

223 *Id.*

224 Sarah McCammon & Lauren Hodges, *Doctors' Worst Fears About the Texas Abortion Law Are Coming True,* NPR News (Mar. 1, 2022), https://www.npr.org/2022/02/28/1083536401/texas-abortion-law-6-months.

225 *Id.*

226 *Id.*

227 *Roe*, 410 U.S. at 166.

228 Mo. Rev. Stat. § 188.017 Right to Life of the Unborn Child Act, Title XII Public Health & Welfare (June 24, 2022), https://revisor.mo.gov/main/OneSection.aspx?section=188.017&bid=47548. Missouri's law describes medical emergency as a condition requiring "immediate abortion" to prevent death "or

ter Missouri's trigger law took effect, St. Luke's Health System, which operates seventeen hospitals and clinics in the Kansas City area, announced that it would stop providing emergency contraception for fear it violated the state's abortion ban, and then changed course the following day when Missouri's Attorney General Eric Schmidt's office clarified that the law does not prohibit Plan B or other forms of contraception.[229] Emergency contraception is primarily offered by health care providers to patients who have been victims of sexual assault. A large health system in Virginia where abortion remains legal through the second trimester paused prescribing and filling prescriptions for methotrexate, a drug that can be used for abortion but is also a treatment for patients with arthritis, and is standard off-label medication for autoimmune conditions such as lupus.[230] Physicians fear repercussions for prescribing or filling prescriptions if the drug inadvertently causes pregnancy loss in patients taking the drug as a rheumatology treatment.[231] The steep criminal penalties for providers who violate a state's abortion ban means that providers are erring on the side of caution so as not to be prosecuted by a zealous prosecutor eager to make a name for themselves as a champion of fetal life.[232] These are not idle concerns, as an Indiana prosecutor publicly vowed to prosecute an Indiana doctor who provided an abortion to a ten-year old rape victim from Ohio who had to cross state lines to obtain abortion

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for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman." Jan van Dis, a professor of obstetrics and gynecology at University of Rochester Medical Center in New York, tweeted that doctors in Missouri were now waiting to treat ectopic pregnancies until their patients had falling hemoglobin levels — an indication of blood loss — or unstable vital signs before they would treat them for fear of criminal liability. Jan van Dis, TWITTER (June 28, 2022), https://t.co/HwYEMz67su / Twitter. .

229 Johnathan Shorman, *Kansas City Area Health System Stops Providing Plan B in Missouri Because of Abortion Ban,* KC STAR (July 1, 2022), https://amp.kansascity.com/news/politics-government/article262988028.html.

230 Goldhill, *supra* note 218.

231 *Id.*

232 *Id.* (remarking that because state abortion laws are often vague about what constitutes a medical emergency, this places providers and hospitals at risk of being second-guessed by prosecutors. As one health care attorney for a Missouri hospital described, "This is a scary time. If you have a state that wants to set an example, they're looking for cases to prosecute.").

care that was foreclosed by Ohio's total abortion ban that lacked a rape or incest exception.[233] In Missouri, every abortion must be reported to the state, and prosecutors can request a court order to examine records and confirm a medical emergency was present.[234] With a criminal abortion ban in place, doctors have had to turn to lawyers and ethicists instead of to colleagues and trusted medical texts, when determining treatment decisions.[235] As the American College of Obstetricians and Gynecologists has described, the uncertainty may result in delays in life-saving treatment while doctors seek legal advice for fear of criminal prosecution.[236]

The impact of abortion restrictions on assisted reproductive technology is also causing reverberations in states that ban abortion.[237] Fertility doctors sometimes need to do a "selective reduction" procedure to reduce the number of implanted embryos to a safe number in rare instances where hormone therapy has resulted in multiple fetuses, a procedure that would likely fall

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233 Alice Mirand Ollstein, *Indiana AG Eyes Criminal Prosecution of 10-Year-Old Rape Victim's Abortion Doc,* POLITICO (July 14, 2022 3:37 PM EDT), https://www.politico.com/news/2022/07/14/indiana-abortion-rape-ohio-00045899.

234 MO. REV. STAT. § 188.052 (Aug. 29, 2019); 19 C.S.R. 30-30.060 (3)(A)-(D) Standards for the Operation of Abortion Facilities – Records and Reports; Goldhill, *supra* note 218 (describing the Missouri law that requires abortion reporting and the right of prosecutors to review medical records to confirm medical emergencies.). *See generally Abortion Reporting Requirements*, GUTTMACHER INST. (Aug. 1, 2022), https://www.guttmacher.org/state-policy/explore/abortion-reporting-requirements.

235 Goldhill, *supra* note 218 (reviewing the case of a doctor whose patient was experiencing an ectopic pregnancy and needed immediate surgery because it was in danger of rupturing, but the doctor discovered she would have to present her case to a hospital ethics committee before she could proceed with surgery).

236 ACOG Practice Management, *Questions to Help Hospital Systems Prepare for the Widespread and Devastating Impacts of a Post-*Roe *Legal Landscape* (June 24, 2022), ttps://www.acog.org/news/news-articles/2022/06/questions-to-help-hospital-systems-prepare-for-the-widespread-and-devastating-impacts-of-a-post-roe-legal-landscape.

237 *See* May Manian, *Lessons from Personhood's Defeat,* 74 OHIO ST. L.J. 75, 91-93 (2013) (discussing the impact of fetal personhood laws on infertility treatment).

within a state's abortion ban.[238] Fertility treatments like IVF likely are not impacted by the current trigger laws that are in effect because while the laws define an "unborn child" as beginning at fertilization, the laws define abortion as an action on a pregnant woman and apply only in the context of abortion.[239] However, fertility treatments such as in vitro fertilization could be banned in states that may pass future fetal personhood laws.[240] As described earlier, the dissent raised the possibility of a federal fetal personhood law being passed in the post-*Roe* future.[241] If an embryo is granted full constitutional rights of personhood, then genetic testing and destroying unused embryos would be illegal.[242] As described earlier, the *Dobbs* decision left open the possibility of states passing fetal personhood laws and at least eight states are considering such laws.[243] People storing frozen embryos in fertility clinics in abortion restrictive states are considering moving them to abortion protective states because of fears that a fetal personhood amendment or a broad interpretation of an abortion ban may prohibit them from destroying unused embryos in the future.[244]

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238 Myah Ward, *How Abortion Bans Might Affect IVF,* POLITICO (May 23, 2022), https://www.politico.com/newsletters/politico-nightly/2022/05/23/how-abortion-bans-might-affect-ivf-00034409 (quoting Professor Seema Mohapatra explaining that selective reduction would likely meet the definition of abortion in states like Texas and Oklahoma.).

239 *See State Abortion Trigger Laws' Potential Implications for Reproductive Medicine,* AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE (July 1, 2022), https://www.asrm.org/news-and-publications/asrms-response-to-the-dobbs-v-jackson-ruling/dobbs/state-law-summaries/.

240 Michelle Jokisch Polo, *Infertility Patients Fear Abortion Bans Could Affect Access to IVF Treatment,* NPR NEWS (July 21, 2022), https://www.npr.org/sections/health-shots/2022/07/21/1112127457/infertility-patients-fear-abortion-bans-could-affect-access-to-ivf-treatment (quoting Professor Judith Daar on the potential impact of fetal personhood on outlawing IVF, "If the legislature does view the unborn human life at its earliest moments as something worthy of protection . . . then laws could move forward that are restrictive of in vitro fertilization.").

241 *See supra* text at notes 67-68.

242 Polo, *supra* note 239.

243 *See State Legislation Tracker*, *supra* note 105.

244 Dominique Mosbergen, *Fertility Doctors Move Embryos, Expecting Abortion Law Changes,* WALL ST. J. (June 24, 2022), https://www.wsj.com/articles/fertility-doctors-move-embryos-to-other-states-in-case-of-roe-v-wade-impact-11656063000 (reporting that fertility doctors in abortion restrictive states

Conclusion

As the *Dobbs* Court observed, the judicial branch has no army with which to enforce its decisions, but rather its commands are followed because of the confidence that the American people place in the institution.[245] The *Dobbs* decision was handed down at a moment when confidence in the Supreme Court was at a historic low.[246] Not only did the American people express the lowest confidence in the Court since polling began, but a majority of people—representing both political parties—believe that the Court is primarily motivated by political agendas. In the wake of the *Dobbs* decision, scholars, lawyers, and policymakers have begun to forge new strategies for protecting abortion now that they have moved from a defensive to an offensive posture. New legal theories including religious freedom, Takings Clause, and reproductive justice implicit in the Reconstruction Amendments, have advanced abortion as a more capacious right than the original cramped vision set forth in *Roe.* Arguments are beginning to emerge that federal laws like EMTALA and FDA rulings preempt state laws that conflict with federal law. In the patchwork of state abortion laws that has come at *Roe*'s end, conflicts between states are emerging as states seek to enforce their abortion laws beyond their own state's borders and states seek to shield their own residents from liability by refusing to cooperate or recognize warrants, subpoenas, and damage awards from neighboring states. In the legal vacuum left when the federal floor protecting abortion was removed, states, municipali-

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had already begun to move embryos in anticipation of *Roe* being overturned); Polo, *supra* note 239 (describing that patients and clinics in abortion restrictive states are considering closing clinics or moving frozen embryos for fear of the impact of future fetal personhood laws.); *see also* Aria Bendix, *States Say Abortion Bans Don't Affect IVF. Providers and Lawyers Are Worried Anyway,* NBC News (June 29, 2022), https://www.nbcnews.com/health/health-news/states-say-abortion-bans-dont-affect-ivf-providers-lawyers-worry-rcna35556 (mentioning that "in states where abortion is outlawed, some clinics are considering moving embryos to places where they can discard them without legal questions" but are concerned with facing liability under a future fetal personhood law for transporting embryos across state lines to discard them.).

245 *Dobbs*, 142 S. Ct. at 2278 (quoting Alexander Hamilton, that the judiciary has "neither Force nor Will" but rather the judiciary's sole authority is to exercise its judgment.).

246 *See supra* text at notes 67-73.

ties, and even individuals charged with enforcing the law, have vowed to chart their own course regardless of the new laws of their states.

The Court in *Dobbs* argued that the *Roe* decision had thrown American law into chaos,[247] but the chaos of the post-*Roe* world is only beginning to emerge.[248] Struggles over state sovereignty versus federal preemption strike at the foundation of the country's federalist system. Interstate conflicts between abortion restrictive and abortion protective states strain interstate comity.[249] Municipalities are breaking away from their state's abortion laws to provide "sanctuary" to those living within their city limits. Some scholars have observed that deputizing private citizens to enforce abortion bans and the level of conflict between states over the issue of abortion have not been seen since the days of fugitive slave laws.[250] Others have observed that the best analogy to post-*Roe* America is the era of Prohibition, in which Americans who agreed with the notion of temperance as a moral and religious mandate nonetheless bristled at being commanded by law to abide by morality imposed by the state.[251] Then, like now, entire states and municipalities openly flaunted

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247 *Dobbs*, 142 S. Ct. at 2274-75 (describing the undue burden standard as unworkable, generating a long list of circuit conflicts, and describing issues on which the courts disagree).

248 *Dobbs*, 142 S. Ct. at 2337 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting) (citing Cohen, Donley, & Rebouché, *supra* note 114, at ___ (manuscript at 2)).

249 Cohen, Donley, & Rebouché, *supra* note 114, at ___(manuscript at40).

250 *See* Michael Hiltzik, *Threats to Criminalize Out-of-State Abortions Are a Scary Reminder of 1850s Americas*, L.A. Times (July 12, 2022 1:58 PM PDT), https://www.latimes.com/business/story/2022-07-12/threats-to-criminalize-out-of-state-abortion; Aziz Z. Huq, *What Texas's Abortion Law Has in Common with the Fugitive Slave Act,* Wash. Post (Nov. 1, 2021), https://www.law.uchicago.edu/news/aziz-huq-finds-historical-parallels-texas-abortion-law; Isabella Oishi, *Legal Vigilantism: A Discussion of the New Wave of Abortion Restrictions and the Fugitive Slave Acts*, 23 Geo. J. of Gender & the Law Online (Spring 2022), https://www.law.georgetown.edu/gender-journal/legal-vigilantism-a-discussion-of-the-new-wave-of-abortion-restrictions-and-the-fugitive-slave-acts/.

251 Michael Kazin, *Opinion: Even if Republicans Outlaw Abortion, Americans Will Soon Rebel,* N.Y. Times (July 11, 2022), https://www.nytimes.com/2022/07/11/opinion/republicans-abortion-prohibition.html.

the law.[252] All eyes are on the coming midterm elections to determine what impact the overturn of *Roe* will have on Americans' willingness to have the state dictate their private family lives.[253] If the Kansas constitutional amendment vote is a harbinger, those with deeply held beliefs that abortion is wrong under most circumstances may bristle at the state overreach that strips reproductive decisionmaking from its people.

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252 *Id.* (describing that when the constitutional amendment passed, Catholic immigrants and their priests openly defied the law, and several cities, including San Francisco and New York, vowed not to enforce it in their cities, and Franklin Roosevelt was elected in part on a campaign promise to repel Prohibition).

253 Katie Gueck and Shane Goldmacher, *"Your Bedroom Is on the Ballot:" How Democrats See Abortion Politics After Kansas*, N.Y. TIMES (Aug. 3, 2022), https://www.nytimes.com/2022/08/03/us/politics/democrats-abortion-kansas.html; Maggie Haberman & Michael Bender, *Trump, the Man Most Responsible for Ending* Roe *Fears It Could Hurt His Party*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/us/politics/abortion-ruling-trump.html (quoting former President Trump as saying that the overturn of *Roe v. Wade* could result in the Republican Party losing the support of suburban women voters).