DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION: RECKONING WITH ITS IMPACT AND CHARTING A PATH FORWARD

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Dobbs v. Jackson Women's Health Organization[2] *undid 50 years of precedent guaranteeing the constitutional right to abortion in the United States. At the one-year anniversary of the decision, and as the devastating consequences continue to play out across the country, this article analyzes Dobbs and its impact. It also charts a way forward for rebuilding a more robust Fourteenth Amendment jurisprudence. It draws on the authors' individual perspective and expertise, and the Center for Reproductive Rights' role as lead counsel in the case and as a global human rights organization advancing reproductive rights in the United States and around the world.*

I. PROLOGUE

A. The Decades-long Campaign to Overrule Roe

In 1973, in *Roe v. Wade*, the U.S. Supreme Court struck down Texas' criminal ban on abortion and held that the decision to terminate a pregnancy is a fundamental right grounded in the right to personal liberty.[3] Soon after *Roe* was decided, and in the years after, abortion opponents relentlessly pressed state and federal lawmakers to enact restrictive abortion laws as part of a coordinated effort to chip away at the right to abortion and

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

3 410 U.S. 113 (1973).

ultimately to outlaw abortion completely.[4] *Dobbs v. Jackson Women's Health Organization* is a devastating milestone in that decades-long effort to overturn *Roe* and undo constitutional protections for abortion access.

The case itself began in March 2018, when Mississippi enacted a ban on abortion after 15 weeks of pregnancy, which took effect immediately upon the Governor's signature.[5] The ban threatened abortion providers with severe penalties.[6] Within hours, the Center for Reproductive Rights and Jackson Women's Health Organization—the only abortion clinic remaining in Mississippi—filed a lawsuit in federal court challenging the law, and the district court entered a temporary restraining order shortly after.[7] Over a dozen states soon followed Mississippi in enacting bans on abortion at essentially every point in pregnancy, from bans on abortion at any point after conception to bans on abortion as early as 6 weeks of pregnancy and at other stages in pregnancy before fetal viability.[8] Courts swiftly blocked each ban,[9] as each law defied nearly 50 years of U.S. Supreme Court precedent, going back to *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, holding that the Fourteenth Amendment guarantees each person the right to decide whether to continue a pre-viability pregnancy.[10] Indeed, in ruling against Mississippi's ban in the federal district court, the Honorable Carlton Reeves observed: "The State chose to pass a law it knew was unconstitutional to endorse a decades long campaign, fueled by national interest groups, to ask the U.S. Supreme Court to overturn *Roe v. Wade*."[11]

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4 CTR. FOR REPROD. RTS., *What if* Roe *Fell*, 12–13 (2019), https://reproductiverights.org/wp-content/uploads/2021/12/USP-2019-WIRF-Report-Web_updated.pdf [https://perma.cc/X3QC-A4UQ].

5 MISS. CODE ANN. § 41-41-191.

6 *Id.*

7 Jackson Women's Health Org. v. Currier, No. 3:18-CV-171-CWR-FKB, 2018 WL 1567867 (S.D. Miss. Mar. 20, 2018) (entering temporary restraining order).

8 *See, e.g.*, ARK. CODE ANN. § 5-61-404 (enacting a total ban with exceedingly narrow exceptions); GA. CODE ANN. §§ 1-2-1(1), 31-9B-2 (implementing a ban after detectable embryonic or fetal cardiac activity, which can be as early as 6 weeks); TENN. CODE ANN. §§ 39-15-216I(1)-(12), (h) (banning abortion at approximately 6 weeks, and after 8, 10, 12, 15, 18, 20, 21, 22, 23, and 24 weeks).

9 *See* Brief of Respondents at 42 & n. 26, 27, Dobbs v. Jackson Women's Health Org. (No. 19-1392) (collecting cases).

10 Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833, 871 (1992); Roe v. Wade, 410 U.S. 113, 162–63 (1973).

11 Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 542 (S.D. Miss. 2018), *aff'd*, 945 F.3d 265 (5th Cir. 2019), *rev'd and remanded,* 142 S. Ct. 2228 (2022).

At the time it passed the 15-week abortion ban, Mississippi had some of the most restrictive abortion laws in the country. Pregnant people seeking abortion care had to make two in-person visits to the clinic, delay their abortion by at least 24 hours after the first visit, and endure state-mandated biased counseling.[12] The state also singled out abortion providers with onerous laws designed to shut down abortion facilities, restricted abortion providers to physicians only, and banned the use of telehealth for abortion care.[13] Additionally, Mississippi already had on the books a decade-old law designed to criminalize the provision of essentially all abortion care if and when *Roe* was overruled.[14] And, in 2019, the year after it passed the 15-week ban, Mississippi made it a crime to provide abortion care as early as 6 weeks.[15] (That law was also blocked.[16]) The Senate sponsor of the 6-week ban noted that the [newly changed] composition of the U.S. Supreme Court was "absolutely . . . a factor" in proposing that law.[17]

When abortion was still legal in Mississippi, the state's labyrinth of abortion restrictions compounded the challenges pregnant Mississippians faced in arranging time off work, transportation, and childcare, as well as in raising funds to cover the cost of abortion care and these logistics.[18] Then, as now, this calculated legislative strategy to eliminate access to legal abortion falls hardest on Black, Indigenous, and other people of color, as well as pregnant people struggling to make ends meet.[19] Mississippi has the

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12 MISS. CODE ANN. § 41-41-33.

13 MISS. CODE ANN. § 41-75-1; MISS. ADMIN. CODE § 15-16-1:44.1.1; MISS. CODE ANN. §§ 41-41-33, 41-41-107.

14 MISS. CODE ANN. § 41-41-45.2.

15 MISS. CODE. ANN. § 41-41-34.1 (banning abortions after detectable fetal cardiac activity, which can be as early as 6 weeks).

16 Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 248 (5th Cir. 2020).

17 Larrison Campbell, *Republicans, Emboldened by a Trump Supreme Court, Advance 'Heartbeat' Abortion Ban Bill for First Time*, MISS. TODAY (Feb. 5, 2019), https://mississippitoday.org/2019/02/05/republicans-emboldened-by-a-trump-supreme-court-advance-heartbeat-abortion-ban-bill-for-first-time/ [https://perma.cc/V8UG-B4X4].

18 *See, e.g.*, Brief of Organizations Dedicated to the Fight for Reproductive Justice as Amici Curiae In Support of Respondents at 4, Dobbs v. Jackson Women's Health Org. 142 S. Ct. 2228 (2022) (No. 19-1392).

19 *See, e.g.*, *id.* at 4 ("If upheld, it will deny marginalized people their reproductive autonomy by forcing them to bear children and risk physical and mental harm and significant economic burden or face the risk of criminal penalty").

highest percentage of Black people of any state in the country,[20] and the majority of people who have sought abortion care in the state are Black.[21] Black women in Mississippi are disproportionately poor,[22] and approximately a quarter of women who are poor in Mississippi are Black women of reproductive age.[23] As reproductive justice scholars and advocates emphasize, "the abortion rate among black women reflects the power of the forces that foist unintended pregnancy upon them. And, importantly, the abortion rate reflects black women's defiance of those forces."[24]

Mississippi's policy of forced pregnancy and parenthood is not matched by policies that advance the health of parents and babies. Mississippi has done little to support people who bear and raise children. As the *Dobbs*

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20 *See* U.S. CENSUS BUREAU, Table R0202, "Percentage of the Total Population Who are Black or African American Alone" American Community Survey, 2021, One-Year Estimates available at https://www.census.gov/acs/www/data/data-tables-and-tools/ranking-tables/ [https://perma.cc/NXW4-YK7S] (when including Washington, D.C., Mississippi has the second highest proportion of Black people of any U.S. state or district).

21 Miss. State Dep't of Health, MSTHRS, https://mstahrs.msdh.ms.gov/forms/pregtable.html [https://perma.cc/EHV2-WGXW] (table generated by selecting: Year; Race (White/Black/Other); 2017–2021; State Total; and Induced Terminations).

22 *See* U.S. CENSUS BUREAU, *Poverty Status in the Past 12 Months By Sex By Age, 2021:ACS 1-Year Estimates Detailed Tables, Mississippi*, https://data.census.gov/table?q=B17001:+POVERTY+STATUS+IN+THE+PAST+12+MONTHS+BY+SEX+BY+AGE&t=Poverty&g=0400000US28&d=ACS+1-Year+Estimates+Detailed+Tables&tid=ACSDT1Y2021.B17001 [https://perma.cc/7CF2-X6QK] (reporting approximately 554,152 people in Mississippi are poor, 313,364 are women and 240,788 are men); U.S. CENSUS BUREAU, *Poverty Status in the Past 12 Months By Sex By Age (Black of African American Alone), 2021:ACS 1-Year Estimates Detailed Tables, Mississippi*, https://data.census.gov/table?q=black&t=Poverty&g=0400000US28&d=ACS+1-Year+Estimates+Detailed+Tables&tid=ACSDT1Y2021.B17001B [https://perma.cc/B3Z8-FSWC] (reporting approximately 181,382 Black women in Mississippi are poor, meaning Black women make up 33% of people and 57% of women who are poor in Mississippi).

23 *See* U.S. CENSUS BUREAU, *Poverty Status in the Past 12 Months By Sex By Age, 2021:ACS 1-Year Estimates Detailed Tables, Mississippi*, https://data.census.gov/table/ACSDT1Y2021.B17001?q=B17001:%20POVERTY%20STATUS%20IN%20THE%20PAST%2012%20MONTHS%20BY%20SEX%20BY%20AGE&t=Poverty&g=040XX00US28&d=ACS%201-Year%20Estimates%20Detailed%20Tables [https://perma.cc/2P5N-7NKM] (reporting approximately 313,364 Mississippi women are poor); *Poverty Status in the Past 12 Months By Sex By Age (Black or African American Alone),* U.S. CENSUS BUREAU, *2021:ACS 1-Year Estimates Detailed Tables, Mississippi*, https://data.census.gov/table?q=black&t=Poverty&g=0400000US28&d=ACS+1-Year+Estimates+Detailed+Tables&tid=ACSDT1Y2021.B17001B [https://perma.cc/UKB3-RNKM] (reporting approximately 76,591 Black women of reproductive age (15–44) are poor, meaning about a quarter of women in Mississippi who are poor are Black women of reproductive age).

24 Brief of Reproductive Justice Scholars as Amici Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392).

district court observed, "the Mississippi Legislature's professed interest in 'women's health' is pure gaslighting . . . . Its leaders are proud to challenge *Roe* but choose not to lift a finger to address the tragedies lurking on the other side of the delivery room: our alarming infant and maternal mortality rates."[25] It is more than 75 times more dangerous to carry a pregnancy to term and give birth in Mississippi than to have an abortion, and pregnancy and childbirth disproportionately threaten the lives of Black Mississippians.[26] Mississippi is ranked essentially last in the United States for the health of women and children,[27] and striking racial disparities exist in infant and maternal death rates, as Black infants and mothers die at a much higher rate than their white counterparts.[28] State infant and maternal mortality reports share a common recommendation to help address these tragedies: extending postpartum Medicaid eligibility from 60 days to one year after childbirth.[29] Yet, the State, for years, refused to implement this recommendation, and even took active steps to frustrate it.[30]

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25 *Jackson Women's Health Org.*, 349 F. Supp. 3d at 541 n.22.

26 *See* Miss. State Dep't of Health, Mississippi Maternal Mortality Report 2013–2016, 5, (2021), https://msdh.ms.gov/msdhsite/index.cfm/31,8127,299,pdf/MS_Maternal_Mortality_Report_2019_Final.pdf [https://perma.cc/LV4D-WEDK] (reporting "[t]he pregnancy-related mortality ratio was 33.2 deaths per 100,000 live births"); *see also* Centers for Disease Control & Prevention, Morbidity and Mortality Weekly Report (MMWR) (2021) (reporting 0.41 deaths per 100,000 legally induced abortions in the United States from 2013–2018), https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm [https://perma.cc/5ELY-B5GT].

27 United Health Foundation, America's Health Rankings, Health of Women and Children: Mississippi https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/overall_mch/state/MS [https://perma.cc/Y7HB-693A].

28 *See* Maternal Mortality Report, *supra* note 26, at 5 (Mar. 2021); Miss. State Dep't of Health, 2019 & 2020 Infant Mortality Report (2021), at 7, https://msdh.ms.gov/msdhsite/_static/resources/18752.pdf [https://perma.cc/G3CR-DJVA].

29 *See* Maternal Mortality Report, *supra* note 26, at 5 & 23; Infant Mortality Report, *supra* note 28, at 28.

30 *See* Emily Wagster Pettus, *Mississippi House Leaders Kill Postpartum Medicaid Extension*, ASSOCIATED PRESS (Mar. 9, 2022), https://apnews.com/article/health-mississippi-medicaid-c49dcbdc7b356f593485853aee5458c1 [https://perma.cc/PF7A-XJT2] (reporting that Mississippi lawmakers refuse to pass a bill extending Medicaid despite acknowledging the maternal mortality rates); Emily Wagster Pettus & Leah Willingham, *Mississippi: No Extension of Postpartum Medicaid Coverage*, ASSOCIATED PRESS (Mar. 30, 2021, 9:39 PM), https://www.clarionledger.com/story/news/politics/2021/03/30/no-extension-postpartum-medicaid-coverage-in-mississippi/4 815069001/ [https://perma.cc/9798-8RM9] (same). By the time of publication, efforts to pass a bill extending postpartum Medicaid were finally successful—after months of resistance from Governor Tate Reeves. *See* Wicker Perlis, *Gov. Tate Reeves Signs Postpartum Medicaid Extension, as Mississippi Joins Other States*, MISSISSIPPI TODAY (Mar. 17, 2023,

In ruling against Mississippi's ban, the district court also reflected: the ban is "closer to the old Mississippi—the Mississippi bent on controlling women and minorities" and specifically highlighted the state's coercive sterilization of Black women.[31] It is critical to recognize—as the district court did, and reproductive justice advocates[32] have emphasized—that abortion bans and restrictions are part of a broader set of state-sanctioned reproductive controls that subordinate Black women, Indigenous people, and other people of color.[33] That legacy of reproductive oppression continues and harms the same communities today.

B. Challenge Before a Newly Composed U.S. Supreme Court

In June 2020, Mississippi asked the U.S. Supreme Court to uphold its 15-week ban.[34] A unanimous Fifth Circuit panel had ruled against Mississippi and held the ban unconstitutional.[35] Likewise, every other district and appellate court that in recent decades reviewed bans on abortion at various pre-viability points in pregnancy ruled against the states that passed them.[36]

8:23 AM) https://www.clarionledger.com/story/news/politics/2023/03/16/ms-governor-tate-reeves-signs-law-to-extend-medicaid-coverage-for-new-moms/70017876007/ [https://perma.cc/E6 4S-PCHA].

31 *Jackson Women's Health Org.*, 349 F. Supp. 3d at 541 n.22.

32 In the 1990s, a group of Black women created the reproductive justice framework, which women-of-color led organizations later defined to include the right to have a child, to not have a child, and to parent one's children in a safe and healthy environment. Loretta J. Ross, *Understanding Reproductive Justice: Transforming the Pro-Choice Movement*, 36 OFF OUR BACKS 14 (2006).

33 *See id.*; *see also generally* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997). Although the term "women" is used here and elsewhere in this piece, especially when using the language of court opinions and empirical studies, people of all gender identities may become pregnant and seek abortion care. *See* Reprod. Health Servs. v. Strange, 3 F.4th 1240, 1246 n.2 (11th Cir. 2021) (explaining that not only those who identify as women may become pregnant).

34 Petition for Certiorari, Dobbs v. Jackson Women's Health Org., No. 19-1392, 2020 WL 3317135 (June 15, 2020).

35 Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *rev'd and remanded*, 142 S. Ct. 2228 (2022).

36 *See, e.g.*, MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 773 (8th Cir. 2015) (holding North Dakota's 6-week ban unconstitutional); Isaacson v. Horne, 716 F.3d 1213, 1231 (9th Cir. 2013) (holding Arizona's 20-week ban unconstitutional); Jane L. v. Bangerter, 102 F.3d 1112, 1114, 1117-18 (10th Cir. 1996) (holding Utah's 22-week ban unconstitutional); Sojourner T. v. Edwards, 974 F.2d 27, 29, 31 (5th Cir. 1992) (holding Louisiana's near total ban unconstitutional).

Consistent with its arguments in the lower courts, Mississippi asserted in its petition for certiorari that the Court could uphold its ban without overruling *Roe* and *Casey*. It asked the Court "merely . . . to reconcile" supposed conflicts "in its own precedents" about "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional."[37] The State stressed that "the questions presented in [its] petition do not require the Court to overturn *Roe* or *Casey*."[38] Mississippi added in a footnote, however, that if its ban could not be upheld under *Casey* and *Roe*, "the Court should not retain erroneous precedent."[39]

In mid-September 2020, Justice Ruth Bader Ginsburg died; Justice Amy Coney Barrett was nominated and confirmed to the Court less than two months later.[40] Over the next year, Mississippi's cert petition was circulated at over a dozen of the Court's private conferences and ultimately granted in the summer of 2021.[41]

Mississippi's footnote then became its entire merits brief. It explicitly and repeatedly asked the Court to overturn *Roe* and hold that the Constitution does not protect the right to abortion.[42] It presented a devastating view of constitutional rights and the extreme power of government to control people's most intimate decisions about their bodies, lives, and futures. In practical terms, it asked the Court to hold that the state, not the individual, has the power to decide whether a person will continue a pre-viability pregnancy and go through childbirth. Among other demonstrably false arguments, Mississippi claimed that no one really relies on the right to abortion—notwithstanding the millions of people who have had abortions and the reality that one in four women in the U.S. will have

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37 Petition for Certiorari at i & 5, Dobbs v. Jackson Women's Health Org., No. 19-1392, 2020 WL 3317135 (June 15, 2020).

38 *Id.*

39 *Id.* at 5–6, n.1.

40 *Justice Ruth Bader Ginsburg Passes, Justice Amy Coney Barrett Seated as Replacement*, AM. BAR ASS'N (Jan. 25, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/year-end-2020/amy-coney-barrett-replaces-ginsburg-on-supreme-court/ [https://perma.cc/W26M-SLYA].

41 Supreme Court of the United States, Dobbs v. Jackson Women's Health Org. Docket, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1392.html [https://perma.cc/K75F-QZTP].

42 *See generally* Brief of Petitioners, Dobbs v. Jackson Women's Health Org., No. 19-1392 (July 22, 2021) (arguing that states have the power to prohibit abortion prior to viability).

an abortion at some point in her lifetime.[43] And it failed to grapple with the damage that would be (and has been) caused by its request that the Court dismantle the equal right to liberty for people who become pregnant.

Mississippi's position was consistent with the regressive, coordinated strategy to enact abortion bans and restrictions across the country. Indeed, as the direct challenge to *Roe* presented in *Dobbs* came before the U.S. Supreme Court, another abortion case rocketed its way there. In the spring of 2021, Texas enacted S.B.8, a law that exposes anyone who "aids or abets" an abortion as early as 6 weeks to the risk of private lawsuits and being dragged into court to defend against massive fines.[44] Over the next several months, the Court refused five times to step in to block the vigilante scheme, which Texas enacted deliberately to evade judicial review.[45] The ban brought most abortion care in Texas to a halt, sending pregnant Texans seeking abortion care to neighboring states. Other states, like Oklahoma—where many Texans sought abortion care in the wake of S.B.8—followed suit, enacting a total abortion ban backed by a vigilante enforcement scheme.[46] For months before the U.S. Supreme Court decided *Dobbs*, the near-total abortion ban in Texas provided a preview of what it would look like if *Roe* fell. When it did and nearly half the states moved to ban abortion, the harm and chaos multiplied exponentially, as discussed in section III.

II. THE COURT'S DECISION IN DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

On May 2, 2022, Politico published a leaked draft opinion in *Dobbs v. Jackson Women's Health Organization*, written by Justice Alito, indicating that

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43 *See id.* at 31–36.

44 *See, e.g.*, Tex. S.B. 8 § 3 (codified at Tex. Health & Safety Code § 171.208(a) (2003)).

45 In Re Whole Woman's Health, 142 S. Ct. 701 (2022) (denying petition for writ of mandamus); Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (dismissing most significant parts of petitioners' suit); United States v. Texas, 142 S. Ct. 522 (2021) (dismissing as improvidently granted); Whole Woman's Health v. Jackson, 142 S. Ct. 415 (2021) (granting petition for certiorari before judgment); United States v. Texas, 142 S. Ct. 14 (2021) (denying application to vacate Fifth Circuit's stay of district court's injunction, treating the application as a petition for a writ of certiorari before judgment and granting the petition); Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021) (denying emergency application for an injunction or to vacate Fifth Circuit's stay of district court proceedings).

46 H. B. 4327, 58th Leg., Second Reg. Sess. (Okla. 2022); *Oklahoma Becomes First State to Entirely Ban Abortion*, CTR. FOR REPROD. RTS., (May 25, 2022), https://reproductiverights.org/oklahoma-becomes-first-state-to-entirely-ban-abortion/ [https://perma.cc/3T4K-6RG9].

the Court would overrule *Roe*.[47] On June 24, 2022, that most extreme position became law, with only minor alterations.[48] For the first time in history, the U.S. Supreme Court took away a right that it had recognized as fundamental to personal liberty: the right to abortion. That the decision was previewed did not mitigate the profound damage it caused and continues to cause.

A. The Majority Opinion: Dismantling the Right to Abortion

Justice Alito authored a majority opinion, joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett. The majority overrules *Roe* as wrongly decided and holds that the Fourteenth Amendment's guarantee of liberty does not encompass an individual's right to abortion.[49] Citing a case about regulation of optometry, it concludes that rational basis review is the appropriate level of scrutiny for abortion bans and restrictions and lists a variety of state interests that would satisfy that standard.[50]

The majority reaches its sweeping result without any discussion or consideration of the harmful impact the decision will have on the health, lives, and futures of pregnant people and their families. Indeed, the majority opinion references "legislative bodies" six times—which is six times more than it mentions the bodies of women or pregnant people.[51]

i. An Unprincipled and Dangerous Approach to Constitutional Interpretation

Justice Alito, writing for the majority, begins by observing that "[t]he Constitution makes no reference to abortion."[52] The majority then purports to apply the analysis used in *Washington v. Glucksberg*, 521 U.S. 702 (1997) to determine whether the Fourteenth Amendment's textual guarantee of liberty encompasses a right to abortion.[53] In *Glucksberg*, the Court considered whether the asserted right was deeply rooted in our

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47 Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 2:14 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/AJ3V-MRJD].

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

49 *Id.* at 2242.

50 *Id.* at 2284 (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955)).

51 *See id.* at 2256, 2268, 2277, 2284.

52 *Id.* at 2242.

53 *Id.* at 2242, 2244.

nation's history and tradition and fundamental to our concept of ordered liberty.[54] But the *Dobbs* Court's reliance on *Glucksberg* is flawed; the Court has not followed the *Glucksberg* approach to defining liberty rights in cases prior to or after that case.[55] As the *Dobbs* joint dissent notes, "[t]he *Glucksberg* test . . . 'may have been appropriate' in considering physician-assisted suicide, but 'is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.'"[56]

Rather, in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Supreme Court reiterated its prevailing approach for determining substantive liberty rights under the Fourteenth Amendment.[57] There, the Court considered whether the constitutional right to marry encompasses protection for a right to marry someone of the same sex. The Court did not ask, narrowly, whether a right to marry someone of the same sex is deeply rooted in this country's history and tradition. Instead, it asked about marriage "in its comprehensive sense," and whether there was a sufficient justification for excluding same-sex couples from the fundamental right.[58] Interpretation of the Constitution's guarantees of fundamental rights, the Court observed, "has not been reduced to any formula" and "requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."[59] Relying on and reinforcing precedent recognizing an expansive understanding of constitutional liberty, the Court determined that individuals have the right to marry a person of the same sex.[60] The *Obergefell* majority, much to the dissenters' dissatisfaction, explicitly declined to apply the narrow history and tradition test from *Glucksberg* in favor of an approach premised on an evolving understanding of liberty.[61]

That broader approach makes sense, especially in cases about sex and family. Otherwise, the Court's interpretation of the Constitution would

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54 521 U.S. at 721.

55 *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015); Lawrence v. Texas, 539 U.S. 558 (2003); *Casey*, 505 U.S. 833; Carey v. Population Servs., Int'l, 431 U.S. 678 (1977); Meyer v. Nebraska, 262 U.S. 390 (1923).

56 *Dobbs*, 142 S. Ct. at 2326 n.4. (quoting *Obergefell*, 576 U.S. at 671).

57 576 U.S. 644 (2015).

58 *Id.* at 671.

59 *Id.* at 663–64.

60 *Id.* at 665.

61 *Id.* at 671.

simply reinforce the historical subordination of marginalized people—including women, LGBTQ people, Black people, and other people of color—whose full and equal rights were not "deeply rooted" in our nation's history and tradition at the time of the Fourteenth Amendment's ratification.

Given this precedent, *Dobbs*'s revised history and tradition test is radical and unsupported in at least two respects.[62] First, it fails to explain its return to *Glucksberg*'s history and tradition test over the Court's more settled and holistic approach to defining liberty rights in cases such as *Obergefell* and *Lawrence v. Texas*.[63]

Second, *Dobbs*'s approach is even narrower than the inquiry *Glucksberg* lays out. Without explanation or support, *Dobbs* asserts that for the Court to find a fundamental right rooted in history and tradition, the right must have been positively endorsed or recognized in 1868, when the Fourteenth Amendment was ratified.[64] But even *Glucksberg* did not constrain recognition of constitutional liberty guarantees in this way.[65]

With its new approach in hand, the *Dobbs* majority proceeds to rely on evidence that mainstream historians and scholars dispute, and reads out critical nuance in state laws in place in 1868 to conclude that at that time, three-quarters of states made it a crime to perform an abortion at any stage of pregnancy.[66] The majority's rote number-crunching ignores evidence that abortion laws on the books were rarely enforced, and when they were, prosecution focused overwhelmingly on rare instances where women died,

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62 For additional discussion, *see generally* Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1182–84 (2023).

63 539 U.S. 558 (2003); *see also*, *e.g.*, Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 149 (2015) (describing the Court's "two contrasting approaches" to defining rights.).

64 *Dobbs*, 142 S. Ct. at 2254 ("Not only are respondents and their *amici* unable to show *that a constitutional right to abortion was established when the Fourteenth Amendment was adopted*, but they have found no support for the existence of an abortion right that predates the latter part of the 20th century . . . ." (emphasis added)); *id.* at 2257 ("Instead of seriously pressing the argument that *the abortion right itself has deep roots*, supports of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right." (emphasis added)).

65 *Glucksberg*, 521 U.S. at 710–19 (discussing history and tradition but nowhere referring to the burden of showing a deeply rooted positive *right* to physician assisted suicide).

66 *Dobbs*, 142 S. Ct. at 2254; *see* Brief of American Historical Association and Organization of American Historians as Amicus Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392) (citing data in conflict with the Court's findings).

with some courts holding that the criminal laws did not in fact ban all abortions regardless of circumstance.[67] It also casts aside the sexist and anti-immigrant motivations underlying enactment of 19th century criminal abortion laws.[68] Nor does it mention the connection between those efforts and physician-backed campaigns, rooted in racism and competition, to push out midwives—overwhelmingly Black women who had been the primary caregivers for pregnant people.[69]

The Court also looks further back, distorting sources to find that abortion at all stages may have been criminalized at common law, failing to note its reliance on cases of battery or poisoning without the pregnant person's consent.[70] Among its sources is an English jurist who defended marital rape and had women executed for witchcraft.[71] Based on this flawed historical approach, and because there was no positive legal right to abortion established in 1868, the majority concludes the Fourteenth Amendment's liberty guarantee cannot encompass a right to abortion.[72]

In addition to cherry-picking historical sources, the *Dobbs* Court's myopic and ossified constitutional vision forecloses any possibility of extending rights to those to whom they were previously denied.[73] First, it fails to acknowledge that the ratifiers of the Fourteenth Amendment were

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67 Brief of American Historical Association and Organization of American Historians as Amicus Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392).

68 *See infra* note 221 (citing sources).

69 *See* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, 90–112 (1998) (discussing 19th and early 20th century campaigns against abortion and against midwives (referred to as "the midwife problem") that "became intertwined into one"); Keisha Goode & Barbara Katz Rothman, *African-American Midwifery, a History and a Lament*, 76 AMER. J. ECON. & SOCIO. 65 (2017) (discussing efforts to marginalize midwives, predominantly Black women, during the same time period).

70 *Cf. Dobbs*, 142 S. Ct. at 2249–53 (explaining the history of abortion regulation).

71 *See generally* G. Geis, *Lord Hale, Witches, and Rape*, 5 BRIT. J.L. & SOC'Y 26 (1978) (describing Lord Hale's misogynistic beliefs and actions, including his support of marital rape and execution of individuals accused of witchcraft).

72 On the other hand, looking to "history and tradition" may not overdetermine the constitutional inquiry; it may be "standardless," allowing judges to "look out over a crowd and pick friends," *i.e.*, to canvass the historical record and rely on select facts to support a preferred outcome. *See* Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1183 (2023).

73 *See* Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 37 (2022) (discussing how "a decision to privilege any historical moment prior to the era in which social movements challenged traditional gender norms is a decision to read the Constitution as silent on abortion rights").

white, male landowners, who did not view women or people of color as full and equal citizens, and did not permit them a voice in the political process.[74] As the dissent aptly notes: "When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship."[75]

Second, the *Dobbs* majority undermines the purpose of the Fourteenth Amendment, which together with its sibling Reconstruction-era amendments, was meant to address the lasting brutality of slavery and the Framers' denial of Black people's humanity. States had endorsed sexual violence and rape, coerced pregnancy and childbearing, and forced the separation of families to deny enslaved people fundamental aspects of liberty, bodily integrity, and dignity.[76] As Professor Peggy Cooper Davis has long explained, to begin to repair that damage, the Fourteenth Amendment guaranteed a right of liberty against state control, including the rights of individuals, not states, to decide whether and when to become pregnant and give birth to a child, and to create and raise a family.[77] With that context, it is quite clear that, for a state to take control of a person's body and demand they go through pregnancy and childbirth, with all the related physical risks and life-altering consequences, is a deprivation of that fundamental liberty right.[78]

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74 *Dobbs*, 142 S. Ct. at 2324 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

75 *Id.* at 2325 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

76 *See* Brief of the Howard Univ. School of Law Human and Civil Rts. Clinic as Amicus Curiae In Support of Respondents at 4–16, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392) (explaining how "Black [w]omen [h]ave [historically] been denied bodily autonomy and reproductive freedom"); Brief of Constitutional Accountability Center as Amicus Curiae In Support of Respondents at 12, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (No. 19-1392) ("[F]undamental aspects of personal liberty and bodily integrity were denied to enslaved people on a daily basis.").

77 *See* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 90–117 (1998) (explaining how the "constitutional right to be a parent . . . has ample, but heretofore unacknowledged support in the history of antislavery and Reconstruction"); *see also* Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 HARV. C.R.- C.L. L. REV. 299 (1993) (drawing on the history underlying the Fourteenth Amendment to demonstrate the ways in which its supporters understood the rights to family, including procreation, contraception and abortion, as fundamental aspects of liberty); Peggy Cooper Davis, *Overturning Abortion Rights Ignores Freedoms Awarded After Slavery's End, Says Peggy Cooper Davis*, THE ECONOMIST (June 13, 2022), https://www.economist.com/by-invitation/2022/06/13/overturning-abortion-rights-ignores-freedoms-awarded-after-slaverys-end-says-peggy-cooper-davis [https://perma.cc/6BQN-WRFN].

78 *See generally* Brief of Respondents, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

Third, the majority dismisses the argument that the Fourteenth Amendment's equality guarantee protects the right to abortion, stating in dicta that banning abortion is not sex discrimination.[79] As discussed below, no party had made this argument and the majority does not undertake any analysis to support its statement. The Court merely invokes a long-abandoned and denounced pregnancy discrimination case, while ignoring decades of precedent establishing modern sex equality doctrine.[80] This inclination to disregard decades of sex equality law is consistent with the majority's regressive and dangerous liberty analysis.

Finally, the *Dobbs* Court does not stop at excising the right to abortion from the Fourteenth Amendment liberty guarantee. Followed to its logical conclusion, its rationale undermines the promise of the Fourteenth Amendment and threatens much of the Court's liberty jurisprudence. The words contraception, sex, and marriage appear nowhere in the Constitution.[81] And rights against coerced sterilization, to contraception, to same-sex intimacy, or to marry a person of the same sex or a different race were not affirmatively protected across the nation in 1868.[82] The majority suggests these are non-issues: abortion is different, the majority says, because it involves the state's interest in potential life.[83] But this is not a reliable limiting principle: consideration of the state's interest fits nowhere in the majority's "history and tradition" test[84] and at least one justice among the majority makes clear there is no difference.[85] As the dissent observes: "Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other."[86]

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79 *Dobbs*, 142 S. Ct. at 2245–46 (majority opinion).

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

81 *See Dobbs*, 142 S. Ct. at 2331–32 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (stating that in the 19th century, the law did not offer protection for marriage, and that the Constitution does not mention the word "contraception").

82 *Id.* (Breyer, Sotomayor, and Kagan, JJ., dissenting).

83 *Id.* at 2277, 2284 (majority opinion).

84 *Id.* at 2331–32 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

85 *Id.* at 2301 (Thomas, J. concurring).

86 *Id.* at 2319 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

ii. Failing to Seriously Consider Stare Decisis

The Court briefly turns to stare decisis, a principle of stability and judicial restraint. Stare decisis sets a high bar for the Court to overrule its own decisions, counseling that unless the Court is to be perceived as representing nothing more than the preferences of its current membership, judicial protection for individual rights must hold firm absent the most dramatic and unexpected changes in law or fact.[87] Nothing had changed since *Roe* or in the 30 years since *Casey* to warrant the "upheaval in law and society" the majority set off by overruling those decisions.[88] Rather, the dissent points out, "[t]he Court reverses course . . . for one reason and one reason only: because the composition of this Court has changed."[89] "[S]ubstitut[ing] a rule by judges for the rule of law," as the Court does, "threatens to upend bedrock legal doctrines" beyond this case, "creates profound legal instability," and "calls into question [the] Court's commitment to legal principle."[90] It "takes aim . . . at the rule of law."[91]

One of the most alarming aspects of *Dobbs*'s stare decisis discussion is its failure to account for the profound harm its decision would cause to people who rely on the right to abortion. The Court holds that it cannot assess the "novel and intangible . . . reliance" interests that are "empirical," such as "the effect of the abortion right on society and in particular on the lives of women."[92] That casts aside not only the profound and devastating consequences of the decision on real people, but also one of the judiciary's primary roles: to consider evidence and make a judgment.

Bringing a child into the world, raising, and nurturing children, and building families and communities are, for many, among the most joyful and meaningful experiences in life. At the same time, these life-changing events bring challenges and risks, as evidence well documents. Every pregnancy entails risk to a pregnant person's health or life, and pregnancy and childbirth involve significant and comparably greater risks than

87 *See Casey*, 505 U.S. at 864–66 (explaining the limited circumstances); *see also Dobbs*, 142 S. Ct. at 2261–62.

88 *Dobbs*, 142 S. Ct. at 2319 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

89 *Id.* at 2320 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

90 *Id.* at 2335, 2348 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

91 *Id.* at 2348 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

92 *Id.* at 2277 (majority opinion).

abortion.[93] Even an uncomplicated pregnancy significantly stresses the body, causes physiological and anatomical changes, and affects every organ system. Childbirth itself is 14 times more likely to result in death than abortion in the United States[94] (and is several times more dangerous in some states[95]). Every pregnancy-related complication is more common among women giving birth than among those having abortions.[96] And approximately one-third of pregnancies end in a caesarean section (C-section)—major abdominal surgery that carries serious risks.[97] Indeed, the United States has one of the highest maternal mortality rates among wealthy democracies.[98] This human rights crisis in U.S. maternal health disproportionately impacts Black, Indigenous, and low-income communities, who consistently face the greatest risks during pregnancy, childbirth, and postpartum due to discrimination and inadequate access to quality health services.[99]

Beyond the increased risk to their health and lives from forced pregnancy and childbirth, people who are denied a wanted abortion, many of whom are already parents, "are more likely to experience economic insecurity and . . . poverty."[100] The financial impacts of being denied an

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93 *See, e.g.*, Brief of Birth Equity Organizations and Scholars as Amici Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392) (detailing some of the many health risks associated with pregnancy, childbirth, and the post-partum period); Brief of American College of Obstetricians and Gynecologists et al. as Amici Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (comparing the risks of pregnancy and childbirth with the safety of abortion procedures).

94 Brief of American College of Obstetricians and Gynecologists as Amici Curiae In Support of Respondents at 10, 18, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

95 *See* Brief of Birth Equity Organizations and Scholars as Amici Curiae In Support of Respondents at 9, *Dobbs*, 142 S. Ct. 2228 (describing how the maternal mortality rate in Mississippi is higher than the national rate).

96 Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 216–217 (2012).

97 Brief of American College of Obstetricians and Gynecologists as Amici Curiae In Support of Respondents at 19–20, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

98 Gender Equity Policy Institute, *The State of Reproductive Health in the United States: The End of Roe and the Perilous Road Ahead for Women in the Dobbs Era* (Jan. 19, 2023), at 6, https://thegepi.org/wp-content/uploads/2023/01/GEPI-State-Repro-Health-Report.pdf [https://perma.cc/AU7L-7PKL].

99 *See infra* note 195 (citing sources).

100 Brief of Respondents at 38–40, *Dobbs*, 142 S. Ct., 2228 (No. 19-1392).

abortion are as large as or larger than being evicted, losing health insurance, being hospitalized, or being exposed to hurricane flooding.[101]

These are among the reasons access to abortion has been critical to women's equal participation in society. In fact, legal abortion has made possible many of the educational and professional gains women have realized over the last five decades.[102] For example, for young people with an unplanned pregnancy, legal abortion increased the probability of finishing college by nearly 20% and entering a profession by nearly 40%.[103]

All of these facts were documented extensively in the respondents' briefing to the Court, the dozens of amicus briefs in support of respondents, or both. The majority ignored them.

Equally disturbing was the majority's specious claim that *Dobbs* aligns with other decisions overruling precedent. Picking up an anti-abortion argument, the majority compares its overruling of *Roe* to the unanimous *Brown* Court's overruling of *Plessy*.[104] As the NAACP Legal Defense and Education fund—which litigated *Brown*—commented about this comparison: "[T]here is and should be no comparison between *Roe* and *Plessy*. While *Roe* recognized that the liberty protected by the federal Constitution includes the right of women to access abortion care, *Plessy* endorsed and upheld a racial apartheid system that denied the equality, dignity, and humanity of Black people in the United States."[105] The *Dobbs* dissent echoes this point, stating that *Brown*'s protection of rights with "a strong basis in the Constitution's most fundamental commitments," stands in stark contrast to *Dobbs*'s revocation of rights on which individuals have relied for decades.[106]

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101 Brief of Economists as Amici Curiae In Support of Respondents at 25, *Dobbs*, 142 S. Ct., 2228 (No. 19-1392).

102 *See generally id.* (discussing the impact of legal abortion on the economic and social lives of women).

103 *Id.* at 3, 13.

104 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2341–42 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting) (describing how the majority used the comparison of *Plessy* and *Brown* to overturn *Roe*).

105 NAACP Legal Defense and Education Fund (LDF), *LDF Issues Statement on Misleading References to* Brown v. Board of Education *by Supreme Court Justices* (Dec. 2, 2021), https://www.naacpldf.org/wp-content/uploads/Statement-on-SCOTUS-Comparison-of-Roe-and-Plessy.pdf [https://perma.cc/UV32-79G9].

106 *Dobbs*, 142 S. Ct. at 2342 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

iii. Masking the Harm the Decision Will Inflict

The majority opinion is shot through with other efforts to conceal the harm its decision will cause. For one, it claims destroying constitutional protection for abortion rights simply "returns the issue of abortion to . . . legislative bodies" and "allows women on both sides of the abortion issue to seek to affect the legislative process."[107] The majority emphasizes that "[w]omen are not without electoral or political power;" in fact, women vote at slightly higher percentages in Mississippi than men do.[108] Defending the revocation of a constitutional right because women can vote sits uncomfortably alongside the majority's interpretive method, which freezes Fourteenth Amendment rights at a time when women could *not*. And, of course, the essence of a constitutional right is that it is not up for majority vote.

Moreover, the appeal to the ballot box rings hollow coming from a Court that has allowed states to dismantle protections for voting rights.[109] As Sherrilyn Ifill, then President of the NAACP Legal Defense Fund, pointed out, both the Court's voting rights and abortion decisions disproportionately harm Black women and other people of color and that harm is particularly acute in the South, where restrictions on reproductive rights and voting rights have gone hand in hand for decades.[110] Political and electoral power, and the power to shape one's own life, are "essential for autonomy and equality," as the Brennan Center for Justice, a democracy law and policy institute, notes.[111] Disenfranchisement and the denial of reproductive control at the hands of the state are twin efforts to deny each individual the power to chart their life's course.

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107 *Id.* at 2277 (majority opinion).

108 *Id.*

109 *See, e.g.*, Shelby Cty. v. Holder, 570 U.S. 529 (2013) (holding that the Voting Rights Act coverage formula is unconstitutional).

110 Sherrilyn Ifill, *Stealing the Crown Jewels*, N.Y. REVIEW OF BOOKS (May 12, 2022), https://www.nybooks.com/daily/2022/05/12/stealing-the-crown-jewels-ifill-roe/ [https://perma.cc/P22K-3H7P]; *see also e.g.*, Jennifer Weiss-Wolf, Madiba Dennie, Sonali Seth, Michael Li & Ian Vandewalker, *Supreme Court's Abortion Ruling Shows What Happens When Democracy is Thwarted*, BRENNAN CTR. FOR JUST. (June 24, 2022), https://www.brennancenter.org/our-work/analysis-opinion/supreme-courts-abortion-ruling-shows-what-happens-when-democracy-thwarted [https://perma.cc/AQY8-3FM3] (arguing that the Supreme Court's animosity towards voting and abortion right disproportionately effects communities of color).

111 *See* Weiss-Wolf, *supra* note 110.

In the same vein, the majority posits that the decision returns to the states the power to regulate—or ban—abortion and will keep the courts out of abortion issues.[112] That, too, is wrong. What happens to abortion access in one state inevitably impacts other states. People with the means to do so have always traveled across state lines for abortion care when it is out of reach at home. As nearly half the states move to ban abortion, even more people will be forced to leave their communities[113]—putting their health and lives at greater risk to seek out safe care where it remains legal. And anti-abortion advocates are not satisfied with allowing each state to decide the legality of abortion within its own borders. Among other tactics, they are already promoting model legislation that would inhibit people from leaving states that have banned abortion to obtain it elsewhere.[114] Some federal legislators, together with antiabortion advocates, are considering a nationwide ban.[115] The courts—and the Court—will be called upon to decide these issues, and more.

B. The Concurring Opinions: Veiled and Direct Threats to Liberty Rights

Justice Thomas, Justice Kavanaugh, and Chief Justice Roberts each offer additional views in separate concurring opinions.

Both Justice Thomas and Justice Kavanaugh fully support the majority's narrow history-and-tradition-based rationale for reversal. Justice Thomas would use *Dobbs* as a launching pad to go even further. He writes that, in future cases, the Court "should reconsider all of [the] Court's substantive due process precedents," and undo constitutional protection for the rights to contraception, to same-sex sexual intimacy, and to marry someone of the

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112 *See Dobbs*, 142 S. Ct. at 2259 (majority opinion) ("[W]e thus return the power to weigh those arguments to the people and their elected representatives.").

113 *See, e.g.*, Brief of Economists as Amici Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392) (arguing that banning abortion in states would cause increased travel distances to nearest abortion clinics for millions of women).

114 *See, e.g.*, Memorandum from James Bopp, Jr., NRLC General Counsel, Courtney Turner Milbank & Joseph D. Maughon to Nat'l Right to Life Comm., NRLC Post-*Roe* Model Abortion Law Version 2 (July 4, 2022), https://www.nrlc.org/uploads/files/NRLCPost-RoeModelAbortionLaw.pdf [https://perma.cc/8MG7-M2L5] (advocating for a model abortion law that would prevent individuals from going to pro-abortion counties to obtain abortions).

115 *See, e.g.*, Caroline Kitchener, *The Next Frontier for the Antiabortion Movement: A Nationwide Ban*, WASH. POST (May 2, 2022, 10:54 PM), https://www.washingtonpost.com/nation/2022/05/02/abortion-ban-roe-supreme-court-mississippi/ [https://perma.cc/K5DT-LJSP] (arguing that antiabortion advocates are planning a push of a nationwide abortion ban).

same sex "[b]ecause the Due Process Clause does not secure *any* substantive rights."[116] By contrast, Justice Kavanaugh claims, without much elaboration, that *Dobbs* does not affect liberty precedents "involving issues such as contraception and marriage."[117] And, as to abortion, Justice Kavanaugh notes, also in a cursory way, that based on the constitutional right to travel, a state could not bar a resident from traveling to another state to obtain an abortion.[118]

Additionally, Justice Kavanaugh insists, the decision to overrule *Roe* is "neutral"—that is, it is neutral to take from individuals and grant to states the power to make decisions about pregnancy and childbirth.[119] As the dissent appropriately responds:

> When the Court decimates a right women have held for 50 years, the Court is not being 'scrupulously neutral.' It is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so.[120]

Chief Justice Roberts concurs in the judgment to uphold Mississippi's 15-week ban only; he would stop short of overruling *Roe* completely and allowing states to ban abortion entirely—at least in this case.[121] He would overrule *Roe* and *Casey*'s central holding that states cannot ban abortion before viability, while retaining what he defines as *Roe*'s protections for a "reasonable opportunity" to access abortion.[122] The Chief Justice provides no explanation as to the constitutional basis or parameters for such a standard, or how it would work in practice.

Like the *Dobbs* majority, Chief Justice Roberts supports his abandonment of the viability line by attempting to paint the United States's constitutional protections for abortion as overly permissive and out of step with the rest of the world.[123] He notes that "[i]t is indeed 'telling that other countries almost uniformly eschew' a viability line"[124] and references for

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116 *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (emphasis in original).
117 *Id.* at 2309 (Kavanaugh, J., concurring).
118 *Id.*
119 *Id.* at 2305, 2310 (Kavanaugh, J., concurring).
120 *Id.* at 2328 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
121 *Id.* at 2310–11, 2314 (Roberts, C.J., concurring in the judgment).
122 *Id.* at 2310 (Roberts, C.J., concurring in the judgment).
123 *Id.* at 2243 n.15 & 2270 (majority opinion); *id.* at 2312 (Roberts, C.J., concurring in the judgment).
124 *Id.* at 2312 (Roberts, C.J., concurring in the judgment).

support an often-repeated and always-misleading statistic about the number of countries that permit abortion later in pregnancy.[125]

In doing so, both Chief Justice Roberts and the majority unquestioningly adopt the rhetoric of abortion opponents, which misrepresents the legal status of abortion across the world to mischaracterize the U.S. as being far more permissive than other countries. In fact, across Europe and in most other developed countries, abortion is allowed on broad grounds around or until viability. Where countries impose earlier gestational limits for abortion on request, there are often broad exceptions, such as to preserve the person's mental health, that extend at the least through viability.[126] As European legal scholars appearing as amicus in *Dobbs* explain, abortion is permitted through at least 22 weeks of pregnancy in 37 of the 46 member states in the Council of Europe, and through 18–21 weeks in another three countries, either on request, on broad socioeconomic grounds, or based on the health of the pregnant person (using criteria that do not limit that to risk to the person's life).[127]

The dissent provides a more accurate and nuanced assessment of world abortion laws and contrasts regression in the United States with the global trend "toward increased provision of legal and safe abortion care."[128] Indeed, in the past 25 years, close to 60 countries have liberalized their laws and policies on abortion.[129] Currently, "72 countries allow abortions on request and 59% of women of reproductive age live in countries that allow abortions broadly."[130] The United States is moving against this tide. It is now one of only four countries that have removed legal grounds for abortion

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125 *Id.*; *cf.* CTR. FOR REPROD. RTS., *U.S. Abortion Laws in Global Context* 4 (Sept. 20, 2022) https://reproductiverights.org/wp-content/uploads/2022/09/US-Abortion-Laws-In-Global-Context-Sept-2022.pdf [https://perma.cc/SS8W-67DX] (finding that U.S. abortion laws have become more restrictive than abortion laws in Europe).

126 *Law and Policy Guide: Health Exceptions*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/worlds-abortion-laws/law-and-policy-guide-health-exceptions/ [https://perma.cc/JZJ8-KQVP] (last visited June 11, 2023).

127 Brief of European Law Professors as Amici Curiae in Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392), at *5–6.

128 *Dobbs*, 142 S. Ct. at 2340 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

129 *See* Risa Kaufman, et al., *Global Impacts of* Dobbs v. Jackson Women's Health Organization *and Abortion Regression in the United States*, 30 SEXUAL & REPROD. HEALTH MATTERS 1 (2022) (providing overview of abortion liberalization in regions around the globe).

130 *Id.* at 4.

since 1994. The other three countries are El Salvador, Nicaragua, and Poland.[131] As the dissent warns, with the loss of U.S. constitutional protections for abortion, and in light of global liberalization, "it is American States that will become international outliers after today."[132]

C. The Joint Dissent: Reinforcing the Fourteenth Amendment's Protection for the Right to Abortion

In a joint opinion, Justices Breyer, Sotomayor, and Kagan dissent, "[w]ith sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection . . . ."[133] The joint dissent sets out why the majority's decision to erase 50 years of precedent safeguarding individual freedom and women's equal status is unprincipled, indefensible, and constitutionally incorrect; breaches core rule-of-law principles designed to promote stability; jeopardizes other rights, from contraception to same-sex intimacy and marriage; and undermines the Court's legitimacy.

In sharp contrast to the majority and each of the concurring opinions, the dissenters also lay bare the harms of the Court's ruling, warning that "[c]losing our eyes to the suffering today's decision will impose will not make that suffering disappear."[134] Put simply, "[the Court] says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs."[135] That "transform[s] what, when freely undertaken, is a wonder into what, when forced, may be a nightmare."[136] Some, especially those of means, "will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate."[137] Thus, "[t]he effects will be felt most severely, as they always have been, on the bodies of the poor. The

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131 *U.S. Abortion Laws in Global Context*, CTR. FOR REPROD. RTS., https://reproductiverights.org/wp-content/uploads/2022/09/US-Abortion-Laws-In-Global-Context-09-22-22.pdf [https://perma.cc/YY8L-U5CD] (last visited June 11, 2023).

132 *Dobbs*, 142 S. Ct. at 2341 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

133 *Id.* at 2350 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

134 *Id.* at 2346 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

135 *Id.* at 2317 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

136 *Id.* at 2318 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

137 *Id.* at 2318–19 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

history of state abortion restrictions is a history of heavy costs exacted from the most vulnerable women."[138]

Whether or not those unable to access abortion "choose to parent, they will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose."[139] And, "[b]eyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right [to abortion] grants."[140] As the dissent recognizes, robbing a person of this right will "alter her views of herself and her understanding of her place in society as someone with the recognized dignity and autonomy to make these choices."[141] Without this right, "the loss of power, control, and dignity will be immense."[142]

The dissent begins to catalogue the devastating questions that, as they foresaw, are arising with urgency in the wake of *Dobbs*:

> Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur, before the Fourteenth Amendment's protection of life kicks in? . . . And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment's protection of liberty and equality?[143]

These questions begin to reveal the profound damage *Dobbs* has caused for each real person behind them. In sum, "[w]ithdrawing a woman's right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today's Court has wrenched this choice from women and given it to the States."[144]

Mindful of this reality, the joint dissent lays out a constitutional understanding that can guide future opinions to rebuild and guard the right to abortion. Constitutional interpretation, the dissenters explain, requires acknowledging that "[t]hose responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights."[145] But because "[t]he Framers (both in 1788 and 1868) understood that the world changes . . . they did not define

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138 *Id.* at 2345 n.27 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

139 *Id.* at 2339 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

140 *Id.* at 2346 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

141 *Id.* (internal quotes omitted).

142 *Id.*

143 *Id.* at 2336–37 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

144 *Id.* at 2346 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

145 *Id.* at 2325 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning."[146] "And," the dissent continues, "over the course of our history," the Court "has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions."[147] Under this approach, "[r]especting a woman as an autonomous being, and granting her full equality, mean[s] giving her substantial choice over this most personal and most consequential of all life decisions."[148]

In contrast to the majority's regressive method, the dissent recognizes that the Constitution charts a path forward. A path that is more, not less, protective of individual rights, and more, not less, inclusive of people who have been excluded from exercising those rights in the past. And it includes protecting the fundamental rights of every individual—including pregnant people—to control their own bodies, lives, and futures.

III. THE REPERCUSSIONS OF DESTROYING 50 YEARS OF CONSTITUTIONAL PROTECTION

The fallout of overruling *Roe* was immediate and sweeping. It shattered the foundational equal right to liberty held for decades by women and all people who can become pregnant. And it set off a devastating course of events in the United States as states began to enforce abortion bans and as uncertainty grew around where and how abortion care could legally continue.[149] The legal aftermath, as well as the health and human rights implications of *Dobbs*, in just one year since the decision is only the beginning of what will continue to unfold.

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146 *Id.*

147 *Id.*

148 *Id.* at 2317 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

149 In Ohio, for instance, providers were forced to cancel more than 600 existing appointments when a state ban took effect in June. State ex rel. Preterm-Cleveland v. Yost, No. 2022-0803 (Ohio, June 28, 2022), Affidavit in Support of Relators' Motion for Emergency Stay, (Affidavit of Dr. Sharon Liner) ¶ 6.

A. A Perilous Legal Landscape

In overruling *Roe*, *Dobbs* opened the floodgates to state efforts to ban abortion.[150] Upon the release of the opinion, some state officials announced that (previously unconstitutional) abortion bans predating the decision became immediately or imminently enforceable.[151] Abortion providers and others filed lawsuits in state courts around the country to clarify the legal effects of *Roe*'s reversal and to prevent state bans from taking effect. Many cases argued that abortion bans violate state constitutional guarantees to privacy, equal protection, or liberty, and several remain pending.[152] Courts in some states are also considering whether abortion bans violate patients' constitutional or statutory religious or conscience rights or right to health, as in Florida, Utah, and Wyoming.[153]

And in March 2023, the first lawsuit on behalf of individual people who were denied abortions since the Court overruled *Roe* was filed in Texas state court.[154] The plaintiffs include 14 individual women who experienced complications during their pregnancies but could not access abortion care in Texas due to the state's bans.[155] The case demonstrates that the questions

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150 *Dobbs*, 142 S. Ct. at 2277. In doing so, the Court did not address whether there are any circumstances under which a ban on abortion might violate a pregnant person's constitutional rights—for example when a patient seeks an abortion in an obstetric emergency, or where a pregnancy results from sexual violence.

151 *See* Alvin Chang, *'Abortion Returns to the States': US Attorneys General React to* Roe v Wade *Ruling*, THE GUARDIAN (June 24, 2022, 7:25 PM), https://www.theguardian.com/law/2022/jun/24/us-attorneys-general-react-supreme-court-ruling [https://perma.cc/KLM5-3Q5X] (reporting that several states' attorney generals made statements celebrating the overturning of *Roe v. Wade*).

152 For a description of the claims in each abortion ban challenge lawsuit filed post-*Dobbs*, see BRENNAN CTR. FOR JUST. & CTR. FOR REPROD. RTS., *State Court Abortion Litigation Tracker* (Feb. 1, 2023), https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker [https://perma.cc/XT6H-UFRK].

153 *Id.*

154 Zurawski v. State of Texas, No. D-1-GN-23-000968 (Travis Cty. Dist. Ct. March 6, 2023).

155 *See* Plaintiffs' First Amended Verified Petition for Declaratory Judgment and Application for Temporary and Permanent Injunction, Zurowski v. State of Texas, No. D-1-GN-23-000968 (Travis Cty. Dist. Ct. May 22, 2023), https://reproductiverights.org/wp-content/uploads/2023/05/2023.05.22-Zurawski-v.-Texas-1st-Am.-Ver.-Pet.-FINAL.pdf [https://perma.cc/AQ3V-7QQ2] (detailing experiences of plaintiff Texans denied abortion care under the state's bans); *e.g., id.* at ¶¶ 7–30 (plaintiff Amanda Zurawski suffered prelabor premature rupture of membranes (PPROM) at about 18 weeks, but was denied an abortion until she returned to the hospital with sepsis; she spent days in the ICU, suffered extreme scarring to one of her fallopian tubes, and will face significant challenges becoming pregnant again); *id.* at ¶¶ 97–114

posed by the dissent, "[h[ow much risk to a woman's life can a State force her to incur. . .[a]nd short of death, how much illness or injury can the State require her to accept,"[156] are ones confronting pregnant people and providers daily—with dangerous and alarming consequences.

On January 5, 2023, the Supreme Court of South Carolina became the first state supreme court since *Dobbs* to reach the merits of a state constitutional challenge to an abortion ban.[157] It ruled that the South Carolina Constitution's explicit privacy right guarantees the fundamental right to abortion, and that the state's ban on abortion as early as the sixth week of pregnancy violates that right. The court reasoned: "[f]ew decisions in life are more private than the decision whether to terminate a pregnancy," and, in a rejection of the *Dobbs* majority's approach, noted that a selective overreliance on the history of the relevant constitutional provision "completely ignores, and arguably perpetuates, the societal landscape of the time," in which women were excluded from the political process.[158]

Later the same day, the Idaho Supreme Court reached a different result, holding that the Idaho Constitution does not protect the right to abortion, and upholding three different bans which collectively prohibit all abortion care in the state—without *any* exceptions.[159] Echoing the *Dobbs* majority's narrow history and tradition test, the Idaho Supreme Court reasoned that

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(plaintiff Ashley Brandt, pregnant with twins, was denied abortion care after one twin was diagnosed with acrania, a condition where the fetus does not develop a skull, and was forced to travel out of state for care to save the life of the other twin); *id.* at ¶¶ 156–75 (plaintiff Samantha Casiano, for whom it was financially and logistically impossible to leave the state for abortion care after receiving a diagnosis that her baby had anencephaly and would not survive, was forced to continue her pregnancy to term and deliver, and denied the "choice and right over her body" and her daughter's body to "be able to put her daughter to rest earlier, since she was going to have to rest either way").

156 *Dobbs*, 142 S. Ct. at 2336-37 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

157 *See* Planned Parenthood S. Atl. v. State, 438 S.C. 188 (2023).

158 *Id.*

159 Planned Parenthood Great Nw. v. Idaho, Dkt. Nos. 49615, 49817, 49899 (Idaho Jan. 5, 2023) (opinion available online at https://coi.isc.idaho.gov/docs/Supreme/49615-2022/010523%20Published%20Opinion.pdf [https://perma.cc/AQ3V-7QQ2]). Idaho outright bans all abortions with no exceptions for the life of the pregnant person, or for cases of rape or incest. A federal court enjoined the state from enforcing its abortion ban inconsistently with the federal Emergency Medical Treatment and Labor Act, which, under certain circumstances, requires some healthcare practitioners to provide "stabilizing care"—including abortions. United States v. Idaho, No. 1:22-cv-00329-BLW, 2022 WL 3692618, at *1-2 (D. Idaho Aug. 24, 2022).

the right to abortion was not "deeply rooted" in the history and tradition of Idaho at the time of statehood.

Since the South Carolina and Idaho decisions, two state supreme courts have also held abortion bans unconstitutional because they lacked adequate exceptions.[160] In March 2023, the North Dakota Supreme Court held that the state's constitution guarantees a fundamental right to access an abortion to preserve a pregnant person's life or health, and the state's trigger ban (which banned all abortion care) could not withstand strict scrutiny.[161] Later the same week, the Oklahoma Supreme Court held that the Oklahoma Constitution protects the right to abortion to preserve the life of a pregnant person, and that, to the extent the state's post-*Dobbs* ban did not adequately allow for an abortion in those circumstances, it was unconstitutional and unenforceable.[162]

These state court outcomes preview how the legal landscape across the country will continue to develop inconsistently across the country as courts resolve pending cases on the merits in different ways.[163] As of the time of publication, there has been state court litigation on abortion bans in more than 18 states, including in states where courts have temporarily blocked bans (in whole or in part);[164] in states where courts have allowed bans to go into effect while litigation proceeds; in states where litigation led to the repeal of a prior ban; and states where bans are in effect and litigation has largely concluded.[165]

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160 Wrigley v. Romanick, 988 N.W.2d 231 (N.D. 2023); Oklahoma Call for Reprod. Just. v. Drummond, 526 P.3d 1123 (Okla. 2023).

161 *Wrigely*, 988 N.W.2d at 242.

162 *Drummond*, 526 P.3d at 1132.

163 For additional comparison of the South Carolina and Idaho decisions, see Alice Clapman, *Abortion Cases Take Originalism Debate to the States*, BRENNAN CTR. FOR JUST. (Jan. 10, 2023), https://www.brennancenter.org/our-work/analysis-opinion/abortion-cases-take-originalism-debate-states [https://perma.cc/GXS8-8F5J].

164 The legal landscape changes quickly—sometimes daily—in response to litigation developments. For updated information, see *After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/9ENU-GEDB] (last visited Aug. 4, 2023) (tracking each state's abortion bans and restrictions). *See also* BRENNAN CTR. FOR JUST. & CTR. FOR REPROD. RTS., *State Court Abortion Litigation Tracker*, https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker [https://perma.cc/F7CC-9HN4] (last updated Feb. 1, 2023) (tracking pending and competed litigation against abortion bans).

165 *Id.*

Dobbs has also empowered anti-abortion litigants to take to court to undermine other constitutional rights and federal statutory protections. Abortion opponents—including advocacy groups and state governments—are asking courts to ban medication abortion nationwide;[166] to limit the applicability of federal law requiring hospitals provide abortion care in obstetric emergencies;[167] and to invalidate federal Title X rules that help minors exercise their constitutional right to access contraception.[168] Frequently, plaintiffs strategically file in federal district courts overwhelmingly chaired by judges appointed by former President Trump,[169] who vowed to overturn *Roe v. Wade*.[170]

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166 Alliance for Hippocratic Oath v. U.S. Food & Drug Admin., No. 2:22-cv-00223 (N.D. Tex. Nov. 18, 2022) (requesting, at a minimum, that court order F.D.A. to revoke approval for mifepristone and, more broadly, seeking nationwide ban on medication abortion). At the time of publication, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit had heard oral arguments but not yet reached a decision on an appeal of the district court's decision to grant in part plaintiffs' request for a preliminary injunction. *See generally* All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210 (5th Cir. 2023).

167 *See* Greer Donley, Kimi Chernoby, and Skye Perryman, *Two Courts Ruled on Abortion in Emergency Situations. One Got It Right*, TIME (Aug. 26, 2022, 9:21 AM), https://time.com/6208656/abortion-emtala-texas-idaho-emergency-situations/ [https://perma.cc/SYM6-NZEL] (reporting that certain state efforts may criminalize doctors who provide abortions in emergency situations).

168 Alliance for Hippocratic Oath v. U.S. Food & Drug Admin., No. 2:22-cv-00223 (N.D. Tex. Nov. 18, 2022).

169 As an example, all three challenges referred to in this paragraph were filed in the Northern District of Texas—in the Lubbock division (EMTALA challenge) or Amarillo division (medication abortion and Title X policy challenges), where new civil cases are virtually guaranteed assignment to a Trump appointee. *See* Brief of Stephen I. Vladeck as Amicus Curiae in Support of Applicants at 10, n. 17, U.S. v. Texas, No. 22-A17 (U.S. July 13, 2022) (analyzing judges by division in Texas and noting that Trump appointee "Judge Kacsmaryk receives 95 percent of new civil cases" filed in the Amarillo division). Moreover, appeals from these district courts are taken to the Court of Appeals for the Fifth Circuit, which legal experts often view as the most conservative federal appeals court in the country. *See, e.g.*, Emma Platoff, *Trump-appointed Judges are Shifting the Country's Most Politically Conservative Circuit Court Further to the Right*, TEX. TRIB. (Aug. 30, 2018, 12:00 AM), https://www.texastribune.org/2018/08/30/under-trump-5th-circuit-becoming-even-more-conservative/ [https://perma.cc/MN6B-W7UH] ("the 5th Circuit . . . [is] considered the country's most politically conservative"); David Smith, *How Trump Reshaped the Fifth Circuit to Become the 'Most Extreme' US Court*, THE GUARDIAN (Nov. 15, 2021, 3:00 AM), https://theguardian.com/law/2021/nov/15/fifth-circuit-court-appeals-most-extreme-us [https://perma.cc/A63Z-8ZU8] ("James Ho, Stuart Kyle Duncan, and Cory Wilson are among six judges appointed by former president Donald Trump to the US court of appeals for the fifth circuit, skewing one of the most conservative – and influential – courts in America even further to the right").

170 Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn* Roe v. Wade *Abortion Case*, CNBC (Oct. 19, 2016, 10:00 PM), https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html [https://perma.cc/XF2U-246P].

And the *Dobbs* decision has emboldened anti-abortion legislatures to disrupt and manipulate legal norms beyond imposing outright bans on abortion care. Some state policies seek to take *Dobbs* farther by broadly restricting access to abortion where it remains legal, for example by limiting travel and imposing broad liability.[171] Recently proposed laws seek to build off Texas's S.B. 8's premise and impose civil liability on people who help anyone in-state access an abortion anywhere, while other draft bills impose criminal penalties or try to prohibit even wholly out-of-state activity.[172] Some state officials have also threatened far-reaching attacks including by targeting online communication about abortion,[173] or by forbidding employer benefit plans from paying for legal care out of state.[174] Texas legislators have also stated their intent to disrupt procedural norms by introducing legislation that would allow district attorneys from anywhere in the state to prosecute abortion violations outside their own jurisdictions if the local district attorney refuses.[175] And, while criminal laws typically require prosecutors to prove the state's case beyond a reasonable doubt for a conviction, Idaho's recently enacted ban shifts the burden to the provider to prove that any abortion performed under the law's narrow exception for

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171 *See, e.g.*, Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (Jun. 30, 2022, 8:30 AM), https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines [https://perma.cc/4Z29-SXVJ].

172 *Id.* Texas's S.B. 8 also exemplifies the radical approach some anti-abortion state governments have taken to curtail access by imposing broad civil liability. TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-.212 (2022). And the National Right to Life Council recently promoted "model" anti-abortion legislation encouraging states to adopt highly restrictive bans enforced through sweeping criminal, administrative, and private civil mechanisms, including bans on certain interstate activity pertaining to minor patients. NAT'L RIGHT TO LIFE, *National Right to Life Committee Proposes Legislation to Protect the Unborn Post-Roe*, June 15, 2022, https://www.nrlc.org/communications/national-right-to-life-committee-proposes-legislation-to-protect-the-unborn-post-roe/ [https://perma.cc/VJ7A-RNR9] (last accessed Jan. 10, 2023).

173 Caroline Kitchener, *Conservatives Complain Abortion Bans Not Enforced, Want Jail Time for Pill 'Trafficking'*, WASH. POST (Dec. 14, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/12/14/abortion-pills-bans-dobbs-roe/ [https://perma.cc/DH3W-3E8Q].

174 Karen Brooks Harper, *Texas Abortion Foes Use Legal Threats and Propose More Laws to Increase Pressure on Providers and Their Allies*, TEX. TRIB. (July 18, 2022, 12:00 PM), https://www.texastribune.org/2022/07/18/texas-abortion-laws-pressure-campaign/ [https://perma.cc/C8UP-ZA26].

175 *Id.*

lifesaving care meets that exception.[176] These norm-breaking—and dangerous—legal tactics will create chaos for healthcare providers while raising new constitutional questions related to preemption, free speech rights, the right to travel, and criminal due process protections.

Other states have expanded or protected access in response to *Dobbs*, including through legislation, executive action, or ballot measures enshrining reproductive rights in state constitutions.[177] Signaling deep public concern over the impact of the decision, in every state where a reproductive rights-related ballot measure appeared in 2022, voters chose to support reproductive rights. Voters in California, Michigan, and Vermont approved constitutional amendments that establish rights to reproductive freedom.[178] Meanwhile, anti-abortion constitutional amendments in Kansas and Kentucky and a legislative referendum in Montana failed by wide margins.[179] While promising, such moves cannot prevent or remedy all of the legal ramifications of hostile states' actions or anti-abortion litigants.

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176 Ian Millhiser, *The Legal Fight to Stop Bans on Medically Necessary Abortions, Explained*, VOX (Aug. 3, 2022, 12:40 PM), https://www.vox.com/policy-and-politics/23289324/abortion-supreme-court-emtala-medically-necessary-doj-biden-hospitals [https://perma.cc/7R7W-P46L].

177 In response to *Dobbs*, some states, like California, Colorado, Michigan, New Jersey, and Vermont formally codified the right to abortion with new statutory protections or voter approved ballot initiatives to amend the state constitution *See, e.g.*, *Meeting the Moment Post-Dobbs: A Review of Proactive Abortion Policies Passed in States & Localities, June 24 – October 1, 2022*, NAT'L INST. FOR REPROD. HEALTH (Nov. 30, 2022), https://nirhealth.org/resources/meeting-the-moment-post-dobbs/ [https://perma.cc/UF3X-ZJES]; *After* Roe *Fell*, CTR. FOR REPROD. RTS., *supra* note 164; 2022 State Legislative Wrap-up, CTR. FOR REPROD. RTS. (Dec. 1, 2022), https://reproductiverights.org/2022-state-legislative-wrap-up [https://perma.cc/5VB5-S96P] (describing state legislation). More than a dozen states also passed comprehensive "interstate shield law[s]" to defend patients and providers against the reach of anti-abortion states' policies. *Id.* These interstate shield laws generally prohibit adverse professional consequences for protected-state abortion providers and bar state officials from assisting out-of-state prosecutions for legal, in-state abortion care. *See, e.g.*, S.B. 9077, 2022 Leg. Reg. Sess. (Ny. 2022); S.B. 9080, 2022 Leg. Reg. Sess. (Ny. 2022); S.B. 9079, 2022 Leg. Reg. Sess. (Ny. 2022). New York's law also creates a new private cause of action that arises generally when someone is targeted by litigation or criminal charges in another state for exercising reproductive rights in New York. S.B. 9039, 2022 Leg. Reg. Sess. (Ny. 2022).

178 Rani Molla, *How Americans Voted for Abortion Rights, in One Chart*, VOX (Nov. 9, 2022, 3:35 PM), https://www.vox.com/policy-and-politics/23449529/chart-abortion-rights-ballot-measures-midterm-elections-kentucky-results-2022 [https://perma.cc/5NKY-4PNY].

179 *Id.*

B. Public Health and Human Rights Regressions

Where courts have allowed abortion bans to stand, countless pregnant people and their families suffer grave harm. Although *Roe* and subsequent decisions were not enough to secure robust and equal access to abortion across the country, the retraction of the rights those cases secured has further destroyed abortion access. States' threatened enforcement has forced clinics to close or significantly restrict abortion services, compelling many pregnant people to try to overcome significant financial and travel obstacles to access care[180] or self-manage abortion (which is medically safe, but carries legal risk),[181] or else carry their pregnancies to term and go through childbirth. This reality endangers pregnant people's health, lives, and liberty, and violates human rights.[182]

The decision's impact on abortion access will continue to fall hardest on people in the U.S. who already face discriminatory obstacles to health care—particularly Black, Indigenous, and other people of color, people with disabilities, people in rural areas, young people, undocumented people, and those with limited financial resources.[183] About three-fourths of all

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180 In the first 100 days following *Dobbs*, 66 clinics in 15 states with abortion restrictions stopped offering abortions; 26 of those clinics "shut down entirely." Marielle Kirstein, et al., *100 Days Post-Roe: At Least 66 Clinics Across 15 US States Have Stopped Offering Abortion Care*, GUTTMACHER INST. (Oct. 6, 2022), https://www.guttmacher.org/2022/10/100-days-post-roe-least-66-clinics-across-15-us-states-have-stopped-offering-abortion-care [https://perma.cc/2FMS-D4KN]. *See also Communities Need Clinics: The New Landscape of Independent Abortion Clinics in the United States*, ABORTION CARE NETW., https://abortioncarenetwork.org/wp-content/uploads/2022/12/communities-need-clinics-2022.pdf [https://perma.cc/W9DF-HBZF] (last visited Jan. 5, 2023) (describing how *Dobbs* affected independent clinics).

181 *See* Brief of Experts, Researchers, and Advocates Opposing the Criminalization of People Who Have Abortions as Amici Curiae in Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392) (describing prosecutions of people for pregnancy outcomes).

182 There is extensive ongoing research on the long-term effects of *Dobbs*. Through a two-year longitudinal study, Advancing New Standards in Reproductive Health (ANSIRH) and the University of California, San Francisco are investigating post-*Roe* economic and health consequences. *Health and Economic Consequences of the End of Roe*, ANSIRH, https://www.ansirh.org/research/ongoing/health-and-economic-consequences-end-roe [https://perma.cc/DFK2-3AQQ] (last visited Jan. 4, 2023). These same institutions are also compiling stories from medical providers regarding the standard of care in the aftermath of *Dobbs*. *See Dobbs Impact Study*, ANSIRH, https://carepostroe.ucsf.edu/ [https://perma.cc/P7K6-3G39] (last visited Jan. 4, 2023) (describing plan to study clinic care after *Dobbs*).

183 *See, e.g.*, Brief of Organizations Dedicated to the Fight for Reproductive Justice as Amici Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392) (discussing barriers

abortions in the U.S. are sought by patients who are poor or have low incomes.[184] Before *Dobbs*, women living in poverty were already more likely to live farther away from abortion providers than women living above the federal poverty level.[185] Many low-income people who seek abortion care do not own cars, and public transportation options may be limited, inefficient, inaccessible, or unavailable to them.[186] With state bans in effect and clinics shuttered, people seeking abortion must now travel even farther—sometimes across multiple state lines—to reach a clinic, adding to the financial hardship many already experience.[187] Indeed, researchers have found that travel time to abortion clinics has increased significantly in the post-*Dobbs* period.[188] This disproportionately affects women of color, including an estimated 6.5 million Latinas who live in the 26 states that have

people of color and other marginalized people face barriers to fully realizing right to reproductive autonomy, including to access abortion, which would be worsened by a ruling upholding Mississippi's ban); Brief of Cecilia Fire Thunder, et al., as Amici Curiae Supporting Respondents, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (arguing that "upholding the . . . abortion ban [would] open yet another dark chapter of depriving Native people the right and dignity to decide if, when, and how to have a family"); Brief of The Autistic Self Advocacy Network & the Disability Rights Education and Defense Fund as Amici Curiae Supporting Respondents, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (discussing importance of constitutional protection for bodily autonomy for people with disabilities).

184 One study shows that 49 percent of patients were below the federal poverty level, and an additional 25 percent were under 200 percent of the federal poverty level. Jenna Jerman, et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER INST. (May 2016), (Table 1), https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014 [https://perma.cc/589G-B8KP].

185 Dan Keating et al., *Abortion Access is More Difficult for Women in Poverty*, WASH. POST (July 10, 2019), https://www.washingtonpost.com/national/2019/07/10/abortion-access-is-more-difficult-women-poverty/?utm_term=.f5a1cc0c1d91 [https://perma.cc/5NL6-3Q5Q].

186 *Id.*

187 *See* Brief of Economists as Amici Curiae in Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392) (discussing the economic impact of abortion access on women); Brief of Abortion Funds & Practical Support Orgs. As Amici Curiae in Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (discussing barriers to abortion access, including barriers that prevent people from accessing abortion before 15 weeks); Brief of California Women's Law Ctr. As Amici Curiae in Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (discussing that state restrictions on abortion compel people to try to seek out care where it remains accessible, including traveling out of state, which can be a significant hardship).

188 The researchers looked at states with existing total abortion bans or "6-week abortion bans" in effect on September 30, 2022. Benjamin Rader, et al., *Estimated Travel Time and Spatial Access to Abortion Facilities in the US Before and After the* Dobbs v. Jackson Women's Health Decision, 328 JAMA 2041 (2022). *See also* Caitlin Myers et al., Abortion Access Dashboard, abortionaccessdashboard.org (last updated Mar. 23, 2023) (ongoing effort to track travel changes in distance to abortion facilities).

banned or will likely try to ban abortion.[189] For many, the barriers to travel will simply be too high.

Abortion bans and restrictions severely impact people's ability to access the full range of reproductive healthcare, regardless of their desired pregnancy outcome. This includes fertility care, care for miscarriage management, and care needed for pregnancy complications. By targeting providers, the laws sow confusion and fear of prosecution or civil liability, driving healthcare professionals to delay or refuse necessary, appropriate treatment, which can put patients at grave risk.[190] Already, clinicians have denied or delayed needed care as they navigate ambiguous and narrow exceptions for medical emergencies.[191] This has profound psychological and physical effects on patients, who have been forced to, for example, endure riskier procedures and surgeries to confirm fetal nonviability[192] or suffer through ongoing miscarriages (increasing the risk of severe bleeding

189 *State Abortion Bans Threaten 6.5 Million Latinas*, NAT'L LATINA INST. FOR REPROD. JUST. (Nov. 2022), https://www.nationalpartnership.org/our-work/health/reports/state-abortion-bans-threaten-latinas.html?utm_source=nbc&utm_medium=referral&utm_campaign=hj_dobbs [https://perma.cc/AY8V-B2H5].

190 *See, e.g.*, Selena Simmons-Duffin, *Her Miscarriage Left Her Bleeding Profusely. An Ohio ER Sent Her Home to Wait*, NPR (Nov. 15, 2022, 12:01 PM), https://www.npr.org/sections/health-shots/2022/11/15/1135882310/miscarriage-hemorrhage-abortion-law-ohio [https://perma.cc/XGV7-BBNG]; *see also* June Med. Servs. v. Landry, NO. C-720988 (19th Jud. Dist. Ct. La., July 15, 2022), Affidavits in Support of Plaintiffs' Motion for Preliminary Injunction, Ex. E (Affidavit of Jennifer L. Avegno, M.D.) ¶ 16 ("Physicians and administrators have expressed significant concerns and questions around what procedures can be used for miscarriage management and when, what procedures can be used to remove a stillborn fetus and when, and how they are supposed to interpret and determine whether a patient qualifies for the life and health of the mother exception. There is complete lack of clarity and confusion among the medical community on the ground."); Ex. M (Affidavit of Nina J. Breakstone, M.D.) ¶ 10 ("In just one week since the *Dobbs* decision, I know of doctors in other states who have caused women to delay presentation in the emergency department, for fear of being accused of attempting to induce abortion."); Ex. P, (Aff. of Anna M. White, M.D.) ¶ 7 ("I have contemplated scenarios where either I have to make the ethical choice to care for a patient, and face jail time for it, or refuse necessary, appropriate care in order to avoid prosecution.").

191 *See, e.g.*, J. David Goodman & Azeen Ghorayshi, *Women Face Risks as Doctors Struggle With Medical Exceptions on Abortion*, N.Y. TIMES (June 20, 2022), https://www.nytimes.com/2022/07/20/us/abortion-save-mothers-life.html [https://perma.cc/8HUB-YNNJ]; Kate Zernike, *Five Women Sue Texas Over the State's Abortion Ban*, N.Y. TIMES (March 6, 2023), https://www.nytimes.com/2023/03/06/us/texas-abortion-ban-suit.html [https://perma.cc/9PA2-PT3Q].

192 Frances Stead Sellers & Fenit Nirappil, *Confusion Post-Roe Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2022, 9:09 AM), https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care/ [https://perma.cc/CR36-AXWV].

and infections) for longer than needed.[193] Pharmacies have also denied patients medicine to manage acute non-pregnancy conditions due to their fear of prosecution.[194]

This chaos and confusion, too, disproportionately impacts Black, Indigenous, and other people of color, who face the greatest health risks in pregnancy and childbirth due to structural racism, inadequate access to services, and underinvestment in overall care, and who often experience discrimination, ill-treatment, abuse, and coercion in maternal health care settings.[195] A recent study estimated that 39% of counties in abortion-restriction states may be maternity care deserts. It also found that, in 2020, maternal death rates were 62% higher in abortion restriction states than in abortion-access states.[196]

Marginalized communities also will disproportionately feel the long-term brunt of states' criminalizing abortion care. Although it is medically safe for people to end their pregnancies at home with abortion pills,[197] it is

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193 *Id.*; *see also, e.g.*, Rosemary Westwood, *Bleeding and in Pain, She Couldn't Get 2 Louisiana ERs to Answer: Is It a Miscarriage?*, NPR (Dec. 29, 2022, 5:00 AM), https://www.npr.org/sections/health-shots/2022/12/29/1143823727/bleeding-and-in-pain-she-couldnt-get-2-louisiana-ers-to-answer-is-it-a-miscarria [https://perma.cc/89H7-GFE6].

194 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/ [https://perma.cc/N949-3J3M].

195 *See, e.g.*, Jamila K. Taylor, *Structural Racism and Maternal Health Among Black Women*, 48 J. L., MED. & ETHICS 506 (2020); Saraswathi Vedam, et al., *The Giving Voice to Mothers Study: Inequity and Mistreatment During Pregnancy and Childbirth in the United States*, 16 REPROD. HEALTH 77 (2019); Judith A. Lothian, *The Continued Mistreatment of Women During Pregnancy and Childbirth*, 28 J. PERINATAL EDUC. 183 (2019).

196 *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, THE COMMONWEALTH FUND (Dec. 14, 2022), https://www.commonwealthfund.org/publications/issue-briefs/2022/dec/us-maternal-health-divide-limited-services-worse-outcomes [https://perma.cc/7GRH-TY6P].

197 Since *Dobbs*, there has been a surge requests for abortion pills by people seeking to self-manage their abortions. Aid Access, an organization that distributes abortion medication internationally, received an average of 83 requests per day from the United States between September 2021 and May 2022. After the *Dobbs* decision—specifically between June 24 and August 2022—they received an average of 214. Shawna Chen, *Mail-order Abortion Pill Requests Surged after* Roe *Reversal, Study Finds*, AXIOS (Nov. 1, 2022), https://www.axios.com/2022/11/01/abortion-pills-roe-reversal-study [https://perma.cc/9M87-8T66]. *See also* Abigail R.A. Aiken et al., *Requests for Self-managed Medication Abortion Provided Using Online Telemedicine in 30 US States Before and After Dobbs v Jackson Women's Health Organization Decision*, 328 JAMA 1768 (2022).

not without legal risk.[198] Even before *Dobbs*, many people in the U.S.—but disproportionately Black, Indigenous, and other people of color and immigrant women, and people experiencing poverty—were subject to the misuse of criminal prosecution or other punitive legal action because of their pregnancy or an outcome of their pregnancy.[199] The loss of federal constitutional protection for abortion dramatically increases the risk of criminal prosecutions among these communities.

This profound retrogression of abortion rights violates human rights. Over the past 25 years, the international community has clarified that abortion is a fundamental human right, critical to ensuring health, justice, and equality.[200] Jurisprudence from international human rights bodies establishes that access to abortion is necessary to protect the rights to life, health, non-discrimination, information, privacy, and freedom from ill-treatment, harmful practices and gender-based violence.[201] In March 2022, the World Health Organization, the leading global public health expert body, published an updated Abortion Care Guideline which recognizes

198 *See* Brief of Experts, Researchers, and Advocates Opposing the Criminalization of People Who Have Abortions as Amici Curiae in Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392) (describing incidents in which U.S. prosecutors targeted people for pregnancy outcomes, including self-managing abortion).

199 In the vast majority of cases, criminal prosecutions following an abortion or miscarriage take place without legal authority. *See, e.g., Arrests and Prosecutions of Pregnant Women, 1973-2020*, NAT'L ADVOCS. FOR PREGNANT WOMEN (Sept. 18, 2021), https://www.nationaladvocatesforpregnantwomen.org/arrests-and-prosecutions-of-pregnant-women-1973-2020/ [https://perma.cc/2GMS-PS83]. *See also* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH. POL., POL'Y, & L. 299 (2013). Prosecutors use a variety of laws, from criminal child endangerment laws, to feticide laws, to antiquated laws criminalizing abortion, to prosecute people who have ended or lost a pregnancy or for other actions or omissions during a pregnancy, including people struggling with substance use. *Id.* at 322–24.

200 *See generally* Rebecca Brown et al., *A Sexual and Reproductive Health and Rights Journey: From Cairo to the Present*, 27 SEXUAL AND REPROD. HEALTH MATTERS 326 (2019).

201 *See e.g.,* CTR. REPROD. RTS., BREAKING GROUND: TREATY MONITORING BODIES ON REPRODUCTIVE RIGHTS 24, 26 (2016), https://reproductiverights.org/wp-content/uploads/2020/12/GLP_TMB_Booklet_2016_Web.pdf [https://perma.cc/2LMS-72LT], *and* CTR. FOR REPROD. RTS., BREAKING GROUND 2020: TREATY MONITORING BODIES ON REPRODUCTIVE RIGHTS, 12, 24–25 (2019), https://reproductiverights.org/sites/default/files/documents/Breaking-Ground-2020.pdf [https://perma.cc/8FUT-ACST].

abortion as an essential health service that is necessary to the realization of human rights.[202]

Indeed, the global human rights community has condemned the *Dobbs* decision and regression on abortion rights in the United States more generally as a violation of human rights. Immediately upon release of the decision, then UN High Commissioner for Human Rights Michelle Bachelet reiterated human rights protections for abortion and the impact that the decision will have on the fundamental rights of millions within the United States, particularly people with low incomes and people belonging to racial and ethnic minorities.[203] UN independent human rights experts, including the UN Working Group on Discrimination Against Women and Girls, the UN Special Rapporteur on Health, and the UN Special Rapporteur on Violence Against Women, similarly denounced the decision.[204] At the conclusion of a human rights review of the United States in August 2022, the UN Committee on the Elimination of Racial Discrimination noted deep concerns with the *Dobbs* decision and recommended that the United States address the disparate impact that it will have on racial and ethnic minorities, Indigenous women, and those with low incomes.[205]

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202 *See* WORLD HEALTH ORG., ABORTION CARE GUIDELINE, 13–14 (2022), https://www.who.int/publications/i/item/9789240039483 [https://perma.cc/N7NS-8ADV], *and see generally* CTR. FOR REPROD. RTS., WHO'S NEW ABORTION GUIDELINE: HIGHLIGHTS OF ITS LAW AND POLICY RECOMMENDATIONS (Mar. 2022), https://reproductiverights.org/wp-content/uploads/2022/03/CRR-Fact-sheet-on-WHO-Guidelines.pdf [https://perma.cc/VT66-64HY] (identifying "that public health evidence supports . . . international human rights law" establishment in finding that "abortion access is a human right").

203 Statement, Michelle Bachelet, UN High Commissioner for Human Rights, Bachelet on US Supreme Court Ruling on Dobbs v Jackson Women's Health Organization (June 24, 2022), https://www.ohchr.org/en/statements/2022/06/bachelet-us-ruling-dobbs-v-jackson-womens-health-organization [https://perma.cc/P9SD-844U].

204 Statement, Working Group on Discrimination Against Women and Girls, Joint Web Statement by UN Human Rights Experts on Supreme Court Decision to Strike Down Roe v. Wade (June 24, 2022), https://www.ohchr.org/en/statements/2022/06/joint-web-statement-un-human-rights-experts-supreme-court-decision-strike-down [https://perma.cc/J78F-32LA].

205 *See* Comm. on the Elimination of Racial Discrimination, *International Convention on the Elimination of All Forms of Racial Discrimination,* at 8-9, ¶¶ 35-36, U.N. Doc. GE.22=14978(E) (Sept. 21 2022), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2FUSA%2FCO%2F10-12&Lang=en [https://perma.cc/9TR6-4MZV].

IV. LOOKING TO THE FUTURE: REALIZING THE PROMISE OF THE FOURTEENTH AMENDMENT

In the aftermath of *Dobbs*, it is imperative to rebuild law and jurisprudence to align with the promise of the Fourteenth Amendment and to protect the reproductive autonomy rights of everyone. Contrary to the U.S. Supreme Court's regressive ruling, longstanding constitutional values, principles, and precedent confirm the right to reproductive autonomy as a human right guaranteed by—and deeply grounded in—the Fourteenth Amendment of the U.S. Constitution.

Roe rightly held that the right to abortion is part of the Fourteenth Amendment's liberty guarantee. It recognized that decisions about childbearing rise to the level of constitutional importance and, in legalizing abortion, it advanced women's social, political, and economic status. And it is part of the constitutional fabric of related fundamental rights, including the right to contraception, sexual intimacy, and marriage for same-sex partners.[206]

But it is also true that *Roe* was never enough, especially as it was constricted in later cases. Since well before *Dobbs,* abortion has been widely inaccessible in wide swaths of the country. Lack of access has always been the reality for people living on low incomes, disproportionately harming Black and Indigenous women, other people of color, people with disabilities, immigrants, young people, and LGBTQIA+ people.[207] Reproductive justice advocates, led by women of color, have long chronicled and challenged this disconnect between legal rights and lived experiences.[208]

And although *Roe* offered a foundation for reproductive autonomy rights beyond abortion, constitutional law remained underdeveloped in relation

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206 *See e.g.,* Roe *and Intersectional Liberty Doctrine*, CTR. FOR REPROD. RTS., https://reproductiverights.org/wp-content/uploads/2020/12/Liberty-Roe-Timeline-spread-for-print.pdf [https://perma.cc/V8BE-VBAY].

207 *See* Brief of Organizations Dedicated to the Fight for Reproductive Justice as Amici Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392) (describing the barriers that marginalized people in Mississippi and Louisiana face barriers to realizing their right to reproductive anatomy); *see also supra* notes 183–187.

208 *See generally* SisterSong, *Understanding Reproductive Justice*, https://d3n8a8pro7vhmx.cloudfront.net/rrfp/pages/33/attachments/original/1456425809/Understanding_RJ_Sistersong.pdf?1456425809https://d3n8a8pro7vhmx.cloudfront.net/rrfp/pages/33/attachments/original/1456425809/Understanding_RJ_Sistersong.pdf?1456425809 [https://perma.cc/6SNU-6WS9].

to the right to have a healthy pregnancy, safely raise children, and live without fear of being prosecuted for conduct during pregnancy or for experiencing miscarriages or stillbirths.

Thus, as advocates and jurists begin the necessary rebuilding of a more durable constitutional framework for reproductive autonomy, the Fourteenth Amendment's guarantee against state deprivation of liberty, including a right to privacy and to control one's body, must remain a core pillar.

But it is not the only pillar. Multiple legal rights are at stake when the government restricts reproductive autonomy. These include protections against sex, race, and other intersecting forms of discrimination, and against restrictions that deny people their lives, including their ability to live a life with dignity. A more robust understanding of the Fourteenth Amendment, grounded in the Amendment's life, liberty, and equal protection clauses and in harmony with international human rights law[209] and comparative

209 International human rights law protects people's access to reproductive health care and the exercise of reproductive decision-making. The United States has ratified three core human rights treaties with important protections for reproductive autonomy: the International Covenant on Civil and Political Rights (ICCPR), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171; the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85; and the Convention on the Elimination of All Forms of Racial Discrimination (CERD), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195. The U.S. has signed but not yet ratified several other human rights treaties that likewise contain critical protections for reproductive autonomy, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13; and the Convention on the Rights of Persons with Disabilities (CRPD), *adopted on* Dec. 13, 2006, 2515 U.N.T.S. 3. The U.S. has attached conditions to the human rights treaties it has ratified so as to preclude the treaties' direct enforcement in litigation in U.S. courts or in actions against the United States before UN human rights treaty bodies (committees of independent experts that monitor implementation of the human rights treaties). *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341 (1995); BREAKING GROUND 2020: TREATY MONITORING BODIES ON REPRODUCTIVE RIGHTS, *supra* note 201.

jurisprudence,[210] can be the basis for strengthening reproductive autonomy rights going forward.[211]

A. Retaining the Right to Liberty

The Court was correct decades ago when it concluded that the Fourteenth Amendment's Liberty Clause protects individual decisions about whether and when to have a child. *Roe* was part of a century of cases interpreting the Constitution's explicit protection for liberty to include the right to bodily integrity and to make personal decisions related to family, marriage, and childrearing.[212] State courts throughout the country have likewise consistently held that rights to bodily autonomy and personal decision-making in matters related to childbearing and intimate

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210 Human rights law and comparative constitutional law can provide constructive grounding for a more robust constitutional right to reproductive autonomy in the United States, as international law and the reasoning of international and regional human rights bodies, UN independent human rights experts, and other national courts can provide useful guidance and persuasive authority for U.S. courts assessing constitutional questions. *See* Lawrence v. Texas, 539 U.S. 558, 572–73 (2003) (looking to the European Court of Human Rights among other sources in holding that a Texas law criminalizing consensual sex between people of the same sex violates the liberty interests protected by the Fourteenth Amendment); *see also* Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (citing international and comparative foreign law as further support and confirmation for the Court's holding that the juvenile death penalty violates the 8th Amendment); Graham v. Florida, 560 U.S. 48, 80 (2010) (citing international and comparative law in a case challenging the practice of sentencing juveniles to life in prison without the possibility of parole, noting the U.S. Supreme Court's "longstanding practice" of looking "beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual"); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (citing international disapproval of the practice of executing developmentally disabled individuals, as detailed in the filing of amicus European Union). *See also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Cardozo Memorial Lecture: Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 12–88 (2006) (cataloging the ways in which the Supreme Court has drawn on foreign and international law in cases throughout its history).

211 The judicial opinions, scholarship and human rights and comparative law grounding the analysis in this section are explored more fully in a report published by the Center for Reproductive Rights shortly after the *Dobbs* decision: CTR. FOR REPROD. RTS., *The Constitutional Right to Reproductive Autonomy: Realizing the Promise of the 14th Amendment* (2022), https://reproductiverights.org/wp-content/uploads/2022/07/Final-14th-Amendment-Report-7.26.22.pdf [https://perma.cc/LN4K-FKTZ].

212 *See* Union Pacific v. Botsford, 141 U.S. 250, 251 (1891); *see also* CTR. FOR REPROD. RTS., Roe *and the Intersectional Liberty Doctrine* (2018), https://reproductiverights.org/wp-content/uploads/2020/12/Liberty-Roe-Timeline-spread-for-print.pdf [https://perma.cc/ABJ6-MUZX] (discussing Supreme Court liberty cases dating back to 1923).

relationships are protected under the liberty guarantees of their independent state constitutions.[213]

International law, too, requires that governments protect, respect, and fulfill the right to make personal decisions, including regarding reproductive capacity.[214] Indeed, "[t]he right of women to sexual and reproductive health is indispensable to their autonomy and their right to make meaningful decisions about their lives and health."[215] Governments must guarantee that these decisions are free of coercion, discrimination, violence, intimidation, and deception.[216] People are deprived of dignity and autonomy when they are restricted from decision-making over their reproductive capacity.[217]

These well-established rights of personal decision-making and bodily integrity support a broad right to reproductive autonomy, including the right to have or not have children, to make one's own health care decisions related to pregnancy, and the rights to access contraception and abortion. A person's decisions related to pregnancy require and deserve constitutional protection under the Liberty Clause because such decisions are inherently bound up with bodily autonomy and dignity – core components of the fundamental liberty right. In revoking the right to

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213 *See e.g.*, CTR. FOR REPROD. RTS., *State Constitutions and Abortion Rights* (July 2022), https://reproductiverights.org/state-constitutions-abortion-rights/ [https://perma.cc/D43B-QGMM] (cataloguing state court precedents that have established a strong, inclusive vision of reproductive autonomy).

214 *See* Report of the Comm. on the Elimination of Discrimination Against Women, *Gen. Recommendation 24: Article 12 of the Convention (Women and Health)*, in *Compilation of Gen. Comments and Gen. Recommendations Adopted by Human Rights Treaty Bodies*, ¶¶ 12(d), 17, 31(e), U.N. Doc. A/54/38/Rev.1, chap 1 (1999) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*] (urging that States parties should "[r]equire all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice"); *see generally* Comm. on Econ., Soc. and Cultural Rights, *Gen. Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the Int'l Covenant on Economic, Social, and Cultural Rights)*, ¶¶ 25, U.N. Doc. E/C.12/GC/22 (2016) [hereinafter CESCR, *Gen. Comment No. 22*] ("Due to women's reproductive capacities, the realization of the right of women to sexual and reproductive health is essential to the realization of the full range of their human rights. The right of women to sexual and reproductive health is indispensable to their autonomy and their right to make meaningful decisions about their lives and health.").

215 CESCR, *Gen. Comment No.* 22, *supra* note 214, at ¶ 25.

216 *See id.* at ¶ 29.

217 Anand Grover (Special Rapporteur), *Interim Rep. of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 21, U.N. Doc. A/66/254 (2011); s*ee also* CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 214, at ¶ 31(e).

abortion as a component of personal liberty, the Court in *Dobbs* undermines decades of jurisprudence about the meaning of liberty. Unchecked, the *Dobbs* analysis will justify further erosion of related rights and manipulation of liberty doctrine—as one lower court has previewed.[218] Retaining and building upon the rich body of jurisprudence preceding *Dobbs* is crucial to the future of reproductive autonomy and liberty rights more broadly.

B. Realizing the Right to Equal Protection

Historians and scholars, in particular Black women scholars and advocates, have extensively documented and analyzed the ways government control of reproductive capacity serves as a tool to subordinate women, people of color, people living on lower incomes and other disfavored groups.[219] A correct understanding of the right to equal protection prohibits the government from regulating reproductive capacity and decision making in these and other discriminatory ways. And a future jurisprudence that recognizes and promotes reproductive autonomy as a matter of equal protection would move the U.S. toward greater alignment with international human rights law's robust protections for the right to equality and non-discrimination.

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218 *See* Deanda v. Becerra, No. 2:20-CV-092-Z, 2022 WL 17572093, at *13 (N.D. Tex. Dec. 8, 2022). In *Deanda*, Trump-appointed Judge Matthew J. Kacsmaryk cites *Dobbs* and its version of history and tradition to simultaneously protect a liberty right consistent with conservative traditionalist views, while calling into doubt others. He holds that a parent's right "to direct the upbringing of their children" deserves protection when it comes to blocking their children's access to contraception, but pointedly dismisses the possibility that it includes parental decisions to support young people's access to gender-affirming care. 2022 WL 17572093, at *15 n.14 (citing Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (M.D. Ala. 2022) (entering preliminary injunction against state law barring access to gender affirming care for minors)). And he goes even further. In dicta, he also invokes Justice Thomas's *Dobbs* concurrence to call into doubt the established right to contraception as recognized in Griswold v. Connecticut, 381 U.S. 479 (1965), and extended to minors in Carey v. Pop. Servs. Int'l., 431 U.S. 678 (1977). *See Deanda*, 2022 WL 17572093 at *13 n.12 (citing *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring)).

219 *See generally* ROBERTS, *supra* note 33; *see also* Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392); Brief of Reproductive Justice Scholars as Amici Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

For centuries, the stereotype that a woman's primary role was to be a wife and mother[220] justified numerous discriminatory laws that perpetuated women's second-class status, including bans on abortion and contraception,[221] as well as laws that limited women's ability to own property,[222] to vote,[223] to pursue an education,[224] to work[225] and to participate fully in civic life.[226]

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220 Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 729 (2003) (recognizing that the assumption that "a woman is, and should remain, 'the center of home and family life,'" had long shaped the law and the Court's own decisions) (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)); *see also* Frontiero v. Richardson, 411 U.S. 677, 684–85 (1973) (discussing "our Nation['s] . . . long and unfortunate history of sex discrimination" often grounded in "gross, stereotyped distinctions between the sexes").

221 *See* Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae In Support of Respondents at 13–16, 30, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (discussing campaign in late 1800s to criminalize abortion on grounds that "nature's laws" required women to be wives and mothers and emphasizing campaign's goal to increase birthrate of Protestant women, as compared to "foreign" and Catholic women, based on antiimmigrant, anti-Catholic views); Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-First Century*, 47 CONN. L. REV. 971, 974, 979–92 (2015) (discussing campaigns and ensuing legislation, including the "federal Comstock Act, which banned the distribution of contraception and information regarding contraception, as well as state-level mini-Comstock laws"); *see generally* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection,* 44 STAN. L. REV. 261 (1992).

222 *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book the First: Chapter the Fifteenth: Of Husband and Wife (1765–1769) (coverture laws, adopted from English common law, dictated that a married woman was "covered" under her husband's legal identity and therefore did not have her own legal identity, restricting her from owning property and obtaining other legal rights).

223 *See* U.S. CONST. amend. XIX (granting women the right to vote as ratified in 1920).

224 See United States v. Virginia (VMI), 518 U.S. 515, 536 & n.9 (1996) (describing historic exclusion of women from higher education based on view that "physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs" and "incapacitate[] them for the adequate performance of the natural functions of their sex").

225 *See, e.g.,* Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW, et al. v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991) (striking down employer's "fetal-protection policy," which barred women from certain jobs); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 648 (1974) (striking down as unconstitutional under Fourteenth Amendment's Due Process Clause public school policies that required pregnant teachers to take unpaid leave beginning four or five months before their expected delivery date and in restricting circumstances and timing of when they could return to work).

226 *See* Hoyt v. Florida, 368 U.S. 57, 62 (1961) (justifying discriminatory policies regarding women jurors because a "woman is still regarded as the center of home and family life"); *see also* J.E.B. v. Alabama, 511 U.S. 127, 141–42 (1994) (recognizing history of sex discrimination in jury service and that many states had prohibited women from serving on juries or imposed barriers to their service until late into 20th century).

During slavery, reproductive control included forcing Black women to give birth for their oppressor's profit, under the cover of state laws that viewed them and their children as property and did not recognize the rape of enslaved women as a crime.[227] Later, in the 1900s, the United States government and many state governments targeted Black women's right to create their own families through federal and state sterilization programs, as well as with policies that penalized Black women for having children.[228]

Other women of color, too, experienced profound government abuse. Racially restrictive immigration policies like the Chinese Exclusion Act of 1882 and the Page Act of 1875 explicitly excluded Asian American women, including wives of those already living in the U.S., from entering the country and therefore controlled the ability of certain communities to bear and rear children.[229] Under the cover of concerns about immigration and welfare costs, in the mid-20th century, physicians routinely coercively sterilized Mexican American and Puerto Rican women, often after they gave birth in

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227 *See* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 90–91 (1998) ("We have seen that enslaved people in the United States could not form legally recognized marriages and that partnerships between them were disrupted by sale, hiring out, and apprenticeship. But as a tool of subordination and a disavowal of common humanity, . . . denial of parental ties, which touched each enslaved person at the moment of birth, impos[ed] a social construction by which s/he would be defined as a commodity rather than as the child of a family, community, and nation."); *see also* ROBERTS, *supra* note 33 at 29, 42, 54 ("Legislation giving the children of Black women and white men the status of slaves left female slaves vulnerable to sexual violation as a means of financial gain."); *see also* Brief of the Howard University School of Law Human and Civil Rights Clinic as Amicus Curiae In Support of Respondents at 6–7, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392).

228 *See* Brief of the Howard University School of Law Human and Civil Rights Clinic as Amicus Curiae In Support of Respondents at 12, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) ("The law thus endorsed both forced procreation and forced sterility for Black women."); *see also, e.g.*, Brief of Reproductive Justice Scholars as Amici Curiae In Support of Respondents at 20–26, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392) (describing legal history of reproductive control of Black women); Relf v. Weinberger, 372 F. Supp. 1196, 1199 (D.D.C. 1974) (in case challenging statutes and regulations authorizing sterilization under federal law on behalf of plaintiffs including Black women, the court found that in just "the last few years" approximately 100,000 to 150,000 people with low-incomes were "sterilized annually under federally funded programs," and that there was "uncontroverted evidence" that "an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization").

229 *See* Catherine Lee, *"Where the Danger Lies": Race, Gender, and Chinese and Japanese Exclusion in the United States, 1870–1924*, 25 SOCIO. F. 248 (2010).

public hospitals.[230] And "[p]hysicians in the Indian Health Service sterilized an estimated 25 to 42 percent of Native American women who were of childbearing age between 1970 and 1976 alone."[231] This sterilization abuse followed the government's actions in forcibly removing Native American children from their families and communities to send them to boarding schools in the late 19th and early 20th centuries.[232]

And beginning in the early 1900s, more than 30 states passed involuntary sterilization laws targeting people with actual or perceived disabilities and others in marginalized communities on the ground that those people "were socially inadequate and should be prevented from procreating."[233] Ignoring these egregious violations of reproductive autonomy, the U.S. Supreme Court upheld such a law over equal protection and due process challenges in *Buck v. Bell*, a decision that has never been overturned.[234] Although nearly all states have now repealed their involuntary sterilization statutes, most still permit forcible sterilization with prior judicial authorization.[235] And "disabled women, especially those with intellectual disabilities, are significantly more likely than nondisabled women to be sterilized and at younger ages."[236]

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230 *See* Declaration of Serena Mayeri, J.D., Ph.D., In Support of Plaintiffs' Motion for Partial Summary Judgment ¶ 22, Dobbs v. Jackson Women's Health Org, No. 3:18-cv-00171 (S.D. Miss. Apr. 29, 2021).

231 *Id.*; *see also* Brief of Cecilia Fire Thunder et al. as Amici Curiae In Support of Respondents at 14–17, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392); Sally J. Torpy, *Native American Women and Coerced Sterilization: On the Trail of Tears in the 1970s*, 24:2 AM. INDIAN CULTURE & RSRV. J., 1, 14 (2000).

232 *See* Rukmini Callimachi, *Lost Lives, Lost Culture: The Forgotten History of Indigenous Boarding Schools*, N.Y. TIMES (July 19, 2021), https://www.nytimes.com/2021/07/19/us/us-canada-indigenous-boarding-residential-schools.html [https://perma.cc/8993-FUAC] ("In the century and a half that the U.S. government ran boarding schools for Native Americans, hundreds of thousands of children were housed and educated in a network of institutions, created to 'civilize the savage.'").

233 Robyn M. Powell, *From Carrie Buck to Britney Spears: Strategies for Disrupting the Ongoing Reproductive Oppression of Disabled People*, 107 VA. L. REV. ONLINE 246, 250 (2021).

234 *See* Buck v. Bell, 274 U.S. 200, 207 (1927) (including maligned holding that "[i]t is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind"); *see also* Brief of the Autistic Self Advocacy Network and the Disability Rights Education and Defense Fund as Amici Curiae in Support of Respondents at 3–4, 7–10, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392) (documenting our country's history of denying people with disabilities control over their bodies); Powell, *supra* note 233, at 251 (discussing the facts behind *Buck* and the ramifications of the Court's holding).

235 Powell, *supra* note 233, at 252.

236 *Id.* at 254.

Just a decade ago, California involuntarily sterilized people who were incarcerated, a policy that disproportionately harmed women of color.[237] As recently as 2020, immigrant rights organizations filed a federal administrative complaint, and then federal court litigation,[238] documenting medical neglect and abuse in an Immigration and Customs Enforcement facility, including forced sterilization through non-consensual hysterectomies performed on those detained at the facility, who are disproportionately women of color.[239] And states have enforced civil or criminal penalties on people who experience miscarriages or stillbirths, or who engage in behaviors that allegedly threaten the health of their pregnancies, contrary to the recommendations of major medical organizations.[240] Invariably, it is women of color and others in marginalized communities who are targeted by the government with such punitive and harmful policies.[241]

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237 CAL. STATE AUDITOR REP. 2013-120, STERILIZATION OF FEMALE INMATES: SOME INMATES WERE STERILIZED UNLAWFULLY, AND SAFEGUARDS DESIGNED TO LIMIT OCCURRENCES OF THE PROCEDURE FAILED (2014), at 1, 37-38.

238 Complaint, Oldaker v. Giles, No. 7:20-cv-00224 (M.D. Ga. Dec. 21, 2020), https://clearinghouse.net/doc/111976/ [https://perma.cc/ZRU2-ZDF8] [hereinafter Complaint]; Administrative Complaint Re: Lack of Medical Care, Unsafe Work Practices, and Absence of Adequate Protection Against COVID-19 for Detained Immigrants and Employees Alike at the Irwin County Detention Center (Sept. 14, 2020), https://clearinghouse.net/doc/112017/ [https://perma.cc/F6DH-BLWN].

239 Complaint, *supra* note 238, at 1-2, 17-20; *see also* PRIYANKA BHATT ET AL., VIOLENCE & VIOLATION: MEDICAL ABUSE OF IMMIGRANTS DETAINED AT THE IRWIN COUNTY DETENTION CENTER (Sabrineh Ardalan et al. eds., 2021) (documenting "stories of women who were subjected to . . . non-consensual medical procedures at the ICDC"); Press Release, U.S. Dep't Homeland Sec., ICE to Close Two Det. Ctrs. (May 20, 2021), https://www.dhs.gov/news/2021/05/20/ice-close-two-detention-centers [https://perma.cc/N4MY-YWZ5] (discussing closure of the ICDC).

240 *See* NAT'L ADVOCATES FOR PREGNANT WOMEN, ARRESTS AND OTHER DEPRIVATIONS OF LIBERTY OF PREGNANT WOMEN, 1973-2020 (Sept. 2021), https://www.pregnancyjusticeus.org/wp-content/uploads/2021/09/Arrests-of-Pregnant-Women-1973-2020-Fact-Sheet.pdf [https://perma.cc/9SXG-FT35] (listing sources documenting criminal cases); Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Dec. 2020), https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period [https://perma.cc/C8FX-XJWA] (describing fetal assault laws and other forms of criminalization of pregnancy).

241 *See* Opposition to Criminalization, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, *supra* note 240; *see generally* MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD (2020) (discussing efforts to "criminaliz[e] women for miscarriages, stillbirths, and [allegedly] threatening the health of their pregnancies").

A brief exploration of three important ways in which equal protection doctrine can address these forms of reproductive oppression follows. While not exhaustive, it offers complimentary and reinforcing legal paths for building stronger constitutional protections for reproductive autonomy.

i. Sex stereotyping and gender discrimination

Modern day policies discriminating on the basis of pregnancy often have worked to deny, rather than advance, the equal status and rights of women and people capable of pregnancy.[242] This is a form of sex discrimination.[243] As the Court has held, classifications that perpetuate the second-class status of women, or are based on stereotypes about men, women, or traditional gender roles, including stereotypes about women's ability to make their own decisions, constitute sex discrimination and are legally invalid. [244]

Despite some erroneous earlier decisions of the Court, and dicta in the *Dobbs* decision notwithstanding, Supreme Court precedent and judicial opinions support an understanding of equal protection that requires heightened scrutiny when the government discriminates against individuals who are pregnant or who have the capacity to become pregnant.[245] Indeed,

242 *See infra* note 245 and accompanying text; *see also e.g.*, Almerico v. Denney, 532 F. Supp. 3d 993, 1002 (D. Idaho 2021) (challenge to state law overriding advanced directives not to administer life-saving treatment for pregnant people)s

243 *See* Siegel, *Reasoning from the Body*, *supra* note 221, at 265.

244 *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1692 (2017) ("For close to a half century . . . this Court has viewed with suspicion laws that rely on 'overbroad generalizations about the different talents, capacities, or preferences of males and females.'" (internal citation omitted)); *VMI*, 518 U.S. 515, 540–42 (1996) (rejecting Virginia's assertions about "tendencies" of men and women as valid justification for excluding all women from VMI's unique, adversarial educational method); Craig v. Boren, 429 U.S. 190, 197–204 (1976) (summarizing Court's sex discrimination cases and highlighting anti-stereotyping language).

245 *See* Nev. Dep't Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003) ("Here, however, Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny."); *VMI*, 518 U.S. at 533 (characterizing laws that classify based on pregnancy as examples of laws that classify based on sex). *Hibbs* and *VMI* do not mention Geduldig v. Aiello, 417 U.S. 484 (1974), and indicate that *Geduldig* has little continued relevance. Although some rely on *Geduldig* for the argument that pregnancy classifications do not classify based on sex, *Geduldig* stated only "it does not follow that every legislative classification concerning pregnancy is a sex-based classification." *Id.* at 496 n.20. In any event, *Geduldig* was wrongly decided, and the Supreme Court has not relied on it in a majority opinion deciding an equal protection case in over 40 years. *See generally* Reva Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. (SPECIAL ISSUE) 167 (2020) (examining "how courts have responded to the equal protection claims of pregnant citizens over the century women were enfranchised"); *see also The Constitutional Right to Reproductive Autonomy*, *supra* note 211, at 20–26 (discussing federal and state cases and citing scholarship).

the dicta in *Dobbs* suggesting the foreclosure of sex discrimination claims against abortion bans or against *any* non-pretextual "regulation of a medical procedure that only one sex can undergo," ignores the development of sex discrimination law and the Court's jurisprudence over the past 50 years.[246] It is this body of case law, not *Dobbs*, that provides the relevant legal framework to guide courts considering sex discrimination claims in future reproductive rights cases. And under this framework, equal protection requires heightened scrutiny of government controls over reproductive and familial decision-making that reinforce women's legal, social, and economic inferiority.

ii. Race discrimination

As reproductive justice advocates and scholars have long made clear, reproductive autonomy is squarely a matter of racial equality. The history outlined above[247] only begins to illustrate the myriad state interventions in virtually every aspect of reproduction and family life—sexual activity, contraception, fertility, pregnancy, abortion, childbirth, adoption, and parenting—that subordinate Black women and their families, Indigenous communities, and other people of color.[248] And it is these types of interventions, as Dorothy Roberts explains in *Killing the Black Body*, that "perpetuate racial subordination through the denial of procreative rights," and "threaten both racial equality and privacy at once."[249]

Thus, the constitutional guarantee of equal protection also requires redressing reproductive oppression targeting Black women and other people of color and the ongoing impact of systemic racism on reproductive health and rights.

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246 *Compare* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245 (2022), *with* Brief of Equal Protection Constitutional Law Scholars et al. as Amici Curiae in Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392); *see also* Reva Siegel, Serena Mayeri, and Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 1 (2022) (setting out equal protection arguments for abortion rights).

247 *See supra* notes 219-241 and accompanying text.

248 *See, e.g.,* ROBERTS, *supra* note 33; LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 124 (Rickie Solinger et al. eds., 2017); REPRODUCTIVE RIGHTS AND JUSTICE STORIES (Melissa Murray et al. eds., 2019); Khiara M. Bridges, *Towards a Theory of State Visibility: Race, Poverty, and Equal Protection*, 19.4 COLUM. J. OF GENDER & L. 965 (2010); GOODWIN, *supra* note 241; BRIANNA THEOBALD, REPRODUCTION ON THE RESERVATION: PREGNANCY, CHILDBIRTH, AND COLONIALISM IN THE LONG TWENTIETH CENTURY (2019).

249 ROBERTS, *supra* note 33, at 308.

As part of the Reconstruction Amendments, the Fourteenth Amendment was meant to protect against racial subjugation and discrimination, including states' racially oppressive control of reproduction.[250] Contrary to this purpose, the U.S. Supreme Court's modern race discrimination jurisprudence, including its judicially-imposed intent standard,[251] fails to adequately account for systemic discrimination and the racially discriminatory effects of indifference, devaluation, and both intentional and unintentional racial bias.[252] And there is grave concern that the current Court will continue to make it harder to remedy race discrimination on multiple fronts—as soon as this term.[253] However, to the extent the Court retains an Equal Protection legal test requiring courts to engage in a "sensitive inquiry" of all direct and circumstantial evidence of discriminatory intent,[254] advocates and lower courts can engage this inquiry

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250 *See* DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES, *supra* note 77, at 90–91; *see also* Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, *supra* note 77; Davis, *Overturning Abortion Rights Ignores Freedoms Awarded After Slavery's End, Says Peggy Cooper Davis*, *supra* note 77.

251 *See* Washington v. Davis, 426 U.S. 229, 240 (1976) (requiring proof of "a racially discriminatory purpose" to warrant constitutional remedy under the Equal Protection Clause). Three years later, in Personnel Administrator of Massachusetts v. Feeney, a sex discrimination case, the Court recast the intent requirement of *Davis* in terms akin to a desire to cause harm or malice. 442 U.S. 256, 279 (1979).

252 For a critique of why the modern intent doctrine contravenes the constitutional goal of equal protection and a corrective reading of *Davis*, see Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1785–86 (2012) (arguing that the Court's decision in *Davis*, "did not demand proof regarding individual mindsets," but formalized a longstanding "contextual approach to proving intent," which was a "broadly informed inferential approach" and one that worked reasonably well at detecting structural race discrimination). *See also* Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1213, 1225–31 (2018) (stating that the "central role of intent in the doctrinal framing of individual rights against unconstitutional discrimination" is not grounded in or required by the text of the Constitution and discussing unsettled doctrine of discrimination in late twentieth century and use of disparate impact standard by lower courts before *Davis*).

253 *See, e.g.*, James Romoser, *The Court is Poised to Set Jurisprudence on Race for Generation—and Not Just in Affirmative Action*, SCOTUSBLOG (Oct. 30, 2022, 7:00 PM) https://www.scotusblog.com/2022/10/the-court-is-poised-to-set-jurisprudence-on-race-for-generations-and-not-just-in-affirmative-action [https://perma.cc/523C-N8JK]; *see generally* Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23 (2022) (arguing the Roberts' Court has reconceptualized race discrimination—and not only in equal protection cases—toward regressive ends to deny constitutional remedies to people of color, while recognizing new claims of racial harm claimed by white litigants); *id.* at 153-69 (predicting three possible paths by which the current Court might move to eliminate constitutional or statutory remedies under disparate impact doctrine to the detriment of racial justice).

254 *See* Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 254, 265–66 (1977) (providing non-exhaustive set of criteria).

to address racially discriminatory reproductive regulation.[255] For decades, reproductive justice advocates, scholars and others have extensively documented the evidence of laws rooted in policies of racial and reproductive coercion.[256] Centering evidence of racial impacts in litigation is one way to force courts to confront historical and contemporary assaults on the equal right of Black and Brown people to control their reproductive lives and futures. While the Supreme Court may remain hostile to such facts and claims for many years to come, it is imperative that future cases and lower courts grapple with these issues to move beyond the current jurisprudence that denies Black women and other people of color the equal right to reproductive autonomy.

iii. Intersecting Forms of Discrimination and Interdependent Rights

Courts can protect reproductive autonomy by applying heightened scrutiny to intersectional claims under the Fourteenth Amendment. Intersectionality, a term coined by Professor Kimberlé Crenshaw,[257] recognizes the "multidimensionality" of individuals' experiences of discrimination and does not treat different prohibited grounds of discrimination "as mutually exclusive categories of experience and

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255 For a discussion of how successes in the voting rights context might instruct reproductive rights cases, see *The Constitutional Right to Reproductive Autonomy*, *supra* note 211, at 30-33.

256 For some recent examples, see Declaration of Serena Mayeri, J.D., Ph.D., Supporting Plaintiffs' Motion for Partial Summary Judgment at 2–3, Dobbs v. Jackson Women's Health Org., No. 3:18-cv-00171 (S.D. Miss. Apr. 29, 2021); Brief of National Asian Pacific American Women's Forum, et al. as Amici Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392); Brief of the Birth Equity Organizations and Scholars as Amicus Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392); Brief of the Howard University School of Law Human and Civil Rights Clinic as Amicus Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392); Brief of Reproductive Justice Scholars as Amici Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392); Brief of Organizations Dedicated to the Fight for Reproductive Justice as Amici Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392); Brief of Advocates for Youth et al. as Amici Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392); Brief of Cecilia Fire Thunder et al. as Amici Curiae In Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392). For an example of this type of information presented to human rights bodies, see CTR. FOR REPROD. RTS., NAT. LATINA INSTIT. FOR REPROD. HEALTH & SISTERSONG WOMEN OF COLOR REPROD. JUSTICE COLLECTIVE, REPRODUCTIVE INJUSTICE: RACIAL AND GENDER DISCRIMINATION IN U.S. HEALTH CARE, A SHADOW REPORT FOR THE UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (2014).

257 Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

analysis."[258] Equal protection arguments and judicial opinions that embrace this holistic approach can better protect reproductive autonomy in two important ways.

First, courts can recognize and address the impact of laws that perpetuate multiple, compounding forms of discrimination—such as sex, sexual orientation, gender identity, race, disability, and class.[259] Doing so better comprehends constitutional injury as it is experienced. This is especially important for people living on lower incomes who are overwhelmingly deprived of reproductive liberty and equality.[260] As Justice Marshall wrote in dissent from one of the Court's multiple decisions holding it constitutional to deny public health insurance to women needing abortions, such laws are "designed to deprive poor and minority women" of reproductive autonomy.[261] Indeed, despite the Supreme Court turning

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258 *Id.* at 139.

259 Federal courts are familiar with doing this when applying anti-discrimination statutes. *See, e.g.*, Mosley v. Ala. Unified Jud. Sys., Admin. Off. Of Cts., 562 F. App'x 862, 866 (11th Cir. 2014); Lam v. Univ. of Hawai'i, 40 F.3d 1551, 1562 (9th Cir. 1994) ("At least equally significant is the error committed by the court in its separate treatment of race and sex discrimination. As other courts have recognized, where two bases for discrimination exist, they cannot be neatly reduced to distinct components."); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987) (concluding that aggregation of evidence of racial hostility and sexual hostility in determining pervasiveness of workplace harassment is permissible and consistent with Title VII); Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980) ("We agree with Jefferies that the district court improperly failed to address her claim of discrimination on the basis of both race and sex . . . . We agree that discrimination against black females can exist even in the absence of discrimination against black men or white women."); *see also* Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 598 n.10 (1999) (deciding in favor of plaintiffs under the Americans with Disabilities Act and noting that judicial recognition of intersecting forms of discrimination is correct "as a matter of precedent and logic" thus rejecting dissent's view that the Court should not recognize discrimination on the basis of disparate treatment among members of the same protected class).

260 Scholars have written extensively on the constitutional principles that justify including people who are poor or low-income as a protected class under the Equal Protection Clause. *See, e.g.*, Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 3–8 (1987); Erwin Chemerinsky, *Making the Right Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525 (1993); Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 7, 21–46 (2007); Julie A. Nice, *Whither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection*, 60 DRAKE L. REV. 1023, 1050–67 (2012).

261 Harris v. McRae, 448 U.S. 297, 344 (1980) (Marshall, J., dissenting). Notably, outside of the abortion context, the Court had not had difficulty understanding that the Constitution requires redress of rights deprivations targeting or disproportionately impacting people living on lower incomes. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966) (holding poll tax

a blind eye to these types of discriminatory policies in abortion cases, state courts have reached different results under state equal protection provisions.[262]

Second, when equal protection is at issue, courts can draw on generations of Supreme Court precedent that recognizes the interdependent and inseparable nature of the Fourteenth Amendment's liberty, life, and equality clauses for protecting individual rights from state overreach.[263] Judicial consideration of the interrelated rights at stake in reproductive rights cases would align the law more closely with reproductive justice[264] and the human rights framework.

By building on decades of case law, a more robust and intersectional equal protection analysis provides a stronger legal framework for securing reproductive autonomy through multiple and interdependent constitutional guarantees, in alignment with human rights. Equality and non-discrimination are tenets of international human rights law. The human rights treaty bodies have made clear that gender equality includes the right to substantive equality,[265] which requires addressing the historical roots of

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imposed on voting was discrimination "on the basis of wealth" of the type "traditionally disfavored"); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 269 (1974) (holding county policy denying nonemergency hospitalization or medical care penalized indigent seeking to exercise right of interstate travel and migration); Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (holding denial of public benefits to newly arrived indigent residents violated Equal Protection Clause).

262 *See State Constitutions and Abortion Rights*, *supra* note 213, at 22-26.

263 *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 536, 541 (1942) (holding sterilization as punishment for repeat offender of crimes of "moral turpitude" deprived defendant of a "basic liberty" in violation of "the equal protection clause" of the Fourteenth Amendment); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding ban on interracial marriage "so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, [it] is surely to deprive all the State's citizens of liberty without due process of law"); Lawrence v. Texas, 539 U.S. 558, 575 (2003) (holding unconstitutional criminal ban on consensual, same-sex sexual activity, recognizing "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked . . . ."); Obergefell v. Hodges, 576 U.S. 644, 672–73 (2015) (relying on *Skinner*, *Loving*, *M.L.B.*, and other precedent blending due process and equal protection).

264 *See* ROBERTS, *supra* note 33, at 305 ("Governmental standards for procreation implicate both equality and privacy interests by denying human dignity."); Powell, *supra* note 233; Crenshaw, *supra* note 257, at 150–52.

265 Human Rights Comm., General Comment No. 28, Equality of Rights Between Men and Women (Art. 3), U.N. Doc. CCPR/C/21/Rev/1/Add.10 (2000); Human Rights Comm., *General Comment No. 18*: Non-Discrimination (37th Sess., 1989), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 195–98 (2008); CESCR, General Comment No. 16: The Equal Right to Men and Women to the

gender discrimination, gender stereotypes, and traditional understandings of gender roles that perpetuate discrimination and inequality.[266] The treaty bodies likewise interpret the prohibition on race discrimination to include a prohibition on laws and policies that have a systemic and disparate impact, rather than solely prohibiting actions or laws with a discriminatory intent.[267] And the human rights principles underlying equality recognize that many people may experience multiple and intersecting forms of discrimination.[268]

C. Protecting and Promoting the Right to Life

Undertheorized in U.S. law, while more fully developed in international human rights law and the constitutional courts of other countries, the right to life provides critical protections for reproductive autonomy. A future jurisprudence recognizing that government interference with personal decisions about pregnancy or medical care implicates a person's 14th Amendment right to life can draw from this understanding.

Roe and subsequent cases held that a state cannot restrict access to abortions that are necessary to preserve the "*life or health*" of the pregnant

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Enjoyment of All Economic, Social, and Cultural Rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C,12/2005/4 (2005); CEDAW Comm., General Recommendation No. 25: on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women, on Temporary Special Measures, U.N. Doc. HRI/GEN/1/Rev.7, at 282–90 (2004).

266 *See* Comm. on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social, and Cultural Rights), ¶27, U.N. Doc. E/C.12/GC/22 (2016).

267 Comm. on the Elimination of Racial Discrimination, General Recommendation 14, Definition of Racial Discrimination (Forty-Second Session, 1993), ¶ 2, U.N. Doc. A/48/18, at 115 (1994); *see also* Comm. on the Elimination of Racial Discrimination, General Recommendation 25, Gender Related Dimensions of Racial Discrimination (Fifty-sixth Session, 2000), ¶ 3, U.N. Doc. A/55/18, annex V at 152 (2000); Hum. Rts. Comm., *General Comment No. 18*, *supra* note 265, at ¶ 6.

268 *See, e.g.*, Comm. on Elimination of Racial Discrimination, General Recommendation XXV on Gender-Related Dimensions of Racial Discrimination (Fifty Sixth Session 2000), ¶ 1, U.N. Doc. HRI/GEN/1/Rev.6, at 214–15 (2003); Comm. on the Rights of Persons with Disabilities, General Comment No. 3 (2016) on Women and Girls with Disabilities, ¶ 2, U.N. Doc. CRPD/C/GC/3 (2016); Comm. on the Rights of Persons with Disabilities & Committee on the Elimination of all Forms of Discrimination Against Women, Joint Statement: Guaranteeing Sexual and Reproductive Health and Rights for all Women, in Particular Women with Disabilities, U.N. Doc. INT/CEDAW/STA/8744/E (2018).

person.[269] In more capacious terms, and independent of *Roe*, California's high court has recognized that abortion bans[270] and funding restrictions[271] implicate the state constitutional right to life because pregnancy and childbirth involve "risk of death" and abortion implicates "the woman's fundamental interest in the preservation of her personal health."[272] And since *Dobbs*, the North Dakota Supreme Court has held that "the citizens of North Dakota have a right to enjoy and defend life and a right to pursue and obtain safety, which necessarily includes . . . a fundamental right to obtain an abortion to preserve [a patient's] life or . . . health."[273] The potential application *and expansion* of these lines of argument to contexts in which state policies or official actions threaten the health, safety, and lives of individuals who are pregnant, give birth, and are postpartum are ripe for development.[274] An important guide in doing so is the strong recognition under human rights and comparative law of the right to life as a critical protection for reproductive autonomy.

Human rights treaty bodies have recognized the connection between restrictive abortion laws, high rates of unsafe abortion, and maternal

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269 Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 327 (2006) (emphasis added) (internal quotation marks omitted). The Supreme Court first set forth this principle in *Roe*, 410 U.S. at 163–65, and reaffirmed it multiple times since, *see* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 768–70 (1986); *Casey*, 505 U.S. at 879. The abortion ban upheld in *Dobbs* had a medical emergency exception, but the Court did not address the question of whether or when such an exception is constitutionally required. *See Dobbs*, 142 S. Ct. at 2328 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("The majority does not say—which is itself ominous—whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical treatment."). *See also* Elyssa Spitzer, *Pregnancy's Risks and the Health Exception in Abortion Jurisprudence*, 22 GEO. J. GENDER & L. 127 (2020) (arguing that protecting the lives of pregnant people requires abortion access for all pregnancies).

270 People v. Belous, 458 P.2d 194, 199–200 (Cal. 1969) (drawing on federal and state constitutional precedents in holding criminal bans unconstitutional prior to *Roe*).

271 Comm. to Defend Reproductive Rights v. Myers, 625 P.2d 779, 793 (Cal. 1981) (holding ban on public insurance coverage for abortion unconstitutional under state constitutional guarantees and explicitly rejecting *McRae* reasoning).

272 *Id.* at 791 n.21 & 792.

273 Wrigley v. Romanick, 988 N.W.2d 231, 242 (N.D. 2023).

274 *See, e.g.*, B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277 (2007) (arguing for the recognition of "a constitutional right to protect one's health"); B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501 (2009) (explaining the importance of a negative right to health); *see also* Yvonne Lindgren, *The Rhetoric of Choice: Restoring Healthcare to the Abortion Right*, 64 HASTINGS L.J. 385 (2013) (emphasizing the need to recognize that the right to abortion is part of a right to health).

mortality.[275] They have found that restrictive abortion laws violate the right to life[276] and that the right to life also protects maternal health.[277] Critically, human rights experts confirm that right to life protections grounded in the human rights treaties do not apply prenatally.[278]

The right to life is interdependent with other rights, including the right to health.[279] Some scholars argue that U.S. Supreme Court precedent supports a right to medical decision-making necessary to prevent death, or even more broadly to preserve health.[280] Some have urged the importance of understanding and framing abortion as medically necessary health

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275 *See* BREAKING GROUND 2020: TREATY MONITORING BODIES ON REPRODUCTIVE RIGHTS, *supra* note 201, at 12 (explaining that "[t]reaty monitoring bodies have long recognized the connection between restrictive abortion laws and . . . maternal mortality").

276 *See* Hum. Rts. Comm., *General Comment No. 36 on the Right to Life*, ¶8, U.N. Doc. CCPR/C/GC/36 (2019) ("restrictions on the ability of women or girls to seek abortion must not… jeopardize their lives").

277 *See id.* at ¶26 (recognizing the importance of maternal and infant health to the right to life); Hum. Rts. Comm., *General Comment No. 28, The Equality of Rights Between Men and Women (Art. 3)*, ¶10, U.N. Doc. HRI/GEN/1/Rev.9 (2000) [hereinafter Hum. Rts. Comm., *General Comment No. 28*] (encouraging states to gather data "on pregnancy- and childbirth-related deaths"); Radhika Coomaraswamy (Special Rapporteur), *Integration of the Human Rights of Women and the Gender Perspective Violence Against Women*, ¶ 66, U.N. Doc. E/CN.4/1999/68/Add.4 (1999) (noting "[g]overnment failure to take positive measures to ensure access to appropriate health-care services that enable women to safely deliver their infants as well as to safely abort unwanted pregnancies may constitute a violation of a woman's right to life").

278 Brief of United Nations Mandate Holders as Amici Curiae In Support of Respondents at 21–22, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392).

279 *See, e.g.*, Hum. Rts. Comm., *Adopted by the Committee Under Article 5 (4) of the Optional Protocol Concerning Communication No. 2348/2014*, ¶ 11.3, U.N. Doc. CCPR/C/123/D/2348/2014 (2018) (noting that "the right to life concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity," and holding that the right to life requires, at a minimum, that governments have the "obligation to provide access to existing health care services that are reasonably available and accessible, when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in the loss of life); s*ee also* Hum. Rts. Comm.,*Views adopted by the Committee under article 5 (4) of the Optional Protocol concerning communication No. 2728/2016*, ¶ 9.4, U.N. Doc. CCPR/C/127/D/2728/2016 (2019) ("The Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States parties to adopt positive measures.").

280 For a discussion of different jurisprudential approaches to the right to make medical decisions in certain circumstances including abortion, see generally B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277 (2007) (arguing for the recognition of a constitutional right to health); *see also generally* B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501 (2009) (examining the relationship between access to abortions and the right to health care).

care.[281] Others have argued for an understanding of the right to health care as integral to the constitutional right to reproductive autonomy.[282]

In human rights and comparative law, the right to life is not narrowly drawn. The duty to protect life requires governments to take affirmative measures to protect the right to life, and also to advance the enjoyment of "a life with dignity,"[283] including by ensuring access to essential goods and services, such as food, water, shelter, and health care, and taking positive steps to reduce maternal mortality.[284] The U.S. Supreme Court has, in other contexts, recognized that government must ensure access to constitutional rights. This includes striking down laws that deterred people with limited resources from exercising their right to vote, to freely travel, and to establish residence in another state.[285] And when liberty or family relationships are at stake, the Court has held court costs must be waived and counsel appointed for people who cannot afford them.[286]

The jurisprudence of other national courts, grounded in human rights law, can guide understanding and application of the U.S. constitutional right of life to similarly protect reproductive autonomy.

A landmark decision by the Supreme Court of India, issued in September 2022, provides an instructive approach. In *X v. Government of*

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281 *See* B. Jessie Hill, *Essentially Elective: The Law and Ideology of Restricting Abortion During the COVID-19 Pandemic*, 106 VA. L. REV. ONLINE 99 (2020) (arguing that for legal protection, abortion should be understood as medically necessary regardless of the patient's reason for it).

282 *See* Yvonne Lindgren, *The Rhetoric of Choice: Restoring Healthcare to the Abortion Right*, 64 HASTINGS L.J. 385 (2013) (emphasizing the need to understand abortion access as part of a right to healthcare).

283 Hum. Rts. Comm., *General Comment No. 36*, *supra* note 276, at ¶¶ 2–3, 26.

284 *Id.* at ¶ 26.

285 *See supra* note 261 (citing cases).

286 M.L.B. v. S.L.J., 519 U.S. 102, 107, 124 (1996) (requiring state to waive costs for indigent mother's appeal of order terminating her parental rights); Lassiter v. Dep't of Soc. Servs. of Durham, 452 U.S. 18, 38 (1981) (holding state must determine if there is a need for court-appointed counsel in cases seeking termination of parental rights); Little v. Streater, 452 US 1, 13, 16 (1981) (holding state must pay for a blood test for an indigent putative father seeking to contest a state paternity action); Boddie v. Connecticut, 401 U.S. 371 (1971) (holding state must waive fees related to divorce proceedings for indigent persons); Douglas v. California, 372 U.S. 353, 355–57 (1963) (holding that equal protection requires state-funded appellate counsel for indigent criminal defendants); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that indigent criminal defendants have a due process right to state-funded trial counsel); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (finding an equal protection violation where indigent prisoners were denied cost-free access to trial transcripts necessary for appellate review).

NCT of Delhi,[287] the court held that unmarried women are entitled to abortion up to 24 weeks of pregnancy under India's Medical Termination of Pregnancy (MTP) Act, which creates exceptions to criminalization of abortion in India and sets forth circumstances in which abortion is permissible. In doing so, the court considered "the right to live a dignified life" as a "constitutional value[]", alongside the right to reproductive autonomy, equality, and privacy, animating its interpretation of its national abortion law.[288] The court reiterates that the right to dignity is a core component of the right to life and liberty under India's Constitution,[289] and the government's positive obligations to protect the right to life and health includes the obligation to increase access to reproductive healthcare such as abortion.[290]

In *Lakshmi Dhikta v. Nepal*,[291] the Supreme Court of Nepal grounded the right to access safe and legal abortion services in a constellation of rights contained in Nepal's constitution, including the right to live with dignity and personal liberty, and held that these human rights place affirmative obligations on the government to ensure access to abortion. Accordingly, the court directed the government to introduce a comprehensive abortion law based on international human rights principles, and to create a fund to cover the cost of services for women living on low incomes or women without income.

And in the case of *PAK and Salim Mohammed v. the Attorney General and 3 Others*, the High Court of Kenya in Malindi affirmed that abortion care is a fundamental right under the Constitution of Kenya and that arbitrary arrests and prosecution of patients and health care providers for seeking or offering abortion care is illegal. In reaching its decision, the High Court engaged an analysis of the right to life under the Constitution of Kenya, drawing, in part, on UN Human Rights Committee's General Comment 36 and noting that the right to life obligates governments to ensure women and girls do not have to undertake unsafe abortions, as well as take affirmative steps to provide access to abortion.[292]

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287 X v. Govt. of NCT of Delhi & Anr., SCC (2022) (India).

288 *Id.* at ¶ 95

289 *Id.* at ¶ 112.

290 *Id.* at ¶ 133.

291 Lakshmi Dhikta v. Government of Nepal, Writ Petition No. WO-0757 ¶¶ 74, 96 (Supreme Court of Nepal) (2009).

292 PAK v. the Attorney General (2022) Constitutional Petition No. E009 H.C.K. 17–21 (Kenya).

Analysis and jurisprudence by these and other courts can guide an understanding and application of the right to life to similarly protect reproductive autonomy under the Fourteenth Amendment.

V. CONCLUSION

There is no overstating the damage caused by the decades long campaign to overrule *Roe* and by a newly reshaped U.S. Supreme Court's legitimation of that strategy. *Dobbs* uprooted deeply embedded liberty rights doctrine and the public's trust in the Court as an institution that relies on precedent and facts, not ideology. It embraced a regressive method of constitutional interpretation that has set our country back decades and is out of step with global norms and the world-wide trend. And it took from approximately half the population the constitutional right to decide whether to be pregnant or give birth to a child, with immediate and ongoing harm for individuals and families. But *Dobbs* is not the final word on the Constitution's protection for the right to abortion. And there is a path forward. Now is the time to rebuild—to advance and sustain a broader and deeper framework for the constitutional right to reproductive autonomy. The Fourteenth Amendment *does* protect those rights through its multiple and interdependent guarantees of life, liberty, and equal protection. Alongside other advocacy strategies essential to securing access to reproductive healthcare and holding government accountable, we must insist that courts fulfill their role in protecting the human right to reproductive autonomy and ensuring equal justice for all.