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"I Wish I Knew How It Would Feel To Be Free": A Lamentation on Dobbs v. Jackson's Pernicious Impact on the Lives and Liberty of Women

April L. Cherry
Cleveland State University College of Law, a.cherry@csuohio.edu

"I Wish I Knew How It Would Feel To Be Free": A Lamentation on *Dobbs v. Jackson*'s Pernicious Impact on the Lives and Liberty of Women*

APRIL L. CHERRY+

I wish I knew how
It would feel to be free
I wish I could break
All the chains holdin' me[1]

ABSTRACT

On June 24, 2022, the Supreme Court overturned nearly fifty years of precedent when it declared in *Dobbs v. Jackson Women's Health Organization* that abortion was not a fundamental right, and therefore it was not protected by the Fourteenth Amendment and substantive due process. In law school corridors and legal scholar circles, discussion of the Court's evisceration of abortion rights focused on the corresponding changes in Fourteenth Amendment jurisprudence and the Court's

* Bill Taylor (Composer), *I Wish I Knew How It Would Feel To Be Free* (1963). The most famous cover was performed and recorded by Nina Simone in 1967.

+ Professor of Law, Cleveland State University College of Law. J.D., Yale Law School; A.B., Vassar College. Support for this research was provided by the Cleveland-Marshall Fund at the Cleveland State University College of Law, and by Cleveland State University. My thanks go to Camille Pollutro, 2022-23 Editor in Chief, and the members of the 2022-2023 Cleveland State Law Review (*CSLR*) who put on a wonderful conference with a mix of thoughtful scholars and lawyers, that was the genesis of the Article. I would also like to thank the members of the 2023-2024 *CSLR* for their editing advice and for their patience. Finally, I would like to express my greatest appreciation for my research assistant Dana Bye; - her expert research and her willingness to push me on my analysis was invaluable; my sister Pamela Cherry (J.D., M.A.) - for her keen eye and editing advice; and to my friends and colleagues Elizabeth Sparks (J.D., LLM), Professor Claire C. Robinson May and Professor Patricia J. Falk – their willingness to read and discuss increasing voluminous drafts and their always sound advice was invaluable. This group of exceptionally gifted thinkers have made this Article immeasurably better. Of course, any errors are mine alone.

1 BILLY TAYLOR, I WISH I KNEW HOW IT WOULD FEEL TO BE FREE (Capital Records 1968).

outright dismissal of stare decisis. But in homes, hospitals, community centers, and workplaces, different conversations were happening. Conversations, mostly had by women, concerned the real-life consequences of overturning *Roe v. Wade* and what losing abortion access meant for millions of people, particularly women. Their stories mirrored those shared by dozens of women in the amici briefs filed in support of Jackson Women's Health Organization. But, unlike previous abortion-related decisions, these stories were completely ignored by the Court in its decision to overturn *Roe v. Wade*. By ignoring the stories of women, the Court failed to understand what "liberty" means to women.

This Article discusses how the *Dobbs* Court failed to consider the lived experiences of women—not only those women who seek or have had abortions, and ultimately decided that the liberty and freedom protected by the Fourteenth Amendment of our Constitution do not include what women need to be autonomous and free. By fully constricting the right to abortion, a right which was already limited to those who lived in certain states and to those who could afford the procedure, the Court broke with its own tradition. By ignoring the lived experiences of those most affected by the substantive right at issue, the Court broke with its practice of considering the content and meaning of liberty of those most affected by the government regulation. Rather, as this Article illuminates, the Court's disregard, intentional or not, of these women's stories in deciding *Dobbs* shows that what women need to be free is no longer protected by the Fourteenth Amendment's Due Process Clause. Moreover, this Article concludes that the diminution of women's constitutional rights in this context, reduces women to their reproductive capacities and to state-sanctioned gender roles, and ultimately it consigns them to a form of second-class citizenship.

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I. INTRODUCTION

After the draft of the Supreme Court's opinion in *Dobbs v. Jackson Women's Health Org.* was leaked,[2] and then again after the decision was issued (and then again at a Cleveland State Law Review ("*CSLR*") symposium in the fall of 2022), the thing that struck me as most odd, was that in many of my early conversations with my constitutional law colleagues, was the lack of discussion about the actual women who would be most affected by the decision and its aftermath.[3] Sure, feminist legal scholars

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[2] In May 2022, Politico published a leaked draft majority opinion authored by Justice Alito that largely matched the final decision. *See* Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

[3] In my discussion in this Article of abortions and those who get them, and those who want them and are unable to get access to them, I have chosen to use the terms "women" and "pregnant women." This was a difficult choice. I know that others—namely, transmen and non-binary people—also get pregnant and need and want abortion care. I also appreciate that transmen and non-binary people have additional barriers in receiving reproductive healthcare. I do not dismiss these comrades or their struggle, nevertheless, I have chosen to identify those affected by abortion restrictions and bans as female for three reasons: First, the vast majority of abortions are obtained by women. In an analysis of their *Abortion Provider Census*, a survey of all known healthcare facilities providing abortion services, researchers at the Guttmacher Institute found that in 2017, there were approximately 862,320 abortions performed in clinical settings. Rachel K. Jones et al., *Abortion Incidence and Service Availability in the United States, 2017*, GUTTMACHER INST. (2019), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-incidence-service-availability-us-2017.pdf. Of those, between 462 and 530 patients identified as transgender or non-binary. Rachel K. Jones et al., *Transgender abortion patients and the provision of transgender-specific care at non-hospital facilities that provide abortions*, CONCEPTION X (Jan. 20, 2020) https://doi.org/10.1016/j.conx.2020.100019.

Second, I believe that the reason reproductive healthcare, including abortion care, is so heavily regulated and thus so difficult to get access to, is because it is women who need it. Abortion restrictions and bans are gendered. Misogyny and our disregard for women has been built into the American system of justice—where we are accustomed to men or the state controlling women's education, bodies, and opportunities—that such control has become normalized and naturalized. Writer Helen Lewis expresses a similar sentiment, *See* Helen Lewis, *The Abortion Debate Is Suddenly About 'People,' Not 'Women,'* THE ATLANTIC (May 22, 2022), https://www.theatlantic.com/ideas/archive/2022/05/abortion-rights-debate-women-gender-neutral-language/629863/ ("But something is lost when abortion-rights activists shy away from saying *women*. We lose the ability to talk about women as more than a random collection of organs, bodies that happen to menstruate or bleed or give birth. We lose the ability to connect women's common experiences, and the discrimination they face in the course of a reproductive lifetime. By substituting *people* for *women*, we lose the ability to speak of women as a class. We dismantle them into pieces, into functions, into commodities.").

Finally, I believe that to the extent that any rights to bodily integrity had been acknowledged, it had been through the difficult work of women—particularly women of color, whose bodies had been so long owned by others, who simply longed to be free. I understand why others have made other linguistic choices. I acknowledge and respect those choices as well. *See* Louis Krupnick, *Transparent Misogyny and Sexism Are Behind Abortion Laws*, WASH. POST (May 23, 2023), https://www.washingtonpost.com/opinions/2023/05/23/misogyny-abortion-laws/;

and reproductive justice advocates were discussing the pernicious effects of the decision on women and were expressing, what was for me, appropriate outrage. But, in "other" rooms, with the "other" people, the discussion about women's lives was absent. There was considerable discussion on Fourteenth Amendment jurisprudence, but all of this was disconnected from those who were most affected by the mammoth changes being made by the Court. How does one talk about allowing states to criminalize abortion without talking about pregnancy, abortion, and the people—mostly women—who experience them? This detachment from the lived experiences of women is not a new phenomenon in the law. Quite frankly, it is par for the course.

Surprisingly, or perhaps not, this detachment from the lived experiences of women or those deemed "other" was not only absent in the law school corridors. It was also absent in the majority opinion in *Dobbs*.[4] In both instances, we are left to wonder why women's lives are absent in these discussions of liberty, privacy, and abortion. Why is it that women's stories warrant so little attention? Or so little merit? If we were to hear them, if we were *to attend* to them, what would they tell us about women's access to liberty or justice? What would they tell us about the current state of liberty and justice in the United States? Would they tell us that we live in a nation where women are loved and respected? Would they tell us that we live in a nation where women are free?

Before the Supreme Court's decision in *Dobbs*, the Court had, in its analysis of personal freedoms, adopted an understanding of constitutionally protected liberties (or freedoms) that was both expansive and in line with contemporary Western notions of freedom, dignity, and justice.[5] Moreover, this contemporary jurisprudence of protected liberties was grounded in the lived experience of those whose freedoms were protected from the power of the State. Reliance on lived experience shaped substantive due process doctrine for more than half of a century, at least since 1965 in *Griswold v. Connecticut*, when the Court held that the privacy doctrine protected the right of married couples to use contraceptive devices.[6] Indeed, from *Griswold* until *Dobbs*, with few exceptions,[7] we find that the Court grounds liberty interests protected by the Fourteenth Amendment in the lived experiences of those protected—discovering and discerning what people need to be free. Not only do we find this foundation in

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see also Kimala Price, *What is Reproductive Justice?: How Women of Color Activists are Redefining the Pro-Choice Paradigm*, 10 MERIDIANS 42, 52–57 (2010).

[4] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022).

[5] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846–51 (1992).

[6] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[7] One important exception to note is the Court's opinion in *Bowers v. Hardwick*, 478 U.S. 186, 190–95 (1986). In *Bowers*, the Court upheld a Georgia statute criminalizing same-sex sexual conduct; holding that such conduct was not protected as a liberty interest under the privacy doctrine/substantive due process clause of the Fourteenth Amendment. The Court overruled its decision in *Bowers* in *Lawrence v. Texas*, noting that it had erred when deciding *Bowers*. Lawrence v. Texas, 539 U.S. 558, 571, 578 (2003).

reproductive rights cases, including *Roe v. Wade*[8] and *Planned Parenthood v. Casey*,[9] but also in *Lawrence v. Texas*[10] and *Obergefell v. Hodges*,[11] cases involving the state regulation of sexuality and same sex marriage. In all of these cases, previously believed to be essential to the Court's substantive due process/liberty jurisprudence, the Court adopts an understanding of what it means to be free by attending to the harms of state intervention into the lives of individuals.[12] The Court then goes about the business of protecting those freedoms from state override and individuals from the attendant harms of the state intervention.[13]

At the same time, it is noteworthy that the Court's understanding of liberty and freedom, and particularly that women need to be free, was limited and lacking even before *Dobbs.* For example, shortly after the Court's decision in *Roe*, the Court was faced with the question of whether the liberty recognized in *Roe* included a reasonable opportunity to access the rights *Roe* purported to protect. In what have become known as the "abortion funding cases," (*Maher v. Roe*[14] and *Harris v. McRae*[15]) the Court held that statutes do not violate the indigent women's liberty interests when they forbid the use of federal or state funds for abortion services for indigent women.[16] Similarly, in *Planned Parenthood v. Casey*, the Court upheld several abortion restrictions. These restrictions made it significantly more difficult—and for the most vulnerable women, virtually impossible—to access the abortion services they sought as part of their fundamental rights.[17]

In the abortion funding cases and in the abortion restrictions upheld by the Court in *Casey*, the Court held liberty only includes the right to make the decision, not the right to have a reasonable chance at exercising that right.[18] In coming to that

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[8] Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[9] *Casey*, 505 U.S. at 852.

[10] *Lawrence*, 539 U.S. at 578.

[11] Obergefell v. Hodges, 576 U.S. 644, 666–72 (2015).

[12] *Lawrence*, 539 U.S. at 558, 575.

[13] *Casey*, 505 U.S. at 851.

[14] Maher v. Roe, 432 U.S. 464, 473–74 (1979) (addressing restriction of state funds for payment of abortion for indigent women).

[15] Harris v. McRae, 448 U.S. 297, 315–17 (1980) (addressing the use of federal funds to pay for abortion for Medicaid recipients).

[16] *Maher*, 432 U.S. at 479–80 (permitting states to exclude abortion services from services paid for by Medicaid); *Harris*, 448 U.S. at 317 (upholding the Hyde Amendment, a federal statute that forbade the use of federal funds to pay for abortion services except where necessary to preserve the life of the pregnant woman or where the pregnancy is the result of rape or incest).

[17] *Casey*, 505 U.S. at 870–99.

[18] The argument in both funding cases and *Casey* is that the State has no obligation to attend to the problem it did not cause—poverty. *See Maher*, 432 U.S. at 471, 479 (stating indigent

conclusion, the Court failed to take the lived experiences of poor and Black and Indigenous, and people of color ("BIPOC") fully into account when fashioning the parameters of abortion jurisprudence.[19] In neither instance did the Court ground its understanding of the liberty protected by the Constitution in the needs of—or the lived experiences of—the nation's most vulnerable women.

The narrow view of women's constitutionally protected liberty rights adopted by the *Dobbs* Court, resulted in the evisceration of abortion rights formerly believed to

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women seeking abortions do not come within a disadvantaged class); *see also Casey*, 505 U.S. at 886–87 (determining that increasing the cost and risk of delay for abortions is not a substantial obstacle).

19 *See generally* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (demonstrating lack of account for BIPOC women). In general, legislatures that pursue abortion restrictions are not concerned about the disparate impact these laws have on poor and BIPOC women. For example, TRAP laws (targeted restrictions on abortion providers) disparately affect these women.

TRAP laws impose onerous and unnecessary licensing and other medically unnecessary requirements on abortion providers and women's health centers. These laws have a disparate impact on poor and BIPOC communities in two ways. First, by making abortion services more expensive to perform for providers, and thus more expensive to patients. And second, by reducing the number of clinics and clinicians available to perform abortion services even in states where abortion continues to be legal. *The TRAP: Targeted Regulation of Abortion Providers*, NAT'L ABORTION FED. (2007), https://www.prochoice.org/pubs_research/publications/downloads/about_abortion/trap_laws.pdf.

Although the Court, in 2016, in *Whole Woman's Health v. Hellerstadt*, 579 U.S. 582 (2016), held that the most onerous TRAP regulations were unconstitutional, states continue to enact and enforce them. As of August of 2023, 23 states have laws that regulate abortion providers and facilities where abortion is performed. The majority of these states (seventeen) mandate burdensome licensing standards; standards that are comparable, if not the same, as those imposed on ambulatory surgical centers, that perform much more complicated procedures, and use more deep sedation. The majority also mandate that facilities that provide abortions have relationships with local hospitals, including transfer agreements and admitting privileges for clinicians. These requirements effectively give hospitals the power to decide whether a clinic can exist. *Targeted Regulation of Abortion Providers*, GUTTMACHER INST. (Aug. 13, 2023), https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers.

While all of the TRAP laws apply to clinics that perform surgical abortion, TRAP laws in thirteen states apply to physicians' offices where abortions are performed, and eighteen states apply TRAP regulations to clinics that provide only medication abortion, even if surgical abortion procedures are not. *Id.*

Even after the Supreme Court's holding in *Dobbs*, TRAP legislation continues to be a focus in state legislatures. For example, Planned Parenthood reports that in 2023, 11 states legislatures introduced TRAP bills, with Arkansas, Montana and Utah enacting new legislation. *MEMO: 2023 State Legislative Session Recap*, PLANNED PARENTHOOD FED'N OF AM. AND PLANNED PARENTHOOD ACTION FUND (June 8, 2023), https://www.plannedparenthoodaction.org/pressroom/memo-2023-state-legislative-session-recap.

be protected by the doctrine of stare decisis.[20] But, for the most vulnerable women, access to abortion was already severely limited by the prior legal regime.[21] For example, the restrictions upheld by the *Casey* Court's adoption of the undue burden standard,[22] and the Court's analysis in the funding cases had already greatly limited abortion access for a substantial number of poor and BIPOC women.[23] So while the right to abortion was constitutionally protected, access was not guaranteed. Thus, in the earlier cases, the Court failed to consider the lived experiences, and thus the needs and desires of poor and BIPOC women. The *Dobbs* Court simply continues this approach; disregarding all available evidence of the deleterious effects and disparate impact of abortion restrictions on poor and BIPOC women.[24]

Nevertheless, *Dobbs* is different from the prior regime. Instead of ignoring only those women at the margins of society, the *Dobbs* Court makes the important statement that the liberty and freedom protected by the Constitution do not include women; the Constitution does not protect what any woman needs to be free. Women can believe whatever they want, but the *Dobbs* Court tells us that women have no freedom that is worthy of significant protection.

In this Article, I address the issues by analyzing under what circumstances, i.e., when and for whom, the Court expands our notions of liberty. Here, I argue that when the Court has expanded our understanding of liberty, it did so because it understood substantive due process as an anti-subordination doctrine. Furthermore, I argue that where the Court has permitted the State to restrict the freedoms of some groups, it did so because it has interpreted substantive due process as a much more limiting doctrine. When the Court understands the need for liberty, and respects the desire for freedom, the Court is paying attention and giving substantial weight to the voices, needs, and the lived experiences of those most affected by the government restrictions in question. The opposite is true as well. The *Dobbs* decision is a perfect example of the way in which the Court ignores the voices, needs, and the lived experiences of those most adversely affected by the state regulation of abortion. In doing so, the *Dobbs* Court presides over the largest formal diminution of liberty and equality in our nation's history.[25]

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20 *Understanding Stare Decisis*, AM. BAR ASS'N (Dec. 16, 2022), https://www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decisis/.

21 *Compare Dobbs*, 597 U.S. 215, *with Casey*, 505 U.S. at 876.

22 *Casey*, 505 U.S. at 876–77.

23 *See, e.g.*, *Maher*, 432 U.S. at 473–74.

24 *See generally* Nicole Acevedo, *Abortion Bans Affect Latinas the Most Among Women of Color, New Report Finds*, NBC NEWS (Nov. 1, 2022), https://www.nbcnews.com/news/latino/latinas-most-impacted-abortion-bans-study-rcna54793 (explaining how "close to 6.5 million Latinas (42% of all Latinas ages 15–49) live in 26 states that have banned or are likely to ban abortions after the Supreme Court struct down Roe v. Wade this summer.").

25 *See* Sara Rosenbaum et al., *The United States Supreme Court Ends the Constitutional Right to Abortion*, THE COMMONWEALTH FUND (June 27, 2022),

I have divided this Article into four more parts and a conclusion. Part II addresses instances of expansion. In this Part, I examine instances where, and for whom, the Court has understood it necessary for liberty and freedom to be expanded, namely cases related to abortion, sexuality, and marriage-equality.[26] Thus in Part II, I discuss the Court's opinions in *Roe*, *Casey* (here, looking at the portion of the statute overturned by the Court), *Lawrence*, and *Obergefell*. Part III of this Article addresses instances of contraction—times in which the Court thought it appropriate to diminish the liberty and freedom of the nation's citizens. Thus, in this Part I discuss the Court's opinions in the funding cases, *Maher v. Roe* and *Harris v. McRae*, and in *Casey* (here, looking at parts of the statute upheld by the Court).

In Part IV, I finally address the Court's opinion in *Dobbs*. My purpose here is not to merely look at what the Court said. Rather, in this part of the Article, my objective is to highlight the real-world impact of the Court's decision, consequences that the Court must have known would follow its dismantling of the right to abortion. Accordingly, I highlight (1) the pregnancy and abortion stories of women that the Court had access to before it decided the case through the Amici process, and (2) the pregnancy and abortion stories of women in the aftermath of *Dobbs*. This analysis demonstrates how the Court's approach and analysis in *Dobbs* necessarily resulted in a diminution of liberty and freedom under the Due Process Clause of the Fourteenth Amendment. As a result, the *Dobbs* Court simply behaved as a rubber stamp for populist prejudices.[27] Finally in Part V, I explain how the Court's disregard of the

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https://www.commonwealthfund.org/blog/2022/united-states-supreme-court-ends-constitutional-right-abortion; *see also* Michelle Banker & Alison Tanner, *Dobb's v. Jackson Women's Health Organization: The Court Takes Away a Guaranteed Nationwide Right to Abortion*, NWLC (July 12, 2022), https://nwlc.org/resource/dobbs-v-jackson-womens-health-organization-the-court-takes-away-a-guaranteed-nationwide-right-to-abortion/.

[26] Although this Part could be expanded, for brevity, I have stayed on theme, discussing only cases related to reproduction, sexuality, and marriage equality. However, the twentieth century Supreme Court has expanded our understanding of liberties protected in marriage and family. Other cases that are ripe for discussion in this same vein include: Loving v. Virginia, 388 U.S. 1, 12 (1967) (inter-racial marriage); Zablocki v. Redhail, 434 U.S. 374, 386–87, 390–91 (1978) (marriage as an indigent parent); Turner v. Safley, 482 U.S. 78, 95–96 (1987) (prisoner marriage); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (right of marital privacy; right of married couples to use contraceptive devices); Eisenstadt v. Baird, 405 U.S. 438, 452–53 (1972) (individual privacy; right of individuals to use contraceptive devices); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (rights of unwed parents and children); United States. v. Windsor, 570 U.S. 744, 769–70, 775 (2013) (unconstitutionality of DOMA Sec. 3).

[27] The *Dobbs* Court stresses that the issue of abortion is a political question, not a constitutional one. As such, the Court asserts that the contours of any abortion right should be left to state legislatures to decide on a state-by-state basis. *See Dobbs*, 597 U.S. at 228–32. This position reflects the widely held belief that in the United States, legislatures are where democracy occurs. It reflects the estimation that state legislatures are "the true majoritarian branch." Legislatures are" the heart of American democracy" because they are held "accountable" by the people through the regular electoral process. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1733 (2021). However, whether legislatures reflect the will of the majority is up for debate. Professor Miriam Seifter argues that state legislatures may instead be the least majoritarian branch of our governments because they are elected through mediated processes controlled by political parties and the legislatures

lived experiences of women and the Court's anti-abortion jurisprudence, has already resulted in dire health, social, and economic consequences for those women most directly affected by its decision and as such reduces women to their reproductive capacities and to state-sanctioned gender roles, and ultimately it consigns them to a form of second-class citizenship.

If it is to be sustained, freedom, liberty and a full measure of citizenship must be readily available to all. It must be obtainable by members of those communities not powerful in the political process. As the *Lawrence* Court noted, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[28] This understanding of that which is protected by substantive due process is absent in the *Dobbs* decision. Indeed, it is rejected by the *Dobbs* Court. Nevertheless, if we fail to include the needs and experiences of the least powerful in our understanding these principles, the rights protected by substantive due process are meaningless, and we risk a continued two-tiered system of citizenship where the least powerful are relegated to lesser forms of citizenship.

II. EXPANDING LIBERTY: TAKING ACCOUNT OF LIVED EXPERIENCE OF PREVIOUSLY EXCLUDED PEOPLES

The Constitution serves human values, and while the effect of reliance on Roe cannot be exactly measured, neither can the certain cost of overruling Roe for people who have ordered their thinking and living around that case be dismissed.[29]

A. Roe *and* Casey

Prior to *Dobbs*, laws restricting abortion were subject to the pregnant individual's right to privacy, a right protected by substantive due process. In essence, the Court, starting in 1965 with contraception in *Griswold v. Connecticut*,[30] and then addressing

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themselves. Gerrymandered voting districts and legally permissible voter intimidation exacerbate residential skews and permit minority interests to control voting districts. *Id.* at 1758. The result is long-term rule by one political party whose views do not reflect the majority of the state.

One the other hand, a 2019 study by the Pew Research Center found that although a majority of American adults (approximately 61%) favored the availability of legal abortion in most cases, in the states with the most restrictive abortion laws, the majority of the public favored restrictive measures and abortion bans. Jeff Diamant & Alexandra Sandstrom, *Do State Laws on Abortion Reflect Public Opinion?* PEW RSCH. CTR. (Jan. 21, 2020). For example, the study found that in Alabama, 58% of the public favored restrictive abortion laws. In Kentucky and Louisiana, 57% of adults in each state favored restrictive abortion laws. *Id.* Their survey also found strong (but not a majority) opposition to legal abortion in other jurisdictions with restrictive abortion laws. For example, 50% of adults in Missouri, 49% in Georgia, and 47% in Ohio were opposed to legal abortion and favored restrictive laws. *Id.* This study thus suggests, that at least on the issue of legal abortion, prior to the Court's decision in *Dobbs*, state legislatures may indeed reflect the will of the majority.

28 Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

29 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856 (1992).

30 *Griswold*, 381 U.S. at 485–86.

the issue of abortion in *Roe v. Wade* in 1973,[31] looked to its prior family and individual privacy cases. The Court held that similar interests were at issue. The fundamental rights recognized under the already established rubric of privacy protected contraception and abortion from interference and coercion.[32]

The Texas statute at issue in *Roe v. Wade* criminalized abortions at all stages of pregnancy except those necessary to save the life of the pregnant woman.[33] The Supreme Court held that the statute violated the pregnant woman's right to privacy.[34] The Court explained that its prior cases had recognized a "zone of the privacy" that protected the individual from state interference.[35] This zone could be found in the penumbras of the Constitution's First, Fourth, Ninth, and Fourteenth Amendments.[36] The Court had recognized this zone of personal privacy in prior cases involving marriage, contraception, and child rearing, and recognized these rights as fundamental.[37] The Court then recognized abortion as part of this cohort of rights, holding that the "zone of privacy" was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[38] However this right was not absolute.

In *Roe*, the Court recognized that in the context of abortion, the State had a compelling interest in the fetus at viability.[39] Thus, the Court devised the now infamous trimester framework to determine when the State could intervene in the abortion decision.[40] Under this framework, the State was forbidden from abortion regulation during the first trimester of the pregnancy, as the State's interest in the non-viable fetus was minimal, and data indicated that the first trimester abortion was safer

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[31] Roe v. Wade, 410 U.S. 113, 116–17, 152–53 (1972).

[32] *Id.* at 152–53.

[33] *Id.* at 117–18.

[34] The Court held that this right to privacy could be found in the penumbras of the Constitution's First, Fourth, Ninth, and Fourteenth Amendments. These penumbras, the Court argued, protect an individual's "zone of privacy" against state laws and regulations. *Id.* at 152–53.

[35] Where the right was deemed fundamental, the individual was protected from state interference unless the State could demonstrate a compelling interest with no less restrictive alternative. *Id.* at 152.

[36] *Id.*

[37] *Id.* at 152–53 (citing Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942); Eisenstadt v. Baird, 405 U.S 438, 453–54 (1972)).

[38] *Id.*

[39] *Id.* at 162–63. *See also*, April L. Cherry, *Roe's Legacy: The Non-Consensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 J. OF CONST. L. 723, 726–32 (2004) (arguing that the Court's abortion jurisprudence does not address the state's interest in a fetus outside of the abortion context).

[40] *Roe*, 410 U.S. at 163.

for the pregnant woman than carrying the pregnancy to term.[41] During the second trimester, the State had the power to enact reasonable regulations related to maternal health, as its interest in maternal health increased as the risk of abortion became greater than carrying the pregnancy to term.[42] Finally, in the third trimester, the State could enact laws criminalizing or otherwise prohibiting abortion to further the State's interest in the life of the viable fetus.[43] Fetal viability was understood as not occurring until sometime in the third trimester.[44] Even then, the statute had to provide an exception to allow for procedures protecting the life and health of the pregnant woman.[45]

Thus, under the now familiar—even if defunct—holding in *Roe*, the Court articulated a right to privacy "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[46] Although the *Roe* Court did not guarantee women access to abortion on demand, it clearly stated that during the first and second trimesters of pregnancy women were free to choose abortion for whatever reason they deemed appropriate.[47] The *Roe* Court held that before viability, women were at liberty to consider the circumstances of their lives that would make the birth of a child physically or emotionally undesirable.[48] In other words, the Court considered women's stories and their understanding of how abortion restrictions affect their lives and their liberty. The Court reasoned:

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent . . . . There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically, or otherwise, to care for it . . . . All these are factors the woman and her responsible physician necessarily will consider in consultation.[49]

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41 *Id.* at 149 ("Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain.").

42 *Id.* at 150 ("Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.").

43 *Id.* at 165.

44 Marygrace Taylor, *What Is The Age of Fetal Viability?*, WHAT TO EXPECT (Aug. 2, 2021), https://www.whattoexpect.com/first-year/preemies/fetal-viability.

45 *Roe*, 410 U.S. at 163–64.

46 *Id.* at 153.

47 *Id.* at 163.

48 *Id.* at 153.

49 *Id.*

Moreover, the Court reasoned that the State's interest in preserving potential human life and protecting maternal health was not sufficiently compelling to justify the prohibition of abortion in the first and second trimesters of a pregnancy.[50] The Court found that only during the third trimester, at the point of fetal viability, is the State's interest compelling enough to justify regulation of the abortion right.[51]

In *Planned Parenthood v. Casey*, the Court elevated the State's interest in the fetus and diminished the due process rights of pregnant women, but still recognized women's freedoms arising from their lived experiences.[52] The case at issue in *Planned Parenthood v. Casey* arose from a challenge to five provisions of the Pennsylvania Abortion Control Act of 1982.[53] These included a twenty-four-hour waiting period, a spousal notification requirement, a parental consent provision for minors, an informed consent provision which required the inclusion of politically charged and medically incorrect information, and a detailed physician reporting requirement.[54]

Although the *Casey* Court overturned *Roe*'s trimester framework, the plurality opinion written by Justice O'Connor, and joined by Justices Kennedy and Souter, upheld the "essential holding" of *Roe*.[55] It maintained that the Fourteenth Amendment's Due Process Clause protected women's liberty interest in abortion.[56] The *Casey* Court held that a woman's right to abort a nonviable fetus is a constitutionally protected freedom.[57] In constructing the contours of this liberty interest, the Court took note of the needs and stories of women, and observed the importance of abortion access to women's equality, stating: "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[58]

In finding the spousal notification provision of the Pennsylvania Abortion Control Act unconstitutional, the Supreme Court in *Casey* offers an example of how the Court has listened to the stories of women and paid attention to their experiences.

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50 *Id*. at 163.

51 *Id*. at 163–64.

52 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 889–94 (1992). Several years earlier in *Webster v. Reproductive Health Services*, the Court signaled that it was willing to contract women's due process protection by questioning whether viability should be the point where the state's interest in the fetus becomes compelling, stating "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability." Webster v. Reproductive Health Servs., 492 U.S. 490, 519 (1989). Later, in *Casey*, the Court did just that.

53 *Casey*, 505 U.S. at 844.

54 *Id*.

55 *Id*. at 846.

56 *Id*.

57 *Id*.

58 *Id*. at 856.

Consideration of women's stories helped the Court to understand how state activity, or state regulations, might affect their liberty interests—and affect them in a way that differs from men.[59] The abortion spousal notification provision of the Pennsylvania Abortion Act required most married women (there were exceptions) to notify their husbands of their decision to have an abortion before the abortion could take place.[60]

Relying on the overwhelming data of domestic violence against women in the United States, the Court held that this portion of the statute was unconstitutional.[61] The Court found that the data demonstrated that the spousal notification provision was likely intended to prevent a significant number of women from obtaining abortions.[62] Thus, the Court held that even though the provision might only affect one percent of the women who obtain abortions in Pennsylvania,[63] the spousal notification "[did] not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle."[64] Furthermore, the Court held that it is those women, those who are burdened by the statute, that are the proper focus of the constitutional inquiry.[65]

What makes the Court's assessment of the statute's spousal notification provision in *Casey* so important to the Court's analysis of the nature of women's liberty interests, is that in order to get to the conclusion it reaches, the Court uses data—the data consisting of women's lived experiences.[66] The data showed that some women might be harmed, including physically restricted or assaulted, if subjected to the spousal notification provision.[67] The Court thus concludes that the content of liberty and freedom is not determined in a vacuum,[68] stating: "[w]e must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."[69]

But the *Casey* Court is clear that it is not solely the spousal notification provision that must be looked at in a social context.[70] Liberty is defined in context, not a vacuum.

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[59] *Id.* at 894–96.

[60] *Id.* at 887.

[61] *Id.* at 891–93.

[62] *Id.* at 893–95.

[63] *Id.* at 894.

[64] *Id.* at 893–94.

[65] *Id.* at 894.

[66] *Id.* at 888–92.

[67] *Id.* at 893.

[68] *Id.* at 849–50.

[69] *Id.* at 894.

[70] *Id.* at 852.

In speaking of the abortion issue generally, the Court speaks about the Constitution, not as a static thing, but rather as a document to be understood in light of our changing culture. The Court states (I believe it is worth quoting at length):

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[71]

Pregnancy, childbirth, and parenting all involve the sacrificing of personal liberties, too important for the State to insist on its own vision of the Good, or the vision of women's proper role in society. Instead, the role of the Court is to protect women from the undue regulation of their freedom by the State; protecting them from interference that stops them from developing their own place in the world—at least as best as they are able with little assistance from the State.[72]

Nevertheless, the *Casey* Court, in holding the spousal notification provision unconstitutional, teaches us two important lessons. First, the holding instructs us that the contours of the liberty interests protected by substantive due process can be determined (or perhaps must be determined) by looking at how the statute at issue bears upon the liberty of the group most impacted.[73] Second, the holding demonstrates the importance of listening to the stories of those who are most impacted by the government restriction.[74]

In *Casey*, the data relied upon the stories of women who had been victims of domestic violence, some of whom had been pregnant.[75] For example, the Court cites

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[71] *Id.*

[72] Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1696 (2008).

[73] *Casey*, 505 U.S. 833.

[74] *Id.*

[75] *Id.* at 893.

a study by the American Medical Association ("AMA") indicating that "in an average twelve-month period in this country, approximately two million women are the victims of severe assaults by their male partners."[76] But this two million, the study continues, is likely a grave underestimate because many women choose not to report.[77] Moreover, the AMA study noted that the surveys used typically exclude the very poor, non-English speakers, and those who are homeless, in the hospital, or institutionalized.[78] While domestic violence research is more limited with regards to spousal notifications, the data available to the Court established that "where the husband is the father, the primary reason women do not notify their husbands is that the husband and wife are experiencing marital difficulties, often accompanied by incidents of violence."[79]

With these studies based on women's stories in hand, the Court ultimately found that Pennsylvania could not enact such an obstacle to abortion on women who, for their own safety or that of their children, choose not to notify their husbands.[80] The Court says, "[W]e must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."[81] Had the Court not considered this data, they may have treated the spousal notification provision as they treated many of the other provisions of the Pennsylvania Abortion Control Act and upheld the spousal notification provision.[82] Thus, women's stories played a critical role in the Court's analysis of the liberty interests at stake.

Another aspect of freedom implicated by abortion restriction legislation, perhaps more political in nature, is the issue of citizenship. In his concurrence in *Casey*, Justice Blackmun refers to the relationship between access to abortion and women's citizenship, arguing that restrictions on abortion, not merely the lack of legal abortion, amount to forced pregnancy and, as such, violate the constitutional requirement of gender equality and consign women to a form of second-class citizenship.[83] Justice Blackmun states:

> A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State

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[76] *Id.* at 891.

[77] *Id.* (citing AMA COUNCIL ON SCIENTIFIC AFFAIRS, VIOLENCE AGAINST WOMEN 7 (1991)).

[78] *Id.*

[79] *Id.* (citing Barbara Ryan & Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. MARRIAGE AND FAMILY 41, 44 (1989)).

[80] *Id.* at 893–95.

[81] *Id.* at 894.

[82] *Id.* at 833.

[83] *Id.* at 928–29 (Blackmun, J., concurring in part and dissenting in part).

> conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption-that women can simply be forced to accept the "natural" status and incidents of motherhood-appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual, or the Constitution."[84]

Justice Blackmun argues that despite any of the other interests involved, including the State's interest in the developing fetus, the State cannot simply forbid abortion.[85] Women's interests in whether the Constitution permits the State to consign them to subordinate social, economic, and political positions in American society, are central to the abortion question. As such, the answer as to how the State may address its interest in abortion cannot be reached without considering the social, economic, and political interests of women implicated by pregnancy and abortion. At a minimum, consideration of women's interests is a necessary predicate for any analysis of women's liberty and freedom.

B. Lawrence *and* Obergefell

The Constitution promises liberty to all within its reach . . . a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.[86]

Beginning with *Lawrence v. Texas*[87] in 2003, in cases involving sexuality and marriage, the Court began to shape the modern concept of substantive due process. This construction of substantive due process explicitly includes an emphasis on the protection of the dignity of individuals as individuals and as members of heretofore marginalized social groups and a recognition of the anti-subordination roots of the Fourteenth Amendment on both the due process and the equal protection doctrines.[88] In shaping this modern doctrine, the Court was very much informed by the lives of those most affected by the state control over their private lives when determining the contours of the liberty protected. In *Lawrence*, the Supreme Court invalidated consensual sodomy laws by finding that the Texas statute violated the privacy rights

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84 *Id.*

85 *Id.* at 922, 927, 929–30.

86 Obergefell v. Hodges, 576 U.S. 644, 651 (2015).

87 Lawrence v. Texas, 539 U.S. 558 (2003).

88 *Id*. at 573–74; *see, e.g.*, Kenneth Karst, *The Liberties of Equal Citizens: Groups & the Due Process Clause*, 55 UCLA L. REV. 99, 101 (2007) (arguing that Due Process Clause includes liberty to be respected as human being; "equal citizenship's anti-subordination values have contributed to individual liberties as those liberties are embodied in the 14th Amendment's Due Process Clause").

of the individuals charged under the criminal statute.[89] The Court's holding explicitly stated that intimate consensual sexual conduct is part of the liberty protected by the substantive due process under the Fourteenth Amendment.[90] As Justice Kennedy, writing for the Court stated:

> The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.[91]

To gain access to information about the importance of having the freedom to engage in intimate sexual activity without fear of criminal sanction, the Court heard not only from the litigants; but also the Justices had the benefit of hearing from sixteen amicus briefs.[92] Organizations ranging from Lambda Legal Services,[93] the American Bar Association,[94] the American Psychological Society,[95] the American Public Health Association,[96] the Cato Institute,[97] the Log Cabin Republicans,[98] groups of law

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89 *Lawrence*, 539 U.S. at 578.

90 *Id.*

91 *Id.* (internal citation omitted) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992)).

92 *Lawrence v. Texas Filings*, WESTLAW, https://1.next.westlaw.com/RelatedInformation/I64f913259c9711d9bc61beebb95be672/riFilings.html, (click "filings") (last visited Mar. 6, 2024).

93 Brief for Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

94 Brief for the American Bar Association as Amicus Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

95 Brief for American Psychological Association et al. as Amicus Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

96 Brief for American Public Health Association et al. as Amicus Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

97 Brief for CATO Institute as Amicus Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

98 Brief for Log Cabin Republicans et al. as Amicus Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

professors,[99] history professors,[100] and leaders from various religious denominations[101] submitted briefs in favor of finding the consensual sexual activity of the sort criminalized in the Texas statute as protected by substantive due process.[102]

Included in these amicus briefs were stories of members of the LGBTQ+ community, explaining to the Court how homosexual sodomy laws needlessly branded as criminally deviant millions of parents, legislators, service members, veterans, and those we consider heroes. For example, under the Texas sodomy law people like Mark Bingham, who on September 11, 2001 helped save countless lives by fighting against the terrorists aboard his plane, would be criminals.[103] Similarly, Reverend Mychal F. Judge, a chaplain to the New York City Fire Department who was killed by falling

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[99] Brief for Constitutional Law Professors Bruce A. Ackerman et al. as Amicus Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

[100] Brief for Professors of History George Chauncey et al. as Amicus Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

[101] Brief for Alliance of Baptists et al. as Amicus Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

[102] There were also several amicus briefs filed in favor of maintaining the Texas statute. Most of these amicus brief described the LGBTQ+ community as deviant, self-destructive, and vectors of sexually transmitted disease. Brief for Agudath Israel of America as Amicus Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief for Center for Arizona Policy et al. as Amici Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief for American Center for Law and Justice as Amicus Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief for Texas Physicians Resource Council as Amicus Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief for Concerned Women of America as Amicus Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief for Family Resource Council et al. as Amici Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief for Liberty Counsel as Amicus Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief for Pro Family Law Center et al. as Amici Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief for Public Advocate of the United States et al. as Amici Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief for the States of Alabama, South Carolina, and Utah as Amici Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief for Texas Eagle Forum et al. as Amici Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief for Texas Legislators, Representative Warren Chisum et al. as Amici Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief for Center for the Original Intent of the Constitution as Amicus Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102); Brief for United Families International as Amicus Curiae Supporting Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102). For example, the brief filed on behalf of the States of Alabama, South Carolina, and Utah (states that had continued to criminalize consensual homosexual sexual activity) argued that homosexual sodomy was properly criminalized as it had "severe physical, emotional, psychological, and spiritual consequences." Brief for the States of Alabama, South Carolina, and Utah as Amici Curiae Supporting Respondent at 17, Lawrence v. Texas, 539 U.S. 558 (2003) (N. 02-102).

[103] Brief for Human Rights Campaign et al. as Amici Curiae Supporting petitioners at 20, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

debris in the lobby of the World Trade Center shortly after administering last rites to a dying firefighter, would also be branded a criminal.[104]

Through these briefs, amici explained to the Court what freedom means to them and what was necessary from the State to achieve it.[105] These stories, and the newly found freedoms they helped the Court to uncover, are essential to the Court's process of protecting liberty under the Fourteenth Amendment. The personal stories aided the Court in understanding the nature of oppressive system, and the necessity of applying constitutional principles to the lived experiences of those whose lives may not have been considered important to our understanding of liberty until now. As Justice Kennedy writes:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. *They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.*[106]

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[104] *Id.* at 20.

[105] Brief for Human Rights Campaign et al. as Amici Curiae Supporting Petitioners at 10–14, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

[106] Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (emphasis added).

The Court's decision in *Lawrence*, and later in *Windsor v. United States*,[107] paved the way for its holding in *Obergefell v. Hodges.*[108] In *Obergefell*, the Court held that state bans on same-sex marriage and statutes requiring states to deny recognition of same-sex marriages duly performed in other jurisdictions are unconstitutional under both the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.[109] In *Obergefell v. Hodges*, the Court reiterated the principles it asserted in *Lawrence*; that each generation gets the opportunity to assert even greater freedom for itself—in part because new generations present new, previously unheard voices.[110] The *Obergefell* Court explained:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new

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[107] The Court's holding in *United States v. Windsor*, 570 U.S. 744 (2013) also paved the way for the Court's decision in *Obergefell*. In *Windsor*, the Court held that Section 3 of the Defense of Marriage Act ("DOMA"), 28 U.S.C. 1738(c), which defined "marriage" and "spouse" to exclude same-sex partners for purposes of federal law, was unconstitutional. The Court stated:

> DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. In determining whether a law is motivated by an improper animus or purpose, "[d]iscriminations of an unusual character" especially require careful consideration. DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

Windsor, 570 U.S. at 769–70 (citations omitted). However, the *Windsor* Court left other parts of DOMA intact, including Section 2, which allowed States and Territories to refuse to recognize duly performed marriages of same-sex couples valid in other U.S. jurisdictions. *Id.* at 752. This issue was decided by the Court in *Obergefell*; Section 2 was declared unconstitutional. After the Court's decision in *Windsor*, the federal government could not deny federal benefits to married same-sex couples. After the Court's decision in *Obergefell*, neither the federal government nor the governments of any State could deny marriage or any benefit thereof from a same-sex couple. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

[108] *Obergefell*, 576 U.S. at 644.

[109] *Id.*

[110] *Id.* at 660.

> insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[111]

In assessing the question before it, the *Obergefell* Court reiterated the unchallenged understanding surrounding the right to marry—that is, that the right to marry had long been held to be fundamental—that is "inherent in the liberty of the person" and as such, protected by the Due Process Clause of the Fourteenth Amendment, which prohibits the State from depriving any person of it "without due process of law."[112] Equally as uncontroversial, as the *Obergefell* Court notes, is that the right to marry is guaranteed also by the Equal Protection Clause.[113] Marriage is one place where the synergy between liberty and equality is most evident.[114] The question for the Court in *Obergefell* is whether this fundamental right to marry was to be enjoyed, with equal force, by gay and lesbian individuals and couples.[115] Although Justice Kennedy gives four reasons why the right to marry does certainly extend to same-sex couples, the first—and perhaps the most important—reason he gives concerns the right of personal choice.[116] As the Court instructed: "A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.[117] This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause."[118] The *Obergefell* Court does the important work of connecting the notion of "individual autonomy," which is the way in which we are accustomed to thinking about liberty, to liberty as a dignitary interest as well.[119] The Court explains:

> Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."
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> The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.

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111 *Id.* at 660.

112 *Id.* at 675.

113 *Id.*

114 Loving v. Virginia, 388 U.S. 1, 16–17 (1967).

115 *Obergefell*, 576 U.S. at 656.

116 *Id.* at 665.

117 *Id.*

118 *Id.*

119 April L. Cherry, *Choosing Substantive Justice: A Discussion of Choice, Rights and the New Reproductive Technologies*, 11 WISC. WOMEN'S L.J. 431, 435 (1997).

> *There is dignity in the bond between two men or two women who seek to marry and, in their autonomy, to make such profound choices*.[120]

The Court continues to refer to this dignitary interest when discussing other rationales for recognizing a liberty interest in same-sex marriage.[121]

A second rationale used by the Court in recognizing that same-sex marriage is part of the liberty interests recognized and protected by substantive due process, was its analysis and acknowledgement of the importance of marriage in *Griswold v. Connecticut*.[122] The Obergefell Court asserted "that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[123] This point was central to *Griswold* v. *Connecticut* . . . . Suggesting that marriage is a right 'older than the Bill of Rights.'"[124] The *Obergefell* Court further noted:

> The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.[125]

In *Roe*, *Casey*, *Lawrence*, and *Obergefell*, the Supreme Court, by focusing on substantive due process as an anti-subordination doctrine, expanded its analysis to take into account the needs of those most intimately affected by the state regulations at issue, marginalized peoples. A focus on anti-subordination required the Court to acknowledge and value the context in which members of marginalized groups live and how their lives are constrained by state regulation. Thus, in its opinions regarding abortion, sexuality, and marriage equality heretofore discussed, the Court centered the dignitary interests of those who have been marginalized. It did this by prioritizing the data and the experiences shared by the plaintiffs in fashioning the content and boundaries of the liberty interests protected by due process.

III. CONSTRICTING LIBERTY: FAILING TO TAKE ACCOUNT OF LIVED EXPERIENCE IN UNDERSTANDING PROTECTED LIBERTY PRIOR TO *DOBBS*

Prior to its consideration in *Dobbs*, there were also instances where the Court, by failing to give due consideration to real-life experiences of those who were most affected by the state regulation at issue, neglected to understand the liberty interests at stake. This was certainly the case where the Court considered whether the Fourteenth Amendment liberty interests includes a reasonable opportunity to access the rights *Roe*

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120 *Obergefell*, 576 U.S. at 666 (emphasis added).

121 *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 584 U.S. 617, 631–32 (2018) (acknowledging the connection between same sex marriage and dignity).

122 Griswold v. Connecticut, 381 U.S. 479, 495 (1965).

123 *Obergefell*, 576 U.S. at 666.

124 *Id.*

125 *Id.* at 667.

purported to protect, either through state and federal funding or without state restrictions that made it significantly more difficult to access the abortion services. In neither instance did the Court account for the lived experiences for poor or BIPOC women, those most affected by the state regulations, when setting the parameters of the liberty interests at issues with the right to abortion.

A. The Funding Cases: Maher v. Roe & Harris v. McRae

In 1976, Congressman Henry Hyde of Illinois, offered an amendment to the Departments of Labor and Health, Education, and Welfare, Appropriation Act, 1977—a rider to an appropriations' bill.[126] That rider restricted the use of appropriated funds to pay for abortions for low-income and indigent women—those provided through the Medicaid program, except for those abortions necessary to save the life of the pregnant woman.[127] The language of the amendment was simple and clear: "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."[128] Passed by Congress on September 30, 1976, overriding President Ford's veto, the Hyde Amendment was expressly designed to limit low-income women's access to abortion by banning federal Medicaid funding for the procedure.[129] Accordingly, even before the fall of *Roe*, indigent women of reproductive age faced an especially difficult time accessing abortion.[130]

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[126] Julie Rovner, *Abortion Funding Ban Has Evolved Over the Years*, NPR (Dec. 14, 2009), https://www.npr.org/2009/12/14/121402281/abortion-funding-ban-has-evolved-over-the-years.

[127] Act of Sept. 30, 1976, Pub. L. No. 94-939, 90 Stat. 1418, 1434 ("None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.").

[128] *Id.*

[129] In 2010, the Affordable Care Act, ("Obamacare") permitted states to expand Medicaid eligibility to all people with incomes below 138% of the federal poverty level. Madeline Guth & Karen Diep, *What Does the Recent Literature Say About Medicaid Expansion?: Impacts on Sexual and Reproductive Health*, KFF (June 29, 2023), https://www.kff.org/medicaid/issue-brief/what-does-the-recent-literature-say-about-medicaid-expansion-impacts-on-sexual-and-reproductive-health/. In the states that expanded Medicaid, this expansion effectively allowed many low-income women to become eligible without becoming pregnant. By 2023, forty states and the District of Columbia have adopted Medicaid expansion. *Status of State Medicaid Expansion Decisions: Interactive Map*, KFF (Oct. 4, 2023), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/. In the states where Medicaid expansion had been implemented, it has reduced significantly, the number of uninsured women of reproductive age and provided more people access to primary and gynecologic care before pregnancy. S. Marie Harvey et al., *The* Dobbs *Decision—Exacerbating U.S. Health Inequity*, 388 NEW ENG. J. MED. 1444, 1445 (Apr. 20, 2023).

[130] In addition to facing barriers accessing abortion, low-income women face barriers to effective contraceptive use, including the cost of highly effective methods and accurate comprehensive reproductive health education. Harvey et al., *supra* note 129, at 1444.

Low-income women also have difficulty accessing the most effective contraceptive methods, due in part to cost, resulting in higher rates of unintended pregnancies.[131] In fact, indigent women are more than five times as likely to report an unintended pregnancy as wealthier women.[132] And, as a result of this higher rate of unintended pregnancy, women living at and below the federal poverty level have a greater need for abortion care.[133] Despite the need for more access to this type of medical care, the Hyde Amendment made access to abortion more difficult for low-income and BIPOC women.[134] Indeed, research in this area has consistently shown that abortion restrictions have both a disparate and negative effect on these same women who also have difficulty accessing other forms of medical care.[135] At the same time that state funds for abortion were restricted, state funds for sterilization for indigent women were readily available.[136] The juxtaposition of these "choices," and state support for these choices, financial and otherwise, have not been lost on indigent women.

Thus, even before the fall of *Roe*, a pregnant woman's state of residence and Medicaid coverage could determine whether she had reasonable access to abortion services.[137] In the post-*Dobbs* world, with the implementation of even more restrictive abortion bans, abortion care is even more difficult to access, if possible, or to obtain at all, in some areas of the country.[138] But the lack of access to funding through Medicaid was certainly a signal that *substantive* liberty was not understood as being equally necessary—or perhaps socially desirable—for all women.[139]

Although the "Hyde Amendment" did not take effect until 1980, the law was almost immediately challenged in court as a violation of women's fundamental right

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131 *Id.* at 1445.

132 *Id.* at 1444 (low-income women are five times more likely to report unintended pregnancy than women living at or above federal poverty level).

133 *Id.*

134 *Id.* at 1446.

135 *Id.*

136 Barry Nestor & Rachel Benson Gold, *Public Funding of Conception, Sterilization and Abortion Services, 1982*, 16 FAM. PLAN. PERSP. 130 (1984).

137 Marian Jarlenski et al., *State Medicaid Coverage of Medically Necessary Abortions and Severe Maternal Morbidity and Maternal Mortality*, 125 OBSTETRICS & GYNECOLOGY 786 (May 2017).

138 Geoff Mulvihill et al., *A Year after the Fall of Roe v. Wade, 25 Million Women Live in States with Abortion Bans or Restrictions*, PBS (June 22, 2023), https://www.pbs.org/newshour/politics/a-year-after-fall-of-roe-v-wade-25-million-women-live-in-states-with-abortion-bans-or-restrictions.

139 *See* Harris v. McRae, 448 U.S. 297, 325 (1980) ("Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest in protecting potential life.").

to access abortion under *Roe*. The Court answered the question in a series of cases. In a 1977 trilogy of abortion funding cases, the Court heard cases involving state funding restrictions involving elective abortions and those involving abortions deemed medically necessary. In these cases, *Beal v. Doe*,[140] *Maher v. Roe*,[141] and *Poelker v. Doe*,[142] the Court ruled that states did not have a constitutional obligation to provide funding for elective abortions nor to provide access for elective abortions in public medical facilities.[143]

Arguably, the most important case in the 1977 trilogy is *Maher v. Roe*.[144] In *Maher v. Roe*, the Court held that the Equal Protection Clause does not require a state participating in the Medicaid program to pay expenses that resulted from an elective (nontherapeutic) abortion.[145] The Court indicated that the State's choice to favor childbirth over abortion and then to pay expenses incidental to childbirth and not those attending to abortion did not impinge upon any fundamental privacy right recognized by the Court in *Roe v. Wade*.[146] The Court argued that the right to privacy protects a woman only from undue interference in her *decision* to terminate a pregnancy.[147] Thus, the *Maher* Court held that the scope of the right to privacy it had recognized in *Roe* did not include the right to actually access abortion services if it meant that the pregnant person needed affirmative assistance from the State.[148] In discussing the right to abortion protected in *Roe*, the *Maher* Court stated that the right to privacy only "protects the woman from unduly burdensome interference with her *freedom to decide* whether to terminate her pregnancy."[149] It does not prevent the state from making "a value judgment favoring childbirth over abortion, and . . . implement[ing] that

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[140] Beal v. Doe, 432 U.S. 438, 447 (1977).

[141] Maher v. Roe, 432 U.S. 464, 479–80 (1977).

[142] Poelker v. Doe, 432 U.S. 519, 521 (1977).

[143] In *Beal v. Doe*, the Court held that neither the language of the Medicaid Act (the Social Security Act) nor its legislative history indicated a requirement that participating states fund every medical procedure falling within the delineated categories of "medical care." Furthermore, the Court held that was not inconsistent with the Act's, to refuse to fund elective medical services. Nevertheless, the Court noted that the Social Security Act permitted a state to fund elective (non-therapeutic) abortions should it choose to do so. *Beal*, 432 U.S. at 447. In *Poelker v. Doe*, the Court upheld a municipal regulation that prohibited public hospitals from providing medically necessary (non-therapeutic) abortions to indigent pregnant women did not violate the women's rights to Equal Protection under the Fourteenth Amendment of the Constitution. *Poelker*, 432 U.S. at 521.

[144] *Maher*, 432 U.S. 464.

[145] *Id.* at 464.

[146] *Id.* at 474.

[147] *Id.* at 473–74.

[148] *Id.* at 479.

[149] *Id.* at 473–74 (emphasis added).

judgment by the allocation of public funds."[150] The *Maher* Court asserted that the state statute restricted the use of state funds for the payment of abortion care for indigent women:

> [P]laces no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of (the State's) decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the (State) regulation.[151]

The Court in *Maher* and subsequent cases neglects to recognize the impact of the lack of access to medical resources on indigent women, a group in which BIPOC women are overrepresented. Lack of access to abortion care severely restricts women's ability to participate in the economic and social life of the state. By recognizing a constitutional right to choose abortion care that does not include a constitutional right to access abortion, the *Maher* Court affirms a model of constitutional rights that disproportionately excludes the most marginalized people who seek reproductive care.[152]

While the 1977 trilogy of decisions dealt with issues of the state funding of abortion medical care for indigent women, these decisions left open the question posed by the Hyde Amendment (and similar state and federal laws that were passed in its wake).[153] That question was whether Congress (or the state) could prohibit the

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150 *Id.* at 474.

151 *Id.*

152 *Id.* at 483 (Brennan, J. dissenting); *see also* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2050 (2021).

153 *See, e.g.*, Williams v. Zbaraz, 448 U.S. 358, 369 (1980) (holding Illinois abortion funding restriction (restricting use of state funds for all abortions including medically necessary abortions) that was comparable to the Hyde Amendment did not violate the Equal Protection Clause of the Fourteenth Amendment). Although nominally, the Hyde Amendment applies only to funding Medicaid funding, other programs receiving federal funds have been restricted with Hyde-like provisions. For example, the Hyde Amendment has been incorporated through cross-referencing into the statutes that apply to the Indian Health Service. Thus, the thousands of people who receive reproductive healthcare through the Bureau Indian Affairs ("BIA")—members of Native American Nations and Alaska Natives—are subject to the Hyde Amendment, and as such cannot receive abortion care through BIA facilities. CONG. RSCH. SERV., THE HYDE AMENDMENT: AN OVERVIEW 1–2 (July 20, 2022), https://crsreports.congress.gov/product/pdf/IF/IF12167. Congress has regularly included Hyde-like abortion restrictions in a variety of annual appropriations statutes and in some instances has more permanently codified these restrictions. Examples of Hyde-like restrictions outside of Medicaid and the BIA include: (1) Foreign Assistance Programs: Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 2, 87 Stat. 714, 716; Department of State, Foreign Operations, and

governmental funding of therapeutic abortions without violating the fundamental rights of indigent women. The Court answered that question in *Harris v. McRae.*[154] In *Harris v. McRae*, the Court, in a 5-4 decision, held that the Hyde Amendment's abortion funding restrictions did not violate the female petitioner's Due Process or Equal Protection rights guaranteed by the Fifth and Fourteenth Amendments.[155] The Court found that the statute at issue, which was the most restrictive of the Hyde Amendments,[156] restricting Medicaid funding for all abortions, except in cases where abortion was necessary to save the pregnant woman's life, was constitutional.[157] The

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Related Programs Appropriations Act, Pub. L. 117-103, Div. K; Title III (restricting funds for global health programs and the Peace Corps), Title VII, §§ 7018 and 7057; (2) Department of Defense: Covering women in the military and all military dependents – anyone who gets health insurance through the DOD. Department of Defense Authorization Act, 1985 (recurring Hyde-like restrictions added to Defense appropriations bills starting in 1978. Restrictions were made permanent by Department of Defense Authorization Act, 1985); Pub. L. No. 95-457, Title VIII, § 863, 92 Stat. 1231, 1254 (1978); Pub. L. No. 98-525, tit. XIV, § 1401(e)(5)(A), 98 Stat. 2492, 2618 (1984) (codified as amended at 10 U.S.C. § 1093); (3) Financial Services and General Government Appropriations Act, Pub. L. 117-103, Div. E, §§ 613, 810; (4) Department of Justice Appropriations Act, Pub. L. 117-103, Div. B, Title II, § 202; (5) City of D.C.: Consolidated Appropriations Act, Pub. L. 115-141, Div. E, Title VIII, § 810; (6) Federal Employee's Insurance: Covering anyone who gets health insurance through federal government employment and their dependents. Department of the Treasury and Postal Service Appropriations Act of 1983 (prohibiting the use of funds for the Federal Employees Health Benefits Program (FEHBP) to pay for abortions, except when the life of the woman was in danger). *See* Pub. L. No. 98-151, § 101(f), 97 Stat. 964, 973 (1983) (referencing H.R. 4139, the Treasury, Postal Service and General Government Appropriations Act, 1984, as passed by the House of Representatives on October 27, 1983). Section 618 of H.R. 4139 stated: "No funds appropriated by this Act shall be available to pay for an abortion, except where the life of the mother would be endangered if the fetus were carried to term, or the administrative expenses in connection with any health plan under the Federal employees health benefit program which provides any benefits or coverages for abortions, except where the life of the mother would be endangered if the fetus were carried to term, under such negotiated plans after the last day of the contracts currently in force." *See* CONG. RSCH. SERV., THE HYDE AMENDMENT: AN OVERVIEW 1–2 (July 20, 2022), https://crsreports.congress.gov/product/pdf/IF/IF12167.

154 Harris v. McRae, 448 U.S. 297, 301 (1980).

155 *Id.* at 319, 326–27. The Court also found that the statute did not violate the Establishment Clause of the First Amendment.

156 The 1976 Hyde Amendment's sole exception was for the life of the pregnant woman. From 1978 to 1980, exception for rape and incest were included. These exceptions were removed in 1981, and from 1981 to 1993, the only exception for Medicaid funding was the life of the pregnant woman. In 1993, the rape and incest exceptions were again included. 192 Pub. L. No. 103-112, tit. V, § 509, 107 Stat. 1082, 1113 (1993); Stanley K. Henshaw et al., *Restrictions on Medicaid Funding for Abortions: A Literature Review*, GUTTMACHER INST. (2009), https://documentcloud.adobe.com/spodintegration/index.html?locale=en-us.

157 *Harris*, 448 U.S. 297, 309–10. By the time the case reached the Court in 1980, the statute had been amended to included exceptions to allow Medicaid funding of abortions that were the result of rape or incest. The Court noted that in the 1980 appropriations statute read:

McRae Court also upheld the right of states to provide funding only for medically necessary abortions, and then only for those which they would be reimbursed through the federal government's Medicaid program.[158]

In his dissent, Justice Brennan noted that the Hyde Amendment was, "by design and effect," a measure coercing indigent pregnant women to have children that they would prefer not to have.[159] The statute is a way for the state to assert power over a disfavored group. As Justice Brennan declared:

> [T]he Hyde Amendment is a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual. Worse yet, the Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather, it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality.[160]

Thus, Justice Brennan believed that the Hyde Amendment required the Court to engage in a "more exacting judicial review than in most other cases."[161] Justice Brennan emphasized: "'When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless.'"[162]

When compared to the other funding cases, *McRae* attracted the most Amicus Briefs, eleven, as opposed to only three in *Maher*.[163] In the briefs supporting respondents, the Court had access to myriad data points and stories detailing the real-world implications of the Hyde Amendment on indigent women. For example, one brief explained how women unable to raise money for a legal abortion turn to less

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> [N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Pub. L. No. 96-123, 109, 93 Stat. 926. *See also* Pub. L. No. 96-86, § 118, 93 Stat. 662. This version of the Hyde Amendment is broader than that applicable for fiscal year 1977, which did not include the "rape or incest." *Harris*, 448 U.S. at 303.

158 *Harris*, 448 U.S. at 311.

159 *Id.* at 330 (Brennan, J., dissenting).

160 *Id.* at 332.

161 *Id*.

162 *Id.*

163 Harris v. McRae, CASETEXT, https://casetext.com/case/harris-v-rae (last visited Mar. 6, 2024); Maher v. Row, CASETEXT, https://casetext.com/case/maher-v-roe (last visited Mar. 6, 2024).

costly and less safe illegal abortions.[164] For those indigent women who can obtain medically-necessary safe, legal abortion, their decision to pursue it could mean depriving their families of food, clothing, or shelter.[165] Thus, many indigent women face the double-bind choice of either risking their lives for a less-expensive, illegal abortion, or risking whatever momentary financial stability they and their families enjoy.

B. Casey*: Informed Consent and the Undue Burden Standard*

Similar to the Court's failure to understand the quality and character of liberty needed to address the interests of indigent women in the funding cases, the *Casey* Court also declined to consider the needs of women when addressing the liberty interests at stake where state regulations served to limit access to abortion services for the most vulnerable women.

In *Casey*, abortion clinics and physicians mounted a due process challenge to five provisions of the Pennsylvania Abortion Control Act.[166] These provisions, as previously discussed, included a mandatory twenty-four-hour waiting period, an informed consent provision requiring that biased information and anti-abortion counseling be given to patients, a parental consent requirement for minors, a detailed physician reporting requirement for each procedure, and a spousal notification provision.[167] In its decision, the *Casey* Court asserted that the State's interest in the non-viable fetus gave it more power to regulate women's pregnancies than the *Roe* Court had suggested decades earlier.[168] In *Casey*, the Court declared that the State's interest in the life of the fetus, even prior to viability, is "substantial."[169] In choosing this standard, the Court moved away from the notion that abortion, women's right to bodily autonomy, and women's right to privacy are fundamental rights, as the Court had articulated it in *Roe* and its progeny. [170]

As a fundamental right, state regulation can only stand if the state interest is compelling and no less restrictive means are available.[171] In *Roe*, the Court located the compelling state interest in the abortion context in the life of the viable fetus.[172]

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164 Brief for National Organization for Women, et. al., as Amici Curiae Supporting Respondents, Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268) ("In 1977, for the first time since 1972, reported deaths due to illegal abortions increased.").

165 *Id.* at 28.

166 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (1992).

167 *Id.* at 844; *see also* 18 PA. CONS. STAT. § 3205 (1990).

168 *Casey*, 505 U.S. at 873.

169 *Id.* at 876 ("[T]here is a substantial state interest in potential life throughout pregnancy.").

170 *Id.* at 951–52.

171 Roe v. Wade, 410 U.S. 133, 154 (1973).

172 There is substantial debate on fetal viability as legal-political term rather than a scientific term of art. Fetal viability as a medical term, is dependent on a variety of factors, including

Thus, under *Roe* and its progeny, the State was permitted to prefer the life of the viable fetus over women's liberty interests, and thus, criminalize the willing destruction of the fetus, so long as exceptions were available to protect the health and life of the pregnant women.[173]

Under the undue burden standard adopted by the *Casey* Court, the Court shifted the power over women's bodies toward the State, in the name of fetal life.[174] By identifying the state's interest in the fetus as substantial throughout the pregnancy, the Court established a rationale for increasing the State's power over women's bodies and their health care decision-making, as well as the justification for constraining women's liberty.[175] Thus, although the Court said it was keeping the essential holding of *Roe* intact, in finding that the State has an interest in the potential life of the embryo and the fetus—even before viability—the *Casey* Court gave the State an increased power to regulate abortion prior to viability.[176] The Court claimed that women's privacy rights, including the right to abortion decision-making, were protected under the new, watered down framework.[177]

This heightened state interest, recognized by the *Casey* Court, allows the state to regulate abortion at all stages of pregnancy, so long as the regulation is not "unduly burdensome"—that is, so long as the purpose or effect of the statute does not place a "substantial obstacle" in the path of a woman seeking an abortion of a non-viable fetus.[178] Justice O'Connor states:

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maternal health and nutrition, as well as fetal age and weight. As a legal term of art, fetal viability has come to be measured much more narrowly and almost solely in terms of fetal age. *See id.* at 163–64; *see also* Rachel Fleishman, *I'm a Neonatologist. This is What Happens When a Baby is Born Five Months Early*, NBC NEWS (May 7, 2022), https://www.nbcnews.com/think/opinion/roe-opponents-babies-born-limits-viability-rcna27557; Elizabeth Romanis, *Is 'Viability' Viable? Abortion, Conceptual Confusion and the Law in England and Wales and the United States*, J.L. AND BIOSCIENCES 1, 7 (2020).

[173] *See, e.g.*, *Roe*, 410 U.S. at 162–63.

[174] *Casey*, 505 U.S. at 878–79.

[175] *Id.* at 876.

[176] *Id.* at 871, 912.

[177] *Id.* at 876–77. Although it is true that under the Court's analysis in *Casey*, abortion could not be outright prohibited by the State unless the fetus was viable, it is also necessarily true, that as the State's power over women's bodily autonomy increases in order to "protect" fetal life, women's autonomy over their own selves decreases. In a war over women's bodies, *Casey* forewarns, to those who were willing to listen, the State was winning. Poor women and BIPOC women saw the writing on the wall in the statutes the Court deemed not unduly burdensome, such as the abortion specific informed consent statutes, of the state could make abortions impossible for them to procure, then abortion was not really a protected liberty interest. Wendy K. Mariner, *The Supreme Court, Abortion, and the Jurisprudence of Class*, 82 AM. J. OF PUB. HEALTH, 1556, 1561 (Nov. 1992); Emma Knight, *Quality of Life Improves with Access to Choose: Easing Abortion Restrictions Benefits Both Mother and Child, Especially for Families of Color*, 41 CHILD. LEGAL RTS. J. 188, 191 (2021).

[178] *Casey*, 505 U.S. at 876.

> The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.[179]

In other words, the Court reasons that the State may enact regulations that are designed to induce women to choose childbirth[180] over abortion, so long as those measures are solely "persuasive" in nature,[181] and "calculated to inform the woman's free choice, not hinder it."[182] But in its application of the undue burden standard to the Pennsylvania Abortion Control Act, the Court did not hold the Commonwealth of Pennsylvania to this standard.[183] The measures that the Court deems merely "persuasive" and "calculated to inform" women's free choice, are instead, coercive, part of an "anti-abortion playbook." This is certainly true of the informed consent provisions.[184]

Informed consent is a standard requirement in all medical practice in the United States. It is fundamental in both medical ethics and law.[185] Generally, the patient has

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179 *Id.*

180 (Or perhaps sterilization). *Id.* at 878.

181 *Id.* at 877.

182 *Id.*

183 *Id.* at 878–79.

184 The mandatory waiting periods are an example. They are also coercive. As of July 1, 2023, twenty-seven states mandated waiting period ranging from twenty-four to seventy-two hours. The waiting period commences after the person seeking abortion has received the counseling mandated by the informed consent statute. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (July 1, 2023) https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion. Where the statute requires the counseling to be in-person, that means that the person seeking an abortion must make two visits to the provider. This adds to the cost of the abortion. It also adds other difficulties for the person seeking the abortion in terms of arranging for childcare, release for work or other responsibilities. For low-income women, these difficulties may preclude them from receiving abortion care. The *Casey* Court had this information, as the dissent notes; the majority simply did not believe the increase in cost to the patient due to this medically unnecessary provision, and another cost raising measure, the medically unnecessary requirement that the abortion provider rather than a member of the nursing staff or a qualified counselor provide the counseling mandated by the informed consent statute, raised to the level of an undue burden. They viewed the increase in cost and the attendant burden much like the burdens caused by indigency in the funding cases (*Harris v. McRae* and *Maher v. Roe*): constitutionally of no consequence. Not of the state's making. Thus, they need not be taken into account when thinking about the contours of the individual's liberty interest and the state's obligations to protect it.

185 *See, e.g.*, AMA Code of Medical Ethics, 2.1.1, *Informed Consent*, 2.1.1.pdf (ama-assn.org); *see also* 18 PA. CONS. STAT. § 3205 (1990).

the right to receive *relevant* and *appropriate* information about the proposed medical procedure.[186] To give consent, the patient must possess the capacity to make decisions about their care; and the patient's decision must be voluntary.[187] Unless treating the patient under emergency circumstances, a physician commits a battery when treating a patient without that patient's informed consent.[188] The informed consent process is an important ethical process; it engenders trust between health-care providers and their patients and provides an atmosphere for patients to ask questions that foster well-informed and thoughtful decisions about their health-care.[189]

However, abortion "informed consent" statutes are different. These statutes, by mandating the exact information that must be shared with the person seeking an abortion, amount to biased counseling laws. Although thirty-two states require abortion-seeking patients to receive counseling before the procedure is performed, twenty-eight of those states specify a compulsory script that medical providers must follow in providing information to their patients.[190] Other statutes go further by requiring ultrasounds be performed, shown, or offered to the patient.[191] These laws compel the medical provider to give information that is intended to discourage the procedure—the information given may be unproven, untrue, irrelevant, and

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[186] AMA Code of Medical Ethics, *supra* note 185.

[187] *Id.*

[188] E. Haavi Morreim, *Medical Research Litigation and Malpractice Tort Doctrines: Courts on a Learning Curve*, 4 HOUS. J. HEALTH L. & POL'Y, 1, 52, 56, 58 (2003).

[189] Parth Shah et al., *Informed Consent*, STATPEARLS (June 5, 2023), https://www.ncbi.nlm.nih.gov/books/NBK430827/.

[190] Twenty-seven of the statutes direct the state health agency to develop written materials. Some (eleven) provide that the materials must be given to the person seeking the abortion, other statutes (sixteen) provide that the materials must be offered to the person seeking the abortion procedure. *See Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (July 1, 2023), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion.

[191] According to the Guttmacher Institute, as of July 1, 2023, twenty-seven states regulate the provision of ultrasound by abortion providers. Of those twenty-seven states, there seem to be four different approaches to whether the state requires the ultrasound imaging and whether the state requires the person seeking the abortion to view the ultrasound image. In the first set of states, six states require the abortion provider to perform an ultrasound on the person seeking an abortion and require the provider to show and describe the ultrasound image. In the second set of states, ten of the twenty-seven states require the abortion provider perform an ultrasound on the person seeking an abortion, and eight of these states require the provider to offer the patient the opportunity to examine the ultrasound image. In the third approach, eight of the twenty-seven states do not require an ultrasound be performed. But if an ultrasound is performed as part of the regular preparation for performing the abortion, then the provider is required to give the patient the opportunity to view an ultrasound image. In the fourth and final approach, these six states simply require that the abortion provider give the patient the opportunity to view an ultrasound image. *See Requirements for Ultrasound*, GUTTMACHER INST. (Sept. 1, 2023), https://www.guttmacher.org/state-policy/explore/requirements-ultrasound.

unnecessary.[192] For example, the Guttmacher Institute found that, as of July 2023, out of the twenty-eight states that required abortion specific "informed consent" counseling, twelve states required the health care provider to tell the abortion-seeking patient that personhood begins at conception,[193] and to give the patient unproven information regarding the fetus's ability to feel pain.[194] Eight states required health care providers to give patients medically inaccurate information regarding medication abortion,[195] and two states required providers to misinform patients that abortion increases the risk of breast cancer.[196]

The Guttmacher Institute also found that of the twenty-one states whose abortion-consent materials included information on the possible psychological response to abortion, eight stressed negative emotional outcomes resulting from abortion—often referred to in anti-choice rhetoric as "abortion regret."[197] Abortion regret is not often experienced by those that have abortions.[198] The data suggests that after abortion most women feel a sense of relief rather than regret.[199] Thus, regret is used to discourage and shame rather than inform women's free choice.

The Pennsylvania statute at issue in *Casey* suffers from many of the problems noted above. In addition, this statute requires the patient to receive a thirteen-page booklet entitled *Abortion: Making A Decision*.[200] The booklet contains information on adoption, childbirth, and child support,[201] showing the state's preference for childbirth over abortion. It also shows material meant to be coercive rather than persuasive. For example, the booklet contains large, colored and highly detailed photographs of fetus at various stages of development—misrepresenting the size and development of the fetus, inaccuracies about the consequences of abortion on fertility,

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192 *See Biased Counseling Against Abortion*, ACLU (Apr. 11, 2001), https://www.aclu.org/documents/biased-counseling-against-abortion.

193 GUTTMACHER INST., *supra* note 191.

194 *Id.*

195 Eight states required information that medication abortion could be stopped after the patient takes the first dose of pills. *Id.*

196 *Id.*

197 *Id.*

198 *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, GUTTMACHER INST. (Oct. 23, 2006) https://www.guttmacher.org/gpr/2006/10/misinformed-consent-medical-accuracy-state-developed-abortion-counseling-materials.

199 *Id.*

200 18 PA. CONS. STAT. § 3205 (1990); COMMONWEALTH OF PA. DEP'T OF HEALTH, ABORTION: MAKING A DECISION (2014), https://www.health.pa.gov/topics/Documents/Programs/Abortion%20-%20Making%20a%20Decision.pdf.

201 *Id.* at 1.

and an emphasis on negative mental health outcomes as a result of abortion.[202] None of this is meant merely to persuade pregnant women to choose childbirth or "inform her free choice."[203] The inclusion of irrelevant and inaccurate material is meant to frighten and coerce her into making the choice preferred by the state.

As a result, the state-mandated, abortion-specific "informed consent" procedure is not solely "persuasive" in nature, and "calculated to inform the woman's free choice, not hinder it." Abortion-specific informed consent statutes are, instead, harmful to the life and health of the person seeking the abortion and constraining of her freedom to choose the abortion itself by the coercive nature of the material provided.[204]

The period before *Dobbs* was one of increasing abortion restrictions. These restrictions created circumstances for some women that made it impossible for them to access abortion. Under these conditions, abortion might as well have been illegal for many women. But the restrictions upheld by the Court in the years before *Dobbs*, communicated other important principles that demeaned women's liberty interests. By upholding the bulk of restrictions at issue in *Casey*, and by upholding the Hyde Amendment and like statutes in the funding cases, the Supreme Court signaled that at least some women should not be permitted to make such important decisions, like abortion, without instruction from the state—thereby infantilizing them and deriding their ability to be autonomous. Moreover, in all of these instances, the Court also signaled that women are not to be treated as individuals with their own liberty interests—rather the important interest at stake in abortion is fetal life.

IV. *DOBBS V. JACKSON*: ARE WOMEN INCLUDED IN THE FOURTEENTH AMENDMENT'S PROMISE OF LIBERTY?

The most striking feature of the [majority] is the absence of any serious discussion of how its ruling will affect women. . . . [I]t reveals how little it knows or cares about women's lives or about the suffering its decision will cause.[205]

In the year before it decided *Dobbs v. Jackson*, the Supreme Court signaled that it would continue its indifference to the material needs of women by allowing a six-week abortion ban to stand. In September of 2021, the Supreme Court, in *Whole Woman's Health v. Jackson*, by denying a request for emergency relief from Texas abortion providers, allowed a six-week abortion ban, the Texas Heartbeat Act (Senate Bill 8), to take effect.[206] By allowing the statute to stand, the Court not only allowed the Texas Heartbeat Act to become the first, successfully imposed six-week abortion ban since the Court's decision in *Roe v. Wade*, but the Court also signaled that it was willing to read the Due Process Clause more narrowly than it had previously.[207] It

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202 *Id.* at 3–7, 10.

203 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 877 (1992).

204 *Id.* at 877, 881, 886.

205 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 405 (Kagan, J., dissenting).

206 Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495–96 (2021). The Texas Heartbeat Act bans abortion after the detection of embryonic cardiac activity, which normally occurs after about six weeks of pregnancy.

207 Whole Woman's Health v. Jackson, 595 U.S. 30, 35–36, 50–51 (2021).

signaled that it was inclined to analyze this constitutional mandate in such a way as to give states more power over women's bodily integrity and reproductive liberty.[208]

A. The Dobbs *Court: The Failure to Attend to Women's Voices*

The statute at the center of the Court's decision in *Dobbs v. Jackson Women's Health Organization* was Mississippi's Gestational Age Act, a statute which bans abortions after the fifteenth week of pregnancy, with few exceptions.[209] This statute gave the Court the opportunity it signaled it wanted in *Jackson*. The *Dobbs* Court took the case as an opportunity to revisit the story of reproductive liberty and its relationship to the due process clause.[210] In doing so, the Court found that women had *no* reproductive liberty that could be protected by substantive due process.[211]

Based on all of the modern family and reproductive privacy jurisprudence that came before it, the Mississippi statute at issue in *Dobbs* was a facially unconstitutional prohibition on a woman's right to choose to terminate her pregnancy.[212] Nevertheless, the Court in *Dobbs* overruled its most direct precedent, *Roe* and *Casey*, and held that the Due Process Clause, neither expressly nor impliedly protected the right to abortion.[213] In doing so, the Court rejected the analytical framework of its privacy jurisprudence that has included, as part of its analysis, the negative impact of the state's policy on those most affected by the policy at issue. For example, in explaining its refusal to overrule *Roe*, due to the application of stare decisis or on the basis of the contours and substance of the liberty right at issue, the *Casey* Court stated its refusal to ignore the fact that the availability of legal abortion had given women a greater opportunity to take part in the life of the Nation.[214] Justice O'Connor stated:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.[215]

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208 *Id.* at 49–50.

209 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022).

210 *Id.* at 238–40.

211 *Id.* at 241.

212 *Id.* at 232.

213 *Id.* at 301.

214 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856, 924 (1992).

215 *Id.* at 856 (citations omitted).

And indeed, in assessing the Pennsylvania Abortion Control statute on women, the *Casey* Court narrowed in on the spousal notification provision as particularly harmful to women's liberty.[216] As noted above, it did so by looking at the lived experience of women—more specifically, data regarding domestic violence.[217]

The *Dobbs* Court had access to a plethora of data regarding the ways in which abortion restrictions, like the Texas Heartbeat Act, (Senate Bill 8), would affect women living in the state. The data provided by over 150 economists and researchers in the Brief of Amici Curiae Economists in Support of Respondents (hereinafter "Economists' Brief"), and widely available elsewhere, sought, in part, to give the Court an education on the current demographics of abortion in the United States.[218] The brief also explained that many women seeking abortions already live under precarious economic and social circumstances.[219]

The economists' analysis of the long-term data demonstrates that while the legalization of abortion has had a profound impact on the lives of women and their position in society, "those changes are neither sufficient nor permanent."[220] They argue that the data demonstrates that substantive access to legal abortion remains "relevant and necessary to women's equal and full participation in society."[221] They note that the availability of high-quality contraception and employment policies that have, as their intent, the support of working mothers, have not made access to abortion care any less essential.[222] For example, approximately half of all pregnancies are unintended, and roughly half of all unintended pregnancies end in abortion.[223] As the economists note, "[t]hese statistics alone lead to the inevitable (and obvious) conclusion that contraception and existing policies are not perfect substitutes for abortion access."[224]

Moreover, women's stories tell us that women also need abortion access for financial reasons, when pregnancy is the result of sexual assault, and when medical

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216 *Id.* at 888–92.

217 *Id.*

218 *See generally* Brief for Economists as Amici Curiae Supporting Respondents at 16, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392) [hereinafter Economists' Brief] (providing data to the Court on the social and economic demographics of women seeking abortion care); *see also United States Abortion Demographics*, GUTTMACHER INST., https://www.guttmacher.org/united-states/abortion/demographics (last visited Jan. 26, 2024) (providing current data on the demographics of women who seek abortion care).

219 Economists' Brief, *supra* note 218, at 23–24.

220 *Id.* at 16.

221 *Id.*

222 *Id.*

223 *Nearly Half of All Pregnancies are Unintended – A Global Crisis, Says New UNFPA Report*, U.N. POPULATION FUND (Mar. 30, 2022), https://www.unfpa.org/press/nearly-half-all-pregnancies-are-unintended-global-crisis-says-new-unfpa-report.

224 Economists' Brief, *supra* note 218, at 16.

complications occur in intended pregnancies.[225] Despite the Petitioner's (and the Court's) attempt to demonize it, the fact is, as the Amici experts make clear, that abortion is a medical procedure that is extremely safe, extremely common, and part of the full spectrum of reproductive healthcare.[226] Abortion is so common in fact, that approximately eighteen percent of all pregnancies in the United States end in abortion and almost twenty-five percent of American women will have an abortion before the age of forty-five.[227] Thus abortion care continues to be a needed part of women's needed and much-used reproductive health-care.

Both the social science experts in Brief of Social Science Experts as Amici Curiae in Support of Respondents (hereinafter "the Social Scientists' Brief")[228] and economists in Economists' Brief discuss the demographics of those who have abortions.[229] Abortion patients were not confined to any one racial group, but BIPOC women continue to be overrepresented.[230] Based upon available data, in 2019,

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225 *See infra* Section III.A.4; *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 406–07 (2022) (Breyer, J. dissenting).

226 Brief for Social Science Experts as Amici Curiae Supporting Respondents at 4, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392) [hereinafter Social Scientists' Brief]; *see also Abortion*, WHO, https://www.who.int/health-topics/abortion (last visited Mar. 6, 2024).

227 Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 112, no. 9 AM. J. PUB. HEALTH 1284 (Sep. 1, 2022), https:// ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304042; *see also Dobbs*, 597 U.S. at 406 (Breyer, J. dissenting). Each year the Centers for Disease Control requests abortion data from all state health agencies, the health agencies in the District of Columbia and New York City. These surveys document the number and types of abortions performed, the demographic characteristics of women who have procured legal abortions, and the number of abortion-related deaths in each jurisdiction. The 2021, a total of 625,978 abortions were reported to the CDC through this process. Using this surveillance data and census and natality data, the CDC concluded that the abortion rate in the United States in 2021 was 11.6 abortions per 1,000 women aged fourteen to forty-four years old, and 210 abortions per 1,000 live births. Katherine Kortsmit et.al., *Abortion Surveillance — United States, 2021*, 72 MMWR Surveillance Summary vol 9, 1-32 (2023), https://www.cdc.gov/mmwr/volumes/72/ss/ss7209a1.htm?s_cid=ss7209a1_w.

228 Social Scientists' Brief, *supra* note 226 at 10–11. (Amici curiae consists of more than 100 individual social science experts who have spent decades conducting and publishing peer-reviewed research about the safety, incidence, social, psychological, and health impacts of unintended pregnancy and abortion in the United States. Specifically, their research focuses on the effects of state restrictions on women seeking abortions. Their research has been published in hundreds of scientific articles which have appeared in leading medical and social science journals).

229 Economists' Brief, *supra* note 218, at 34.

230 Abortion patients were not confined to any one racial group, but BIPOC women continue to be overrepresented. James Studnicki et al., *Perceiving and Addressing the Pervasive Racial Disparity in Abortion*, 7 HEALTH SERV. RSCH. AND MANAGERIAL EPIDEMIOLOGY 1 (2020) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7436774/pdf/10.1177_2333392820949743.pdf. And the anti-abortion movement uses this to argue that abortion is being used as a form of

approximately 40% of those receiving abortion care were Black women, 30% of those receiving abortion care were White women, 20% were Latina, and the remainder represented women of other racial and ethnic origins.[231]

Moreover, Black women are more likely to live in jurisdictions where abortion is heavily restricted or banned, while White women on the other hand are more likely to reside in jurisdictions where the laws protect access to abortion. Research indicates that in the twelve months prior to the Court's decision in *Dobbs*, 39% of Black women receiving abortion care, received care in states where abortion is greatly restricted; while only 30% of Black women received abortion care where abortion was statutorily or constitutionally protected.[232] This same study found that a smaller percentage of White women received abortion care in states where abortion was heavily restricted when compared to the experience of Black women.[233] Thirty-five percent of White women receiving abortion care, received care in states where abortion is restricted; whereas 28% of White women receiving abortion care, did so in states where abortion was statutorily or constitutionally protected.[234]

Another significant demographic data point presented to the Court is that most women seeking abortions are living in poverty.[235] Approximately 49% of women seeking abortions are poor, while 75% are low income.[236] As a result of their lack of financial resources and the absence of public funding for abortion health care, these women often end up accessing abortion care later in their pregnancies than is

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genocide against Black communities. Again, altering the story from outside of the experience. P.R. Lockhart, *"Abortion as Black Genocide": Inside the Black Anti-Abortion Movement*, VOX (Jan. 19, 2018), https://www.vox.com/identities/2018/1/19/16906928/black-anti-abortion-movement-yoruba-richen-medical-racism.

231 Samantha Artiga, et al., *"What Are the Implications of the Overturning of Roe v. Wade for Racial Disparities?"*, KFF (Jul. 15, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturning-of-Roe-v-Wade-for-racial-disparities/.

232 Rachel K. Jones & Doris W. Chiu, *"Characteristics of Abortion Patients in Protected and Restricted States Accessing Clinic-Based Care 12 Months Prior to the Elimination of the Federal Constitutional Right to Abortion in the United States"*, 55 PERSP. SEXUAL AND REPROD. HEALTH 80, 83 (2023), https://onlinelibrary.wiley.com/doi/epdf/10.1363/psrh.12224.

233 *Id.*

234 *Id.*

235 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 407 (2022) (Breyer, J. dissenting).

236 Economists' Brief, *supra* note 218, at 23. "Poor" is defined as family income below the federal poverty level, which in 2020 was $17,839. "Low-income" is defined as incomes below 200% of the federal poverty level. *See Poverty Thresholds*, U.S. CENSUS BUREAU (Sept. 14, 2021), https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html. Most women seeking abortion care are already parenting, as 59% of women who have abortions already have at least one child. Economists' Brief, *supra* note 218, at 23. Finally, the data indicates that most women who have had an abortion do so while in the midst of other disruptive live events. For example, 55% of women who have had abortions report a recent disruptive life event such as the death of a close friend or family member, loss of a job, the end of a romantic relationship, or the stress of overdue rent or mortgage. *Id.*

medically optimal and later in their pregnancies than they would prefer.[237] The data also shows that, even prior to *Dobbs*, studies found that most women would have preferred to have had the abortion earlier.[238]

Most women seeking abortion care are already parenting, as 59% of women who have abortions already have at least one child.[239] Finally, the data indicates that most women who have had an abortion do so while in the midst of other disruptive life events. For example, 55% of women who have had abortions report a recent disruptive life event such as the death of a close friend or family member, loss of a job, the end of a romantic relationship, or the stress of overdue rent or mortgage.[240]

Indeed, more than 140 amici briefs were filed in the case, with the majority filed in support of Respondent, Jackson Women's Health Organization.[241] Amici certainly gave the Court access to the long-term social science, public health, and medical data regarding the economic, health, and social consequences of both access to and denial of abortion care on women.[242] Moreover, the Amici gave the Court access to personal abortion stories and what the availability of abortion meant to their lives. In the Brief filed on behalf of the Advocate for Youth, Inc., and NEO Philanthropy, also known as the "*We Testify*" Brief, more than a dozen people recount for the Court the intimate details of why they chose to terminate their pregnancies.[243] In this Brief, the witnesses took this opportunity to explain to the Justices the circumstances that led to their decisions to access abortion care and the result having that care had on their lives.[244]

In many ways, the accounts of the women in the *We Testify* Brief are unsurprising. Women's choices for accessing a full life of opportunities are limited. Abortion is often a double-bind choice, as education and economic opportunities often are only easily available to women when they are lucky—living under circumstances where

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237 *State Funding of Abortion Under Medicaid*, GUTTMACHER INST. (Aug. 31, 2023), https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid.

238 Jones & Chiu, *supra* note 232, at 84. (More than two-thirds of respondents from states in which abortion access was protected and states in which it was heavily restricted would have preferred to have the abortion earlier, but respondents who indicated this preference in restricted states more likely reported having trouble coming up with the money and not knowing where to go).

239 Economists' Brief, *supra* note 218, at 23.

240 *Id.* at 23–24.

241 Ellena Erskine, *We Read All the Amicus Briefs in Dobbs So You Don't Have To*, SCOTUS BLOG (Nov. 30, 2021, 5:24 PM), https://www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-dobbs-so-you-dont-have-to.

242 *Id.*

243 Brief for Advocates for Youth, Inc. and NEO Philanthropy, Inc. d/b/a We Testify as Amici Curiae Supporting Respondents Dobbs v. Jackson Women's Health Org. 945 F.3d 265 (5th Cir. 2019) (No. 19-1392) [hereinafter We Testify Brief]. We Testify is an organization dedicated to increasing the spectrum of abortion storytellers and shifting the way the media understands the complexities of accessing abortion care.

244 *Id.*

nothing goes wrong—where everything goes flawlessly, seamlessly—where everything falls into place.[245] In every other instance, women pay a price—make a double-bind choice—if they want to have the opportunities that men have. If the woman is low-income or is a BIPOC woman, then she needs more luck, or she will need to make more double-bind choices.[246] And, as demonstrated by the decades of social science data, as well as the women's stories in the *We Testify* Brief, pregnant low-income and BIPOC women also need luck or make double-bind choices to ensure their of physical safety.[247]

Thus, it is well-documented that women suffer great harm when they are denied access to abortion care due to restrictive abortion laws. They face long-term financial and physical insecurity, and their health is often impaired. The *Dobbs* Court had access to all of this data, but failed to use any of this evidence in rendering its decision.

1. The Economic Consequences of Abortion Restrictions

The Brief of Amici Curiae Economists in Support of Respondents, written by over 150 economists and researchers with extensive experience in the field of causal inference,[248] gave the Court the opportunity to be educated on the role that access to legal abortion has played in women's economic and social advancement in the post-*Roe* era. The Economists' Brief analyzed decades of research and concluded that *Roe* had played a causal role in women's advancements in social and economic life in some very significant ways, particularly for young women. For example, young women who accessed legal abortion to delay motherhood by just one year, were able to achieve an 11% increase in hourly wages later in their careers.[249] Access to legal abortion also increased the probability that young women with unintended pregnancies finished college by nearly 20%, and the likelihood that they entered a professional occupation increased by nearly 40%.[250] The economists also found that the effect of access to abortion on the financial stability for African American women was greater than

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245 Philosopher Marilyn Frye defines double-bind choices as "situations in which options are reduced to a very few and all of them expose one to penalty, censure, or deprivation." Furthermore, Frye argues that these types of choices are emblematic of systems of oppression. MARILYN FRYE, POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 6 (1983).

246 *See* Martha C. White, *How Limiting Abortion Access Hurts Women Financially*, NBC NEWS (May 5, 2022), https://www.nbcnews.com/business/business-news/limiting-abortion-access-hurts-women-financially-roe-v-wade-rcna2729; *see also Human Rights Crisis: Abortion in the United States after Dobbs*, HUM. RTS. WATCH (Apr. 18, 2023), https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs.

247 We Testify Brief, *supra* note 243, at 20–21.

248 Economists' Brief, *supra* note 218, at 1, 6 (defining causal inference as using methods and tools to understand the causal effects of policies and legal changes. In this Brief, causal inference measures the causal impact of a wide range of policies, in particular, women's access to abortion).

249 *Id.* at 13.

250 *Id.*

average.[251] For example, access to legal abortion increased the probability that Black teenage women graduated from high school by 22% to 24%, and it increased the likelihood that they attended college by 23% to 27%.[252]

The Turnaway Study thoroughly documents the negative impact of abortion restrictions.[253] This study, conducted by researchers at the University of California, San Francisco, included interviews with and data from more than 1,000 women from clinics in twenty-one states.[254] The study's population was chosen to closely resemble the population seeking abortions in the United States as a whole.[255] The study included both women who received abortions and women who were denied abortions. Moreover, the women in each group had similar biographies at the time they sought abortions.[256] Researchers found that the course of the women's lives diverged after they received or were denied the requested abortion, and that the changes in their lives were directly attributable to whether they were able to secure an abortion.[257]

Regarding the financial consequences of abortion denial, the long-term data demonstrates that women denied abortion suffer great economic hardship, not just in the immediate period surrounding the ensuing pregnancy and childbirth, but in the long term. For example, women who were denied abortion services and gave birth experienced an increase in household poverty lasting more than four years longer than those who received an abortion.[258] Years after the abortion denial, these women were

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[251] *Id.*

[252] *Id.* at 12.

[253] DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING – OR BEING DENIED – AN ABORTION 174, 177, 179, 180 (2020) [hereinafter TURNAWAY STUDY].

[254] Because the Turnaway Study is so well designed and well regarded, and its scope so extensive, it has produced fifty peer-reviewed papers in top medical and social science journals regarding the medical and social effects on women of laws and policies that deny women abortions. *The Turnaway Study*, ADVANCING NEW STANDARDS IN REPROD. HEALTH, https://www.ansirh.org/research/ongoing/turnaway-study (last visited Mar. 6, 2024); *see also The Harms of Denying a Woman a Wanted Abortion*, ADVANCING NEW STANDARDS IN REPROD. HEALTH, https://www.ansirh.org/sites/default/files/publications/files/the_harms_of_denying_a_woman_a_wanted_abortion_4-16-2020.pdf (last visited Mar. 6, 2024).

[255] TURNAWAY STUDY, *supra* note 253, at 254, 255.

[256] *The Harms of Denying a Woman a Wanted Abortion*, *supra* note 254.

[257] Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who are Denied Wanted Abortions*, 112 AM. J. OF PUB. HEALTH 1290, 1292 (2022), https://pubmed.ncbi.nlm.nih.gov/35969820/; *see also The Harms of Denying a Woman a Wanted Abortion*, *supra* note 254.

[258] Foster et al., *supra* note 253, at 1290, 1294; *see also The Harms of Denying a Woman a Wanted Abortion*, *supra* note 254 ("Women who were turned away and went on to give birth experienced an increase in household poverty lasting at least four years relative to those who received an abortion.").

more likely than women who wanted and received an abortion, to live in poverty.[259] Indeed, researchers have observed that being denied a wanted abortion results in a substantial increase in household poverty, a reduction in full-time employment, and an increase in reliance on public assistance programs—a reliance, the data suggests, that persists until the women and their children have timed out of the program.[260] As a result, abortion denial increases the likelihood that women do not have enough money to pay for the basic expenses for themselves and their children.[261]

Even where women who were denied abortions managed to stay out of poverty, abortion denial nevertheless takes a financial toll. Those denied abortions had lower credit scores, increased overall debt, and more negative public financial records, such as bankruptcies and evictions, than women who had been able to secure abortion.[262] Specifically, the data demonstrates that, up until the time that they sought abortion care, the economic futures of the two groups (those who had abortions and those who were turned away) were very similar.[263] It was precisely at the point in their lives when one group obtained an abortion and the other group was turned away, that one group—the "turnaway group"—began to experience significant economic difficulty.[264] Over the five-year period subsequent to the abortion refusal, the average woman in the turnaway group experienced a 78% increase in past-due debt and an 81% increase in public records related to bankruptcies, evictions, and court judgments.[265] Such a significant increase in financial stress and debt did not occur in the cohort of women who received abortion care.[266]

It should also come as no surprise that the children of women who were denied abortion care also suffer economically. For example, the Turnaway Study found that children who were born as a result of the denial of an abortion are more likely to live below the federal poverty level than children born from a subsequent pregnancy to women who received an abortion.[267]

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259 *The Harms of Denying a Woman a Wanted Abortion*, *supra* note 254.

260 Foster et al., *supra* note 253, at 1292–93.

261 *Id.* at 1294.

262 Sarah Miller et al., *The Economic Consequences of Being Denied an Abortion* 4, 23, 36 (Nat'l Bureau of Econ. Rsch., NBER Working Paper No. 26662, 2020).

263 *Id.* at 4.

264 *Id.* at 4, 31.

265 *Id.* at 4, 23, 36; *see also* Economists' Brief, *supra* note 218, at 24–25.

266 Miller et al., *supra* note 262, at 4, 23, 36; *see also* Economists' Brief, *supra* note 218, at 24–25.

267 Diana Greene Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion*, 172 JAMA PEDIATRICS 1056–57 (2018), https://jamanetwork.com/journals/jamapediatrics/fullarticle/2698454.

2. The Health Consequences of Abortion Restrictions

The rate of abortion mortality is extremely low (-0.0007%);[268] fewer than one out of every 100,000 abortion patients die from abortion-related complications.[269] In fact, first trimester abortions, when safely performed by medical professionals, are safer than taking a pregnancy to term.[270] Conversely, women who are denied abortions can, and do, suffer from significant negative health resulting from giving birth—problems obviously not experienced by those women who are able to access abortion care.[271]

Women who were denied abortions suffered from rates of mortality and morbidity higher than other women who bring their pregnancies to term.[272] Moreover, rates maternal mortality and morbidity are high in states with restrictive abortion laws and

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268 The mortality rate for abortion is approximately 0.0007%. Suzanne Zane, et al., *Abortion-Related Mortality in the United States:1998–2010*, PUBMED CENTRAL 4 (Aug. 1, 2016) (author's manuscript) (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4554338/).

269 *Id.*

270 Roe v. Wade, 410 U.S. 113, 149 (1973).

271 Caitlin Gerdts, et al., *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth after an Unwanted Pregnancy* 26-1 WOMEN'S HEALTH ISSUES 55, 58 (2016); *see also*, Lisa Marshall, *Study: Banning Abortion Would Boost Maternal Mortality by Double-Digits*, CU BOULDER TODAY (Sept. 8, 2021), https://www.colorado.edu/today/2021/09/08/study-banning-abortion-would-boost-maternal-mortality-double-digits. Moreover, it should go without saying that women receiving abortion care do not die from pregnancy or pregnancy-related causes.

272 Caitlin Gerdts, et al., *supra* note 271, at 58. *See Severe Maternal Morbidity*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/severematernalmorbidity.html (last visited Jan. 26, 2024) (defining maternal morbidity as "unexpected outcomes of labor and delivery that result in significant short- or long-term consequences to a woman's health"); *Maternal Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/maternal-mortality/index.html (last visited Jan. 26, 2024) (defining maternal mortality as "the death of a woman during pregnancy, at delivery, or soon after delivery"). Katherine Sack, lead investigator of Milken Study states that in states one reason that maternal mortality is higher in states where abortion is restricted is due to lack of obstetric training in dilation and curettage (D&C), an indispensable procedure for obstetrics. D&C is a procedure used for miscarriages and for abortion. In jurisdictions where abortion care is restricted, training in these techniques is often restricted in obstetric certification. This means that in these states, many obstetricians lack these critical skills. Williesha Morris, *New Report: Alabama Has Worst Maternal Mortality Rate in the U.S.*, AL.COM (Aug. 1, 2023), https://www.al.com/news/2023/08/new-report-alabama-has-worst-maternal-mortality-rate-in-the-us.html. Moreover, states that haven't expanded Medicaid under the ACA (Obamacare) tend to have higher maternal mortality rates. ACA/Medicaid funds would expand the funds available to provide for additional care for women during their pregnancy and for postpartum care for women after they have given birth. *See* Erica L. Eliason, *Adoption of Medicaid Expansion Is Associated with Lower Maternal Mortality*, 30 WOMEN'S HEALTH ISSUES 147, 148–49 (2020). Alabama is one of ten states that has not expanded Medicaid under the ACA. Morris, *supra* note 272.

abortion bans, and significantly higher than in states without restrictive abortion laws or abortion bans.[273]

Some pregnancy-related illness can lead to death or chronic, lifelong disability, and the rate of maternal morbidity is higher among women who have been denied access to legal abortion, and for women who live in states with restrictive abortion laws.[274] For example, the two of the leading causes of maternal mortality among BIPOC women, preeclampsia and postpartum hemorrhage, are not experienced by women who received abortions.[275] Moreover, where preeclampsia is less severe and does not result in maternal death, it can lead to chronic, lifelong illness.[276] Other serious pregnancy-related illnesses, such as gestational diabetes and gestational hypertension, can, resolve after the pregnancy ends. Even so, these illnesses can lead to lifelong kidney damage.[277] The rates of these, potentially fatal and life-limiting illnesses, are higher among women denied abortion.[278] Women denied abortion also report having more illness postpartum. For example, women who gave birth after being denied abortions report having more chronic headaches, migraines, and joint pain, than women who were able to access abortion care.[279]

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

274 Amy N. Addante et. al., *The Association Between State-Level Abortion Restrictions and Maternal Mortality in the United States, 1995-2017*, 104 CONTRACEPTION 496, 499 (2021).

275 *Maternal Mortality in the United States: A Primer*, COMMONWEALTH FUND (Dec. 2020), https://www.commonwealthfund.org/publications/issue-brief-report/2020/dec/maternal-mortality-united-states-primer; *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 36 US States, 2017–2019*, CTRS. FOR DISEASE CONTROL & PREVENTION (2022), https://www.cdc.gov/reproductivehealth/maternal-mortality/docs/pdf/Pregnancy-Related-Deaths-Data-MMRCs-2017-2019-H.pdf; *Black Women Over Three Times More Likely to Die in Pregnancy, Postpartum than White Women, New Research Finds*, POPULATION REFERENCE BUREAU (Dec. 6, 2021), https://www.prb.org/resources/black-women-over-three-times-more-likely-to-die-in-pregnancy-postpartum-than-white-women-new-research-finds/. *See also*, Gerdts et al., *supra* note 271, at 57 (defining eclampsia and postpartum hemorrhage).

276 Ainslie M. Hildebrand et al., *Preeclampsia and the Long-term Risk of Kidney Failure,* 69 AM. J. KIDNEY DISEASE 487 (2017); Vesna D. Garovic & Phyllis August, *Preeclampsia and the Future Risk of Hypertension: The Pregnant Evidence*, 15 J. NAT'L INST. OF HEALTH 1, 1, 7 (2013).

277 Lauren J. Ralph et al., *Self-Reported Physical Health of Women Who Did and Did Not Terminate Pregnancy After Seeking Abortion Services: A Cohort Study*, 171 ANNALS OF INTERNAL MED. 238, 238, 244–45 (2019).

278 *Id.*

279 Ralph et al., *supra* note 277 at 244. The Turnaway Study found evidence of only short-term differences in mental health outcomes between the women who received abortions and those that were denied. "Shortly after being denied an abortion, women had more symptoms of anxiety and stress and lower levels of self-esteem and life satisfaction than women who received an abortion. Over time, women's mental health and well-being generally improved, so that by

3. Other Physical and Social Consequences of Abortion Restriction

The physical and social well-being of women and children is negatively affected by abortion denial. For women whose physical safety is violated by their romantic partner, we know that abortion denial has dire consequences. In relationships where battering occurs, the battering often escalates during pregnancy.[280] The long-term data gathered by the Turnaway Study found that, for women who received wanted abortion care, physical violence from men involved in the pregnancies decreased.[281] For the women who were denied abortions and gave birth, the Turnaway Study found an increase in violence.[282] Researchers also found that women who were denied abortion care were more likely to stay in contact with a violent partner longer than those who received wanted abortion care.[283] On this note, the Turnaway Study concluded:

> For the one in twenty women who experience abuse from the man involved in the pregnancy, being turned away and giving birth increases the duration of ongoing contact, with the result that the incidence of violence higher among women who are denied an abortion compared to those who received one. A pregnancy carried to term that is with the wrong man or comes at the wrong time has reverberations for the woman's future relationships. In the long run, being denied an abortion reduces the chance that women are in a very good relationship years later, further evidence of the role of abortion in enabling women to set their own life course.[284]

The analysis performed and the conclusions reached by the scholars in the Economists' Brief is consistent with the Turnaway study researchers. Each group of scholars conclude that the long-term data demonstrates that legal abortion has had a large effect on the shaping of families in the post-*Roe* era, in ways that most deem positive. While the Turnaway Study talks of the role of abortion in "enabling women to set their own life course,"[285] the Economists' Brief demonstrates how access to

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six months to one year, there were no differences between groups across outcomes. To the extent that abortion causes mental health harm, the harm comes from the denial of services, not the provision." TURNAWAY STUDY, *supra* note 253, at 108–09.

280 Joanna Cook & Susan Bewley, *Acknowledging a Persistent Truth: Domestic Violence in Pregnancy*, 101 J. OF THE ROYAL SOC'Y OF MED. 358, 359 (July 1, 2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2442136/.

281 Sarah C. Roberts et. al., *Risk of Violence from the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion*, 12 BMC MED. 144, 148–49 (Sept. 29, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4182793/.

282 *Id.*

283 TURNAWAY STUDY, *supra* note 253, at 234. Researchers also concluded that "[p]roviding abortions increases the chance that women will find healthier and happier relationships in the future." *Id.* at 236.

284 *Id.* at 238, 239.

285 *Id.*

legal abortion "changed the arc of women's lives."[286] Each set of scholars remarked on how access to legal abortion for women, changed the lives of children. The Economists' Brief noted that the data showed that access to abortion has reduced the number of children who live in poverty and whose families receive assistance from state welfare agencies.[287] It has also reduced the number of child neglect and abuse cases.[288]

Thus, the long-term data indicates that access to abortion has helped families and children because it has helped women. The opposite also seems to be true. For example, when compared to women who receive requested abortions, women who are denied abortions are also more likely to raise their children without the help of male partners or family members.[289] This increases the risk that the child will grow up in poverty.[290] Child development also suffers. The long-term data shows that if the woman who is denied the abortion already has children at the time they seek the abortion, the emotional development of those existing children is inferior when compared to the children of mothers who received the abortion when requested.[291] And with respect to the child that results from the denied abortion, the long-term data shows that, under conditions of abortion denial, carrying an unwanted pregnancy to term is associated with poor maternal bonding.[292] Under these circumstances, new mothers report feeling trapped or feeling resentment toward their babies.[293] When feelings of maternal bonding with subsequent children were compared, women who received abortions reported experiencing a greater sense of maternal bonding than women who were denied abortions.[294] Thus, abortion restriction and denial cause both women and children to suffer.

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286 Economists' Brief, *supra* note 218, at 6; *see also id.* at 6–15.

287 *Id.* at 14.

288 *Id*. This makes sense given that most child neglect cases arise out of circumstances of poverty. Guy C. Skinner et al., *A Review of the Relationship Between Poverty and Child Abuse and Neglect: Insights from Scoping Reviews, Systematic Reviews and Meta-analyses*, 32 CHILD ABUSE R. 1, 5, 12, 14 (2023).

289 Foster et al., *supra* note 253, at 1292.

290 *Id.* at 1293.

291 Diana Greene Foster et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. OF PEDIATRICS 183, 185–87 (Oct. 30, 2018), https://pubmed.ncbi.nlm.nih.gov/30389101/.

292 Foster et al., *supra* note 253, at 1056–58.

293 *See, e.g.*, Corrine H. Rocca et al., *Emotions Over Five Years After Denial of Abortion in the United States: Contextualizing the Effects if Abortion Denial on Women's Health and Lives*, 269 SOC. SCI. AND MED. 1, 7 (2020).

294 Foster et al., *supra* note 253, at 1056–58.

4. The Court "Heard" Women Speak: The *We Testify* Brief Narratives

The experiences of the *We Testify* Brief witnesses mirror the findings of the decades of social science data. Their experiences demonstrate that women rely on abortion services when becoming pregnant as a result of sexual assault,[295] in order to protect their physical and mental health,[296] to define their place in society,[297] due to economic concerns,[298] maintain and gain access to educational opportunities,[299] and maintain and gain access to economic opportunities.[300]

Many of those giving testimony in the *We Testify* Brief observed that obtaining an abortion was necessary to preserve their own lives. For example, Pamela Noblitt terminated a pregnancy in 1971 after being informed by her physician that, because of her own health, the physician did not believe Ms. Noblitt would survive a full-term pregnancy.[301] Moreover, because of an experimental treatment she was receiving, there was more than a fifty percent chance that "the baby would suffer severe and likely fatal birth defects subsequent to the medications [she] had been taking."[302] Tara Schleifer, another witness for the *We Testify* Brief, had chosen abortion care more recently, but under similar circumstances. Ms. Schleifer testified that she chose abortion upon becoming pregnant because the much wanted second pregnancy endangered her life. She stated:

> After facing a nine-year grueling, exhausting, expensive, repeating cycle of . . . hope and devastation due to explained infertility, I found myself pregnant, the old fashioned way. What an exciting surprise. . . . My dream turned into my absolute worst nightmare . . . I learned how much my pregnancy itself was endangering my life. . . . Leaving my son motherless and my husband a

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295 Megan Pietruska and Cazemba Jackson testified that they chose abortion after they became pregnant after being raped. Ms. Jackson indicated that she had to secure a payday loan in order to pay for the procedure. We Testify Brief, *supra* note 243, at 6–7.

296 For example, six months before becoming pregnant, Sal Alves was hospitalized for suicidal ideation and substance abuse problems. In her testimony, Ms. Alves notes that continuing the pregnancy "would have been detrimental to my mental and emotional health." The abortion allowed her to save her life post-hospitalization. *Id.* at 9–10. Rape victims who become pregnant, such as Ms. Jackson, also talk about depression as a result of the pregnancy. *See also id.* at 7.

297 "[D]efine their place in society" includes deciding when and whether to have children. *Id.* at 17–20.

298 *Id.* at 23–24.

299 *Id.* at 24–26.

300 *Id.* at 28–32.

301 *Id.* at 9.

302 *Id.*

> grieving widow and single dad was not an option I was willing to entertain.[303]

Some of the women who testified in the *We Testify* Brief noted that the unintended pregnancy was severely detrimental to their mental health. Several of those who gave witness testified to struggling with depression and suicidal ideation and stated that they would have chosen suicide had abortion not been available.[304] Jenn Chalifoux is one such example. Ms. Chalifoux stated that she had long struggled with an eating disorder and, at the time she became pregnant, she was on a medical leave from college.[305] Although Ms. Chalifoux was ultimately able to receive abortion care, she believed that had she been unable to receive the abortion, she would have never recovered from her eating disorder and may have ended her life. She states:

> The procedure that I needed involved two consecutive days of pre-surgical preparation . . . . On the first day, after I received another ultrasound, I was yet again informed that my pregnancy was farther [sic] along than we had realized. My appointment was pushed back another week. If it were any later, I was told, I would have to travel out of state. That week was the worst of my life. I was trapped in my pregnant body, which was changing against my will more and more with each passing day. Desperate to end my pregnancy and powerless against time, I stopped sleeping and became suicidal. . . .
>
> If I had been forced to carry my pregnancy to term, I believe that I would have ended my life rather than give birth.[306]

Other women testified that choosing to terminate their pregnancies allowed them to escape abusive relationships or to maintain their personal safety by keeping an abuser out of their lives.[307] Tohan O.'s story provides such an example. Tohan O. testified that when she learned was pregnant, she was in a life-threatening relationship with her abuser and knew that she could not leave the relationship if she remained pregnant.[308] She stated:

> I felt in my bones that I could not continue the pregnancy . . . . I needed to be able to permanently leave my abuser and I also knew I couldn't do it while

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303 *Id.* at 8.

304 *Id.* at 14, 15, 16.

305 *Id.* at 10.

306 *Id.* at 11.

307 *Id.* at 21.

308 *Id. See also* Hafrun Finnbogadottir & Anna-Karin Dykes, *Increasing Prevalence and Incidence of Domestic Violence During the Pregnancy and One and a Half Year Postpartum, as well as Risk Factors: A Longitudinal Cohort Study in Southern Sweden*, 16 BMC PREGNANCY & CHILDBIRTH 1, 8 (2016), https://doi.org/10.1186/s12884-016-1122-6.

> pregnant. Having an abortion was the only way to keep my relentless abuser away from me and my son.[309]

Ms. O. was able to access abortion with the help of her father, a minister, who helped to protect her from her abuser, as well as to find abortion services and keep her decision to have an abortion private.[310]

Various women testified that their choice to access abortion resulted from financial concerns. For example, for some of the witnesses cited in the *We Testify* Brief, access to abortion allowed them not to slip, or not slip further, into poverty.[311] For example, Linda Stoker indicated that she chose to have an abortion so that she could financially support the child she already had without relying on public assistance.[312] Ms. Stoker's experience speaks to the many ways in which American law and public policy fail women and their children. Her story demonstrates that women, by and large, do not earn a family wage,[313] that women with children cannot rely on fathers to pay child support, and that state child support systems do not ensure that families with children have income support.[314] Decades of decrying the moral and financial irresponsibility of the "welfare queen" also adds to the shame that women with children feel when having to rely on others, especially state welfare systems, for financial help.[315]

Finally, others in the *We Testify* Brief shared that the availability of abortion allowed them to realize their education and career goals. Two people, Holly Bland and Zoraima Pelaez, talked of how they became pregnant early in their college careers and

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309 We Testify Brief, *supra* note 243, at 21.

310 *Id.* at 21.

311 *Id.* at 18, 20, 25.

312 *Id.* at 23–24.

313 A family wage is a wage that is high enough to enable the wage owner to support her family. *See generally* Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, PEW RSCH. CTR. (Mar. 1, 2023), https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/; Janelle Jones, *Five Facts About the State of the Gender Pay Gap*, U.S. DEPT. OF LABOR BLOG (MAR. 19, 2021), https://blog.dol.gov/2021/03/19/5-facts-about-the-state-of-the-gender-pay-gap.

314 Hannah Pitcher, *The Irrationality of Child Support Enforcement in the United States: Harming Children and Punishing the Poor*, 11 IND. J. L. & SOC. EQUAL. 381, 382, 386, 394, 398 (2023). Also, poor women have children with poor men, often there is not enough income to support two households so child support from the child's father does little to raise children out of poverty; Kaelyn Forde, *Lack of Paid Family Leave, Support at Work Partly to Blame for 30-year Low in Fertility Rates: Experts*, ABC NEWS (Jan. 12, 2019), https://abcnews.go.com/US/lack-paid-family-leave-support-work-partly-blame/story?id=60330818; *see also* Michelle Fox, *Child-care Costs and Lack of Paid Leave Hold Many Working Parents Back*, CNBC (May 12, 2021), https://www.cnbc.com/2021/05/12/child-care-costs-and-lack-of-paid-leave-hold-many-working-parents-back.html.

315 Jessica Lapham & Melissa L. Martinson, *The Intersection of Welfare Stigma, State Contexts and Health Among Mothers Receiving Public Assistance Benefits*, 18 SSM POP. HEALTH 1, 1–2 (2022).

made the decision to access abortion because they knew that having children at that stage in their education would limit both their educational opportunities and the careers that they hoped to have.[316] As Ms. Pelaez stated:

> I thought of my future. Would I be able to continue my education and become the first in my family to graduate college? I considered my options and decided to have an abortion. In the most fundamental sense, the opportunity to exercise my constitutional right to abortion made me who I am today.[317]

The decisions made by Ms. Bland and Ms. Pelaez demonstrate the double-bind choices women and other pregnant people face when deciding to have an abortion. Women, particularly young women, must decide whether to have children or pursue education, careers, and gain financial stability. We live in a society that does not support them having both. Before *Dobbs*, these decisions were not made lightly, but in the wake of *Dobbs*, these choices, even double-bind ones, are disappearing for many women. Instead, women are forced into continuing their pregnancies, and for most, forced into parenting.

B. Dobbs*: The Fallaciousness of the Court's Arguments Against Application of Substantive Due Process to Women's Abortion Access and Women's Bodily Integrity*

In failing to apply substantive due process to the right to access abortion and the right of women to bodily integrity, the Court made three arguments. The Court's first argument is a textual one: the right to abortion literally does not appear in the Fourteenth Amendment.[318] The Court's second argument was an original intent argument that the right to abortion is not deeply rooted in our nation's history and tradition, and because it is not, the framers of the Fourteenth Amendment, did not intend for it to be included in its concept of liberty.[319] The Court's third argument concerns the nature and meaning of autonomy, concluding that the right to abortion is simply not a necessary component of autonomy.[320]

The Court's outcome in *Dobbs* necessitated this analytic approach. How else could the Court reduce rights that had been enjoyed by a significant portion of the population for a generation but to ignore well-settled constitutional doctrine and forms of analysis? More specifically, with respect to the Court's first argument against the application of Due Process to the right of women to access abortion care, that abortion is not mentioned in the text of the Constitution, it has been long settled that some of the rights that substantive due process protects, including the right to privacy are rights

316 We Testify Brief, *supra* note 243, at 24–25.

317 *Id.* at 25–26.

318 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240–41 (2022).

319 *Id.* at 248–50.

320 *Id.* at 255–58, 293–94.

that are unenumerated—hence literally not present in the text.[321] To insist on enumeration is to eviscerate the very basis of the right to privacy, including the right to marry, marital privacy, and family privacy (parental rights), as has been understood for more than a century,[322] rights that the majority claims it leaves intact.[323] Thus the question becomes whether the Court can, with good conscience, have it both ways. Either all substantive due process rights have to be textual or they do not. Or do the Justices face the consequences of being seen as exercising their personal prejudices?[324]

With respect to the Court's second argument against the application of Due Process to the right of women to access abortion care, the originalist intent complaint, the Court's argument is equally specious. The Court tells us that in order for the Due Process Clause to protect women's access to abortion, abortion must have been protected as a fundamental right at the time the Fourteenth Amendment was ratified,

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321 For example, the right to privacy. *The Right of Privacy*, EXPLORING CONST. CONFLICTS, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/rightofprivacy.html (last visited Mar. 6, 2024).

322 For example, the right to privacy has been understood to be protected by substantive due process. It is an unenumerated right: family privacy. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399–400, 402–03 (1923); Wisconsin v. Yoder, 406 U.S. 205, 214–15, 234 (1972); Marital privacy, *see, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 481–82, 484–85 (1965); Individual privacy, Eisenstadt v. Baird, 405 U.S. 438, 443 (1972). The right to marry is another example. *See, e.g.*, Loving v. Virginia, 381 U.S. 1, 2 (1967); Zablocki v. Redhail, 424 U.S. 374, 382 (1978).

323 *Dobbs*, 597 U.S. at 257.

324 Although I am not a "court-watcher," I want to suggest that it looks as though the Court has become "imperial" in one of two ways. And in either event, the Court should take heed. Either: (1) The Court believes its own hype. It believes that because it is the last arbitrator of constitutionality, that it need not follow any rules—even its own, and there is nothing that Congress or the rest of the Country can do. Justice Alito has said as much with respect to the ethics issues. *See* Josh Gerstein, *Alito: Congress Can't Regulate Supreme Court Ethics*, POLITICO (July 28, 2023), https://www.politico.com/news/2023/07/28/alito-congress-supreme-court-ethics-00108830; *see also Dobbs*, 597 U.S. at 414 (Breyer, J., dissenting) ("Power, not reason, is the new currency of the Court's decision making." (quoting Payne v. Tennessee, 501 U.S. 808, 844 (1991))); or (2) The Emperor has No Clothes! (Speaking a little truth to power here. We see them and their treatment of women. The Court is acting "imperial" in the sense of thinking that they are all powerful. Of course, they may think that, but I am suggesting that they are not drunk on their own power as I am in the first instance. Instead, here I am suggesting that they are fools. They think they are all powerful, but they are not. Congress, on behalf of the People, has the power to expand the Court, in addition to more mundane regulations, such as regulation of salaries and staff. *See* Martha Kinsella, *Congress Has the Authority to Regulate Supreme Court Ethics – and the Duty*, BRENNAN CTR. FOR JUST. (July 17, 2023), https://www.brennancenter.org/our-work/analysis-opinion/congress-has-authority-regulate-supreme-court-ethics-and-duty. Thus, the Court is simply naked and too full of hubris to admit it. The larger and more important question is, what does it mean to have the third, co-equal branch of government acting in such a manner? What does this say for the maintenance of other institutions that depend upon the unsaid/unspoken agreement to abide by the rule of law? Does the Court agree to abide by the rule of law? Is that agreement unspoken?

in 1868.[325] After reviewing the status of abortion statutes in various states, the Court finds that at the time the Fourteenth Amendment was ratified, the right to abortion was not a fundamental right held by women, thus it could not now be thus protected as one.[326] The Court stated:

> [W]e must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy . . . . Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the Fourteenth Amendment means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to abortion.[327]

The problem of looking to the past to determine the protection of liberty and freedom for those in the present is apparent. Or, at least it should be. Relying on the past means relying on the power dynamics or entrenchment of power and prejudices of the past as well. As the Court in *Obergefell* instructs us, it is in the very "nature of injustice . . . that we may not always see it in our own times."[328] As a result, the framers did not list every liberty protected by the Fourteenth Amendment. Rather, "they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[329] Accordingly, the *Obergefell* Court proclaimed: "When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."[330] So the result of looking to the past to determine whether or not a particular activity was within the meaning of liberty at the time the Fourteenth Amendment was ratified leans into a power structure that was heavily male, and heavily white, and heavily patriarchal. At the time the Fourteenth Amendment was ratified women had very limited security over the possession of their persons and property.[331] Thus, if women's access to abortion was not considered part and parcel of human liberty, we should not be surprised because women's liberty as a general matter was not seen as part and part of human liberty. Should the longstanding prejudices against women and misogyny of the nineteenth-century control the constitutional possibilities for the twenty-first century citizen? Is our Constitution (and accordingly marginalized people) stuck in

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325 *Dobbs*, 597 U.S. at 250.

326 *Id.* at 253.

327 *Id.* at 239–40.

328 Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

329 *Id.*

330 *Id.*

331 *See generally* Jennifer A. Bennice & Patricia A. Resnick, *Marital Rape History, Research, and Practice*, 4 TRAUMA VIOLENCE AND ABUSE 228 (2003); Catherine Allgor, *Coverture: The Word you Probably Don't Know but Should*, WOMEN'S HIST., https://www.womenshistory.org/articles/coverture-word-you-probably-dont-know-should (last visited Mar. 6, 2024).

social, political, and economic statuses of the eighteenth and nineteenth centuries? This is a primary problem of constitutional originalism as applied to the Fourteenth Amendment.[332] The overarching question for the Court is whether the purpose of the Fourteenth Amendment is liberatory or not. Is the Fourteenth Amendment meant to be a tool of anti-subordination; a constitutional mechanism to protect unpopular or less powerful populations from the whims of the majority? Or is the Fourteenth Amendment meant to be a tool to maintain the status quo as it existed at the time the Amendment was ratified? Moreover, the Court must decide whether this analytical framework is one that it will use only where the rights at issue apply to women, or will this framing also apply when other marginalized groups seek recognition of greater liberties and freedoms under our Constitution?

The Court's third argument against the application of Due Process to the right of women to access abortion care, the argument regarding the very nature and meaning of autonomy, is perhaps the most hollow and the most troubling. With little argumentation, the Court asserts that abortion cannot be part of a broader recognized constitutional right to autonomy.[333] The Court simply declares: "These attempts to justify abortion through appeals to a broader right to autonomy and to define one's

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332 *See* Jamal Greene, *Originalism's Race Problem*, 88 DEV. U. L. REV. 517, 521 (2011) (arguing that originalism denies marginalized groups the possibility to "dissent from history." "Originalism . . . in practice almost always assumes that the meaning of any particular constitutional provision is fixed at some historical moment. . . . On this understanding, the potential for a race problem becomes more transparent"); Michael S. Lewis, *Evil History: Protecting Our Constitution Through an Anti-Originalism Canon of Constitutional Interpretation*, 18 U.N.H. L. REV. 261, 266–68 (2020) (arguing that current originalist methodology fails to "confront the full brunt of our past, both good and evil . . . [as] it engages in abuses that we would condemn if perpetrated by other nations").

333 The Court's pronouncement can be characterized as a slippery slope argument. This argument reminds me of "Chicken Little" folktales. Like any folktale, there are many versions, and many endings. But what they all have in common is that it is a story about a barnyard animal, in the American version, a chicken, who believes that the world is coming to an end after being hit on the head by an acorn. He is hysterical, but the reader also knows that he is obviously wrong! Nevertheless, Chicken Little takes what he believes to be a hero's journey through the kingdom to warn the King of the impending calamity. Along the way, he sees other citizens and convinces them that "The sky is falling!" He convinces others that he meets along the way, including Henny Penny, Ducky Lucky, and Turkey Lurkey, to join him on this hero's journey. In most of the "Chicken Little" folktales, the group of heroes meet a fox, Foxy Loxy. And as we all know, foxes are wily and noxious beasts. (See *Pierson v. Post*) And as wily foxes do—he invites them, one by one, into his lair and proceeds to eat them . . . all. As a result, the name "Chicken Little" has since become synonymous with someone who is an alarmist, someone who exaggerates danger, or someone "who warns of or predicts calamity, especially without justification." *Chicken Little*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/Chicken%20Little (last visited Mar. 6, 2024). On second thought, the *Dobbs* majority may be right. The world as *they* know it, indeed may be coming to an end. The sky may indeed be falling. And if the sky falling means the end of oppressive systems, then it should surely fall, and we should help destroy it. As Rock Master Scott & The Dynamic Three might say, "we don't need water, let the *motherfucker burn!"* ROCK MASTER SCOTT & THE DYNAMIC THREE, THE ROOF IS ON FIRE (Reality Records 1984); *see also* LYRICS.COM, https://www.lyrics.com/lyric/24571895/'80s+%5BCleopatra%5D/The+Roof+Is+on+Fire (last visited Mar. 6, 2024).

'concept of existence' prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drugs, prostitution, and the like."[334] But why is this so? Why is an understanding of access to legal abortion as part of women's right to autonomy, "too much"? Why is the right whether to bear a child, why is the right to bodily integrity for women seen as a "high level of generality"?[335] In the Court's rendition, the necessary preconditions for autonomy are not only very limited, but they are also very gendered, as they do not include consideration of women's material conditions and as a result, they do not include consideration of what women need to be free.

What seems clear by the analytical framework chosen by the Court in *Dobbs*, is that it has chosen to use this analytical framework in the context of women's assertion of due process rights regarding their bodies, and the attendant social and economic rights that come with controlling fertility. The message, intended or not, is that the women need to be put in a place, perhaps, women need to be put in "their place." And that place is one of subordination—where their voices, needs, and participation in the life in the community are secondary to the state's interest in women acting in subordinate roles of nineteenth-century America where their fertility determines their social and economic roles;[336] a place where liberty and freedom are defined in terms of the lived experiences of people who do not experience pregnancy, childbirth, or the social expectations that are attendant to women's roles in parenting.

The larger problem is that the Court's opinion is not purely a message or form of communication.[337] The Supreme Court's opinion in *Dobbs*, like all Supreme Court opinions in our system of law, has real-world effects. The narratives from the Amici Briefs in *Dobbs*, and decades of social science data tell us that limits on abortion services, even where they are less-restrictive than permitted after *Dobbs*, demonstrate that where abortion access is heavily restricted, women first lose the ability to control their fertility; then control of their bodies; then lose educational and work opportunities.[338] Poverty often ensues.[339]

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334 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 257 (2022).

335 *Id.*

336 *See generally* Bari Watkins, *Review: Women's World in Nineteenth-Century America*, 31 AM. Q. 116, 118–19, 125 (1979).

337 Even if this was "purely" a message, it would be problematic.

338 Brief for Nat'l Women's L. Ctr. et al. as Amici Curiae Supporting Respondents at 7–9, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392); Brief for Social Science Experts as Amici Curiae Supporting Respondents at 29–31, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392); *The Economic Effects of Abortion Access: A Review of the Evidence*, CTR. ON THE ECON. OF REPROD. HEALTH (2019), https://iwpr.org/wp-content/uploads/2020/07/B379_Abortion-Access_rfinal.pdf.

339 TURNAWAY STUDY, *supra* note 253, at 22 (study following women for a decade found that those denied an abortion were four times as likely to be living in poverty years later); *see also* Jennifer Ludden, *Being Denied an Abortion Limits Women's Economic Prospects*, NPR MORNING EDITION (May 26, 2022), https://www.npr.org/2022/05/26/1100587366/banning-abortion-roe-economic-consequences.

The losses are not due to the choices made by individual women. The losses are due to systemic forces, including the force of the law.[340] Thus the losses women incur, cannot occur without the support of the law. The law supports a system that then limits women's opportunity to study, and work, and participate in parts of the society and economy as intensely as they might like or need.[341] Women's losses are easily accomplished by allowing the state to assert an interest in the life of the fetus that is stronger than the woman's interest in the life of the fetus, and stronger than the state's interest in protecting the liberty of women or the interest of women in themselves. The *Dobbs* Court thus makes clear that the state has no obligation to protect any of these interests.

Of course, these losses are not suffered equally across the racial and economic spectrum. As I have argued above, low-income women, BIPOC women, and other marginalized peoples suffer these losses first and most deeply.[342] For example, with regard to abortion restriction, lower-income and BIPOC women had been suffering from the chipping away of privacy, if not lack of substantive rights, since *Roe* was decided with difficulty accessing affordable care.[343] Middle and upper-income women were able to avoid the dignitary slings and arrows of the Court's abortion jurisprudence because of their economic and social flexibility.[344] For these women, abortion could be private in every sense of the word. They could use private physicians for abortion services, no need to rely on public hospitals or public funds.[345] They could even use private-unidentified facilities for services (so no need to deal with the

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340 FRYE, supra note 245, at 4 ("The experience of oppressed people is that the living of one's life is confined and shaped by forced and barriers which . . . are systemically related to each other in such a way as to catch one between and among them . . . .").

341 *See The Harms of Denying a Woman a Wanted Abortion*, *supra* note 254 (describing findings from Turnaway Study related to economic hardship and single parenting); *see also* Dan Fost, *UCSF Turnaway Study Shows Impact of Abortion Access on Well-Being*, U.C.S.F. (June 30, 2022), https://www.ucsf.edu/news/2022/06/423161/ucsf-turnaway-study-shows-impact-abortion-access (stating women are more likely to be unemployed, live below the poverty line, require food assistance, and afford basic living needs when not able to access abortion); *see also* Kim, *The Turnaway Study: An Evidence-Based Argument for Reproductive Rights*, NAT'L ORG. FOR WOMEN (Feb. 23, 2022), https://now.org/blog/the-turnaway-study-an-evidence-based-argument-for-reproductive-rights/ (describing economic hardships women face when denied abortion access from Turnaway Study results).

342 *See supra* text accompanying notes 21–22, 134.

343 *See* Maher v. Roe, 432 U.S. 464, 483 (1977) (Brennan, J., dissenting) (describing difficulties and impossibilities of obtaining care for indigent women generally as well as with abortion care).

344 *See* Cari Romm, *A Safe, Easy, Illegal Abortion*, THE ATLANTIC (July 24, 2015), https://www.theatlantic.com/health/archive/2015/07/abortion-1960s/399443/ (describing the privilege middle-and upper-class white women have in obtaining out of hospital abortions because they can afford to do so).

345 *Id.*

harassment and intrusion of sidewalk counselors like Mrs. Scalia).[346] Where abortion was restricted in their home jurisdiction, these women had the funds to travel to a jurisdiction where there was no such restriction.[347] And where there was a statutory waiting period, these women had the economic funds to miss work, if necessary, or arrange for paid childcare, if necessary, in order to attend to their medical needs.[348] One result of the Court's opinion in *Dobbs* is to equalize this loss of freedom. *Dobbs* tells us that the state's role is not to facilitate liberty and freedom. Rather, *Dobbs* signals that the state can indeed impose upon women its own view of women and their proper roles in American society. The Fourteenth Amendment does not require the State to permit women to shape their own roles according to their own concept of their place in society.[349]

V. THE EXPECTED (AND INTENDED?) AND UNINTENDED CONSEQUENCES OF DOBBS OPINION FOR WOMEN'S LIVES

"I feel like the world hates women," she added. "How can we not take it that way?"

Kaleigh, twenty-nine years old, eight weeks pregnant, responding to Texas SB 8, Texas's six-week abortion ban.[350]

The *Dobbs* Court stripped away constitutional protection for women's right to access legal abortion. No longer is women's right to bodily integrity protected by the Fourteenth Amendment's promise of substantive due process.[351] Because of the

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346 Erin Gloria Ryan, *Is Justice Scalia's Wife an Anti-Abortion Pregnancy Counselor?*, JEZEBEL (Apr. 22, 2014), https://jezebel.com/is-justice-scalias-wife-an-anti-abortion-pregnancy-coun-1566238671.

347 *See* Katrina Kimport, *What to Know About the Costs Of Traveling for Abortion Care in the US – Here's What I Learned From Talking to Hundreds of Women Who've Sought Abortions*, THE CONVERSATION (Aug. 30, 2022), https://theconversation.com/what-to-know-about-the-costs-of-traveling-for-abortion-care-in-the-us-heres-what-i-learned-from-talking-to-hundreds-of-women-whove-sought-abortions-187266 (describing the significant costs of traveling to get an abortion in the United States); *see also* Karen Brooks Harper, *Wealth Will Now Largely Determine Which Texans Can Access Abortion*, THE TEX. TRIB. (June 24, 2022), https://www.texastribune.org/2022/06/24/texas-abortion-costs/ (describing costs of a surgical abortion to be between $1,000 and $4,000, disallowing non-affluent individuals from obtaining the service); *see also* Betty Dunbar, Letter to the Editor, *The Wealthy Will Always Have Abortion Access. I Did 62 Years Ago*, L.A. TIMES (June 24, 2022), https://www.latimes.com/opinion/letters-to-the-editor/story/2022-06-24/wealthy-will-also-have-abortion-access-i-did-62-years-ago (testifying to the fact that she was able to obtain an abortion at age eighteen only because her boyfriend's parents were wealthy).

348 *See* Kimport, *supra* note 347 (including childcare for women who already have children as one of the costs of going out of state to get an abortion).

349 *Cf.* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 852 (1992).

350 Shefali Luthra, *'I Wish This On No One': Navigating Pregnancy in The Year Since Texas's Abortion Ban*, THE GUARDIAN (Aug. 30, 2022) https://www.theguardian.com/world/2022/aug/30/texas-abortion-ban-sb8-anniversary.

351 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240 (2022).

Dobbs Court's failure to recognize women's liberty interest in abortion access, the State need only show that any regulation of abortion is rationally related to a legitimate state interest.[352] The *Dobbs* Court, following *Casey*, locates the state's interest in the potential life of the embryo—seemingly at the moment of conception.[353] As a result, the Court's analysis in *Dobb*s has permitted states to ban, that is, to criminalize, abortion at all stages of embryonic and fetal development.[354]

The consequences of the *Dobbs* opinion in are not to the "theoretical" status of women. The Court's opinion has had negative social, economic, and political consequences. The most immediate consequences have been those for women's health, access to healthcare, and for their social and economic lives.[355] Some of these negative consequences were certainly intended by both the State of Mississippi and by the Court. Certainly the evisceration of legal abortion was an intended outcome of the abortion restriction statute. Some would argue that the decrease in educational and economic opportunities for women were also intended outcomes. On the other hand, other harmful consequences may have been unintended. But as I explain below, these arguably unintended consequences were, nevertheless, expected to occur. These outcomes relate to the adverse effect on women's health, including decreased access to healthcare outside of the context of abortion, the increase in self-managed abortion, and the creation of medical emergencies for pregnant women who had intended to take their pregnancies to term.[356] But as we know, not only did the Court fail to enjoin the Mississippi fifteen-week abortion ban, the Court went further: removing all protection of women's reproductive bodily integrity; thus ensuring a wave of negative consequences for women.

If the Court had read the Briefs of the parties and the Amici, the Justices should have expected at least two real-world consequences for women: (1) that even in the short term, women in the United States, particularly, but not only, those who are most economically vulnerable, would no longer have access to legal abortion at any stage of their pregnancies, for any reason; and (2) that the educational and career opportunities for generations of women would be limited by not having control over their bodily integrity—and that this would have social and economic consequences

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352 *Id.* at 301 ("[Abortion regulation laws] must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.").

353 *See id.* ("These legitimate interests include respect for and preservation of prenatal life at all stages of development…"); *see also Casey*, 505 U.S. at 876.

354 *See* TEX. HEALTH & SAFETY CODE § 170A.002(a) (2021) ("A person may not knowingly perform, induce, or attempt an abortion."); *see also* ALA. CODE § 26-23H-4 (stating abortion is unlawful unless necessary to prevent death or serious health risk to mother); *see also* Right to Life of the Unborn Child Act, MO. REV. STAT. § 188.017(2) (2019) (stating abortions cannot be performed or induced; anyone knowingly providing one is guilty of class B felony and potentially loss or suspension of professional license).

355 *See* Youyou Zhou & Li Zhou, *Who Overturning Roe Hurts Most, Explained in 7 Charts*, VOX (July 1, 2022), https://www.vox.com/2022/7/1/23180626/roe-dobbs-charts-impact-abortion-women-rights (explaining impacts and research on the effects of overturning Roe on women).

356 *See infra* text accompanying notes 361–63.

not just for individual women, but also for the larger society. With this knowledge, the Court nonetheless moved toward eviscerating a right to bodily integrity that had not only been relied upon for a generation to help women order their lives, but a right that signaled that we believed women to be equal citizens, and that the Constitution spoke to their needs—even when those needs were different from the needs of men. But there were also extremely dangerous medical and social consequences for women that they *may* not have expected, some involving abortion, others involving reproductive healthcare outside of abortion. These consequences are crucial in the consideration of women's liberty interests and the issue of women's freedom.

Thus, in this final Part, I consider each of these concerns. First, I consider a few of the health and healthcare-related consequences of the *Dobbs* opinion, some expected (perhaps desired) and some perhaps unintended, including: the limiting (or evisceration) of legal abortion; the rise in self-managed abortion; and the effects that these statutes on healthcare outside of abortion, treatment of pregnant women in the face of the medical emergencies. Next, I reconsider the social consequences of *Dobbs*. But in this subpart, I consider the social, economic, and legal constraints caused by the removal of women's liberty interest by *Dobbs*, and how these constraints consign women to a form of second-class citizenship. Second-class citizenship cannot be sanctioned by the Fourteenth Amendment.

A. Healthcare-Related Consequences

1. Limiting (or Eviscerating) the Availability of Legal Abortion Care for Women in the United States

Various Amici warned the Supreme Court that long-term, well-vetted, scientific and economic data amply demonstrated that upholding abortion restrictions, such as the fifteen-week abortion ban at issue in *Dobbs*, would have substantial negative consequences for women's physical and mental health, as well as for their socioeconomic comfort and security.[357] Amici counseled that by upholding the abortion restrictions at issue in *Dobbs*, and overturning the Court's long-standing precedents of *Roe* and *Casey*, thereby removing constitutional protection from the right to access abortion care, women would lose access to legal abortion. Amici thus warned that the loss of constitutional protections would result in grim consequences, including the outright ban of legal abortion throughout the United States.[358] This claim was not hyperbole. As of the date of oral arguments in *Dobbs*, almost half of the states in the United States were prepared to ban abortion outright.[359] Thus, the Court was warned that if it were to withdraw from women any constitutional protection for

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357 *See, e.g.*, Social Scientists' Brief, *supra* note 226, at 2.

358 *Id.*

359 *Id.*; Elizabeth Nash & Lauren Cross, *26 States Are Certain or Likely to Ban Abortion Without Roe: Here's Which Ones and Why*, GUTTMACHER INST. (Oct. 28, 2021), https://www.guttmacher.org/node/33203/printable/print (listing states that would ban abortion immediately upon *Roe*'s overturning as well as those who were likely to do so at the time of oral arguments for *Dobbs*).

their right to decide whether to continue a pregnancy prior to viability, most women in the United States would lose all ability to access legal abortion care.[360]

Perhaps one of the most easily anticipated consequences of the *Dobbs* decision was the speed at which abortion became unavailable across the United States. A rash of abortion clinic closures occurred within the first 100 days following the Court's opinion in *Dobbs*.[361] An analysis by the Guttmacher Institute found that at least sixty-six abortion clinics closed or stopped providing abortion care in the days following *Dobbs*.[362] Closures in states with total *bans* on abortion—Alabama, Arizona, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin,[363] meant that there were no clinics offering abortion care in these states by October 2, 2022. In other words, shortly after the Court's opinion in *Dobbs*, abortion care became unavailable in these states,[364] states that had accounted for a significant number of abortions in the fifty year period between the Court's opinion in *Roe* and its *Dobbs* opinion. For example, in 2020, there were a combined 125,780 abortions performed in these fourteen states.[365]

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360 Social Scientists' Brief, *supra* note 226, at 2; *see* Zhou & Zhou, *supra* note 355 ("About 33.7 million women, or about half of reproductive-age women . . . in the US, live in states where there are poised to be new restrictions.").

361 Marielle Kirstein et al., *100 Days Post-Roe: At Least 66 Clinics Across 15 U.S. States Have Stopped Offering Abortion Care*, GUTTMACHER INST., https://www.guttmacher.org/2022/10/100-days-post-roe-least-66-clinics-across-15-us-states-have-stopped-offering-abortion-care (last visited Mar. 6, 2024). "Post-*Roe*" refers to the period after the fall of *Roe*.

362 *Id.*

363 The bans in these states, except for Oklahoma and West Virginia, made no exceptions abortion when the pregnancy was the result of rape or incest. *See Tracking Abortion Bans Across the Country*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (last visited Mar. 6, 2024) (listing the bans on and protections for abortions by all U.S. states); *see also* OKLA. STAT. tit. 63 § 1-741.1A. (listing exceptions of rape, incest, and life of the mother to the abortion ban in the state); *see also* W. VA. CODE ANN. § 16-2R-3(b) (LexisNexis, 2022) (prohibiting abortions without reasonable medical judgment unless they are the result of sexual assault or incest).

364 Kirstein et al., *supra* note 361; Alison Durkee, *100 Days Since Roe v. Wade Was Overturned: The 11 Biggest Consequences*, FORBES (Oct. 2, 2022), https://www.forbes.com/sites/alisondurkee/2022/10/02/100-days-since-roe-v-wade-was-overturned-the-11-biggest-consequences/?sh=7f9f08407464 (performing abortions is criminalized in thirteen states in nearly all circumstances; Georgia bans the procedure at six weeks of pregnancy).

365 Kirstein et al., *supra* note 361. In the 100-day Post-*Roe* period, Georgia's six-week abortion ban was enjoined. Lois M. Collins, *Georgia's 'Heartbeat' Abortion Ban Blocked*, DESERET NEWS (Nov. 16, 2022, 12:30 PM), https://www.deseret.com/u-s-world/2022/11/16/23462308/georgia-abortion-ban-blocked (stating a Georgia Superior Court judge blocked a heartbeat bill). A significant number of abortions were performed in Georgia annually. In 2020, for example, 41,620 abortions were performed in Georgia. Kirstein et al.,

The lack of abortion care in those states without clinics affects not only populations in those states but also populations in neighboring states where abortion care is still legally available. Where familial and economic circumstances permit, some pregnant women are seeking abortion care in the states where clinics exist.[366] Evidence suggests that these clinics are utilized by people from neighboring jurisdictions—those with abortion restrictions and bans.[367] Thus, even in states without oppressive abortion restrictions, pregnant women seeking abortion care are finding it difficult to access care because clinic capacities are stretched to their limits. For example, Illinois abortion clinics reported that by August 2022, 86% of their patients were from out of state, and as a result of the increased patient load, their wait time had increased to three weeks.[368] North Carolina, which borders several states with abortion bans, but where abortion remains legal up to twenty weeks, saw the number of abortions performed in the state after *Dobbs* rise dramatically. The state saw a 37% increase in abortions performed in August 2022 (4,360) when compared to the number performed in August of 2021 (3,190).[369] The initial evidence indicates that much of the patient increase is made up of patients from neighboring states.[370] A clinic in Charlotte, North Carolina reported that while in August of 2021 only 14% of their patients resided out-of-state, in August of 2022, more than 52% of their patients were out-of-state residents.[371]

Adding to the uncertainty caused by clinic closures since *Dobbs*, states began experimenting with abortion restrictions involving gestational limits in the period leading up to *Dobbs*. Ohio and Georgia introduced statutes with a six-week gestational limit, Arizona's and Florida's statutes banned abortions after fifteen weeks, and North

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supra note 361. If Georgia is included, the area covered by these total or six-week bans, in the 100-day Post-*Roe* period, fifteen states, were home to approximately 22 million women of reproductive age. *Id.* This meant that in October 2022, almost 29% of the U.S. population of women of reproductive age were living in states where abortion was either completely banned or banned before most women knew that they were pregnant. *Id*. As abortion bans and restrictions have increased, the number of women of reproductive age subject to them has since increased. *See* Zhou & Zhou, *supra* note 355 (indicating number of women currently under bans and those who could be soon as more bans are passed).

366 *See* Social Scientists' Brief, supra note 226, at 20–21.

367 Kirstein et al., supra note 361.

368 *See* Durkee, *supra* note 364; Kirstein et al., supra note 361.

369 Kate Kelly, *How the Fall of Roe Turned North Carolina Into an Abortion Destination*, N.Y. TIMES (Mar. 4, 2023), https://www.nytimes.com/2023/03/04/us/abortion-north-carolina.html; *see also* Lynn Bonner, *Out-of-state Patients Spur Abortion Increase in North Carolina*, NC NEWSLINE (Nov. 1, 2022), https://ncnewsline.com/2022/11/01/out-of-state-patients-spur-abortion-increase-in-north-carolina/.

370 Bonner, *supra* note 369 ("Fifty-three percent of the people to A Woman's Choice North Carolina clinics are from out of state . . . .").

371 *Id.*

Carolina's statutes banned abortion after twenty weeks—all before viability.[372] Prior to *Dobbs*, judges in many states, including Indiana, Iowa, North Dakota, Montana, Ohio, South Carolina, Utah, and Wyoming, enjoined statutes that restricted abortions prior to viability.[373] Nevertheless, this deluge of litigation resulted in confusion as to whether abortion was still available in those states.[374] After the fall of *Roe*, the uncertainty did not simply evaporate, in some states, the question became whether reproductive autonomy, including the access to abortion care, was protected by the various state constitutions.

For example, before the fall of *Roe*, the Kansas Supreme Court held that the right to abortion is protected by their state constitution. In *Hodes & Nauser v. Schmidt*, a 2019 case involving a fifteen-week abortion ban and a statute the prohibited the use of dilatation and evacuation (D & E) as a method for late-term abortions, the Kansas Supreme Court held that the Kansas Constitution broadly protected "personal autonomy," which is "the heart of human dignity" and "encompasses our ability to control our own bodies, to assert bodily integrity, and to exercise self-determination."[375] Similarly, the Supreme Courts in Alaska, Florida, Minnesota, and Montana have also concluded that their constitutions protect the right to privacy—protecting individuals from state intrusion into private decision making in a variety of

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372 *See* OHIO REV. CODE ANN. § 2919.194(A) (LexisNexis 2019) (describing when abortions can be performed after heartbeat is detected as well as process by which women must consent to the abortion); *see also* GA. CODE ANN. § 16-12-141(b) (West 2019) (explaining abortions cannot be performed after heartbeat detected with exceptions); *see also* ARIZ. REV. STAT. § 36-2322.B. (LexisNexis, 2022); *see also* FLOR. STAT. ANN. § 390.0111(1) (West, 2023); *see also* N.C. GEN. STAT. § 14-45.1(a).

373 *See* Conn v. Conn, 525 N.E.2d 612, 613 (Ind. Ct. App. 1988) (violating a woman's right denied when district court enjoined her from obtaining an abortion); *see also* Planned Parenthood of Greater Iowa, Inc. v. Miller, 30 F. Supp. 2d 1157, 1168 (S.D. Iowa 1998) (enjoining enforcement of the Iowa Partial-Birth Abortion Ban Act for violating woman's right to privacy related to mother's health); *see also* MKB Mgmt. Corp. v. Burdick, 954 F. Supp. 2d 900, 913–14 (D. N.D. 2013) (enjoining implementation of House Bill 1456 due to its contradiction to *Roe* and *Casey*); *see also* Weems v. State by and through Fox, 2019 MT 98, ¶ 15, ¶ 23, 395 Mont. 350, 359–60, 362–63 (Mont. 2019) (reconfirming right to early-term abortion in Montana as a right to privacy and allowing medical personnel the ability to perform them); *see also* Cordray v. Planned Parenthood Cincinnati Region, 122 Ohio St. 3d 361, 368–69 (2009); *see also* Planned Parenthood South Atlantic v. Wilson, 26 F.4th 600, 609 (4th Cir. 2022) (holding district court's enjoinment of six week heartbeat abortion ban was appropriate in its entirety); *see also* Utah Women's Clinic, Inc. v. Graham, 892 F. Supp. 1379, 1384 (D. Utah 1995) (enjoining an abortion funding restriction to Medicaid because abortions for rape or incest are a medically necessary procedure for women); *see also* Wyo. Abortion Rts. Action League v. Karpan, 881 P.2d 281, 287 (Wyo. 1994).

374 *See* Vanessa Romo, *A Year After Dobbs and the End of Roe v. Wade, There's Chaos and Confusion*, NPR (June 24, 2023), https://www.npr.org/2023/06/24/1183639093/abortion-ban-dobbs-roe-v-wade-anniversary-confusion (discussing the varying abortion laws around the country and the confusion it's causing for doctor's and women regarding availability per state).

375 Hodes & Nauser, MDs, P.A. v. Schmidt, 309 P.3d 461, 497 (Kan. 2019).

areas, including abortions.[376] Thus, in all of these states, their highest courts have concluded that the right to access abortion is protected by the states' constitutional right to privacy. Nevertheless, the litigation regarding whether access confused patients and resulted in a denial of abortion for some women who discovered that care was available, but were too far along in their pregnancies.

After *Dobbs*, a pregnant woman who wanted an abortion faced a national nightmare: a rash of clinic closures following the Court's decision in *Dobbs*, the stress on clinics in states without unduly restrictive abortion laws, and state legislatures' attempts to ban abortion despite state constitutional limitations. These constraints were in addition to the pre-existing limitations allowed by the *Casey* Court (such as informed consent/counseling requirements and waiting periods), in jurisdictions still permitting abortions.[377] Thus, it comes as no surprise that in the *first two months* post-*Dobbs*, an estimated *10,000 women* who sought abortion care were unable to receive treatment.[378] In those two months, the course of the lives of those 10,000 women would change immeasurably.[379] The lives of their families, and children they would be forced to give birth to and parent, would also be immeasurably affected by their lack of choice in this major life decision.

2. Increase in Self-Managed Abortion Care: Detriment, Dangerousness, and an Affront to the Dignity of Pregnant Women

At the very least, the Court had to understand that upholding the fifteen-week abortion ban would lead to many fewer abortions in Mississippi and other jurisdictions where similar bans were adopted (but, of course, we know that the Court did much more than this). The Court was warned by Amici that merely upholding the fifteen-

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376 *See, e.g.*, Valley Hosp. Ass'n v. Mat-Su Coal. for Choice, 948 P.2d 963, 969 (Alaska 1997); *In re* T.W., 551 So.2d 1186, 1204 (Fla. 1989); Wharran v. Morgan, 351 So.3d 632, 640 (Fla. Dist. Ct. App. 2022) (protecting against broad discovery of cell phone data, including usage and substance of data as long as substance is balanced between need and right to privacy in trial court); Women of Minn. by Doe v. Gomez, 542 N.W.2d 17, 27 (Minn. 1995) (holding women have right under Minnesota Constitution to decide to have an abortion); Jeannette R. v. Ellery, 1995 Mont. Dist. LEXIS 795, at *20 (Mont. Dist. Ct. 1995); Armstrong v. State, 1999 MT 261, ¶51, 989 P.2d 364, 378 (Mont. 1999); *see also State Constitutions and Abortion Rights*, CTR. FOR REPROD. RTS. 3, https://reproductiverights.org/wp-content/uploads/2022/07/State-Constitutions-Report-July-2022.pdf (last visited Mar. 6, 2024) (explaining that reproductive rights are fundamental, and that Alaska, Florida, Minnesota, and Montana enshrined reproductive rights in right to privacy in state constitutions).

377 *See* 18 PA. STAT. AND CONS. STAT. § 3205(a)(1)-(2) (West 2024) (stating twenty-four hour informed consent to woman receiving abortion by physician performing the abortion, attending physician, or another qualified health professional).

378 *See* Amelia Thompson-DeVeaux & Anna Rothschild, *The Number That Captures the Impact of The Dobbs Decision*, FIVETHIRTYEIGHT (Dec. 21, 2022), https://fivethirtyeight.com/videos/the-number-that-captures-the-impact-of-the-dobbs-decision/.

379 *See id.*

week ban would put abortion out of reach for many women.[380] In states where there were few clinics prior to *Dobbs*, (like in Mississippi, there was only one), and where there were pre-existing regulations (including informed consent, counseling, and waiting-period regulations), many pregnant women seeking abortion already experienced significant delays in obtaining services.[381] This suggests that many pregnant women were already seeking care close to the fifteen-week mark. The Social Scientists' Brief informed the Court that a fifteen-week ban would lead some pregnant women who were subject to the ban to attempt to self-manage their abortion.[382]

A "self-managed abortion" is any action a person takes to end her pregnancy outside the formal healthcare system.[383] Methods include self-sourcing medications such as misoprostol or mifepristone; using herbs, plants, vitamins, or supplements; consuming toxic substances including drugs and alcohol; and other non-medical physical methods.[384] A 2020 study found that approximately 7% of U.S. women reported attempting to self-manage an abortion in their lifetime, often with ineffective methods.[385] Immediately following the leaked *Dobbs* opinion in May 2022, online searches for abortion medications increased 162%.[386]

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380 *See* Social Scientists' Brief, supra note 226, at 3 ("Mississippi's 15-Week Ban will make it more difficult for women to obtain abortion care, cause some women to unnecessarily delay their care, and for others, ultimately deny access to abortion care altogether.").

381 *See* Michele Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 2022 SUP. CT. REV. 111, 150–51 (2022) (describing in Jackson Women's Health Org.'s litigation argument all the regulations Mississippi had enacted prior to the passing of the fifteen-week ban).

382 Social Scientists' Brief, supra note 226, at 22–23.

383 Nisha Verma and Daniel Grossman, *Self-Managed Abortion in the United States*, 12 CURR OBSTET GYNECOL REP 70 (March 7, 2023), https://link.springer.com/article/10.1007/s13669-023-00354-x. *See also*, Marcela, *Let's Talk About Self-Managed Abortion*, PLANNED PARENTHOOD: BLOG (July 11, 2023, 7:37 PM), https://www.plannedparenthood.org/blog/lets-talk-about-self-managed-abortion.

384 *Id.*

385 Lauren Ralph, PhD, et al., *Prevalence of Self-Managed Abortion Among Women of Reproductive Age in the United States*, 3 JAMA Network Open 2 (Dec. 18, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774320.

386 Verma and Grossman, *supra* note 383, at 71.

Thus, if they were lucky, women subject to an abortion ban would unlawfully gain access to medical abortion pills.[387] If they were unlucky, the women might attempt to self-manage abortion with potentially harmful or ineffective methods.[388]

The Court had access to knowledge of the experience of women in Texas who have lacked access to legal abortion services since the passage of the Texas Heartbeat Act, SB8, in 2021.[389] One result of the Court's failure to enjoin SB8 was an increase in self-managed abortion.[390] This experience demonstrates how self-managed abortion, in the present context, can be a desperate and dangerous option for women seeking

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387 *See* Social Scientists' Brief, supra note 226, at 23–24. Studies have demonstrated that protocol currently used in medication abortion is most efficacious if used during the first ten weeks of pregnancy. Mary Gatter et. al., *Efficacy and Safety of Medical Abortion Using Mifepristone and Buccal Misoprostol Through 63 Days*, 91 CONTRACEPTION 269 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4373977/. In the United States, physicians are advised by the American College of Obstetricians and Gynecologists (ACOG) not to prescribe medication abortion after the tenth week, (or seventieth day) of pregnancy. Am. Coll. of Obstetrician & Gynecologists, *Practice Bulletin No. 2225: Medication Abortion Up to 70 Days of Gestation*, 136 OBSTETRICIAN & GYNECOLOGY 31 (2020); American College of Obstetrician & Gynecologists, Practice Bulletin No. 2225, Medication Abortion Up to 70 Days of Gestation (Oct. 2020), https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2020/10/medication-abortion-up-to-70-days-of-gestation. Other studies have indicated that medical abortion appears to be safe and effective as late as the fifteenth week of pregnancy. *See, e.g.*, Nathalie Kapp, et al., *Medical Abortion at 13 or More Weeks Gestation Provided through Telemedicine: A Retrospective Review of Services*, 3 CONTRACEPTION 1 (2021), https://www.sciencedirect.com/science/article/pii/S2590151621000046. As a result of these studies, the World Health Organization (WHO) recommends use of medication abortion through the twelfth week of pregnancy. But, WHO has also affirmed that this method of abortion is safe and effective until the fourteenth week of pregnancy. World Health Organization, *Abortion Care Guideline* 68 (2022), https://www.who.int/publications/i/item/9789240039483.

388 Social Scientists' Brief, supra note 226, at 22–23.

389 Whole Woman's Health v. Jackson, 595 U.S. 30, 63 (2021) (filing to enjoin Texas Heartbeat Act which bans abortion after the detection of embryonic cardiac activity, which normally occurs after about six weeks of pregnancy); *see* Oriana Gonzalez, *Whole Women's Health to Close Clinics in Texas Following Near-Total Abortion Bans*, AXIOS (July 6, 2022), https://www.axios.com/2022/07/06/texas-abortion-clinics-close-roe-ban (stating the four Whole Women's Health clinics left in Texas to move to New Mexico for operations due to *Jackson* decision); *see Self-managed Abortion Requests Increased 1,180% in Texas During First Week of S.B. 8*, HEALIO (Mar. 2, 2022), https://www.healio.com/news/primary-care/20220302/selfmanaged-abortion-requests-increased-1180-in-texas-during-first-week-of-sb-8; *see also* Abigail R.A. Aiken et al., *Association of Texas Senate Bill 8 With Requests for Self-managed Medication Abortion*, JAMA NETWORK OPEN (Feb. 25, 2022), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789428 (finding that after SB 8 went into effect, demand for self-managed abortion through Aid Access increased substantially in Texas).

390 Abby Vesoulis, *How Texas' Abortion Ban Will Lead to More At-Home Abortions*, TIME (Sept. 21, 2021, 11:19 AM), https://time.com/6099921/texas-self-managed-abortions/.

abortion when a legal abortion is no longer an option.[391] Even when safe, self-managed abortion care can be viewed by the state as a criminal activity.[392]

The Advocates Opposing Criminalization Brief explained to the Court that, regardless of restrictive abortion laws, like the fifteen-week Mississippi ban at issue in *Dobbs*, people in need of abortion services will look for ways to end their pregnancies when "formal channels" are unavailable or inaccessible.[393] Briefly, they state:

People who need to end a pregnancy will find a way to do so. This reality has existed throughout history, and transcends borders, politics, and culture. Where the law creates barriers to access, people will do their best to circumnavigate them; where the law bans abortion in the formal medical system, people will find ways to self-determine their reproductive lives outside of that system.[394]

Moreover, the Advocates Opposing Criminalization Brief argues that abortion restrictions and bans do not simply lead to fewer abortions, or fewer legal abortions.[395] Rather, laws prohibiting and restricting abortion lead to criminalizing pregnant women for ending their pregnancies, or for merely being suspected of it, based on a

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391 *Id.*; Liza Fuentes et al., *Texas Women's Decisions and Experiences Regarding Self-Managed Abortion*, 20 BMC WOMEN'S HEALTH 1, 6 (2020), https://bmcwomenshealth.biomedcentral.com/articles/10.1186/s12905-019-0877-0; Olga Khazan, *Plan C: The Abortion Backup Plan No One Is Talking About*, THE ATLANTIC (Oct. 12, 2021), https://www.theatlantic.com/politics/archive/2021/10/plan-c-secret-option-mail-order-abortion/620324/.

392 *See 19-Year-Old Girl Sent to Jail for Self-Managed Abortion in Nebraska*, TRUTHOUT (July 21, 2023), https://truthout.org/articles/19-year-old-girl-sent-to-jail-for-self-managed-abortion-in-nebraska/; *see also* Margery A. Beck, *Nebraska Mother Sentenced to 2 Years in Prison for Giving Abortion Pills to Pregnant Daughter*, ASSOCIATED PRESS (Sept. 22, 2023, 5:31 PM), https://apnews.com/article/abortion-charges-nebraska-sentence-36b3dcaadd6b705ca2315bc95b99bdc1; Christine Fernando, *South Carolina Woman Arrested, Accused of Self-Managed Abortion*, USA TODAY (Mar. 3, 2023 5:57 PM), https://www.usatoday.com/story/news/nation/2023/03/03/south-carolina-woman-arrested-self-managed-abortion/11392785002/; *see also* Laura Huss et al., *Self-Care, Criminalized: August 2022 Preliminary Findings*, IF WHEN HOW, https://www.ifwhenhow.org/resources/self-care-criminalized-preliminary-findings/ (last visited Mar. 6, 2024).

393 Brief of Experts, Researchers, and Advoc. Opposing the Criminalization of People who have Abortions as Amici Curiae in Support of Respondents at 5, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392) [hereinafter Advocates Opposing Criminalization Brief]. Amici Opposing Criminalization are healthcare professionals, researchers, attorneys, and advocates for sexual and reproductive health, rights, and justice. They describe their work as involving the elimination of stigma, defending rights, and ensure access to healthcare. Amici are united in opposition to the criminalization of people who end their own pregnancies or experience a pregnancy loss.

394 *Id.*; *see also* Heidi Moseson et al., *Self-Managed Abortion: A Systematic Scoping Review*, UCSF, Feb. 1, 2020, at 3, http://escholarship.org/uc/item/1mj5832t ("Regardless of the legal climate, people may seek alternative models of abortion provision, such as self-managed abortion, when they cannot or do not want to access facility-based abortion care.").

395 *See* Advocates Opposing Criminalization Brief, supra note 393, at 6.

reproductive outcome.[396] This trend has already been seen in the United States in cases where, for decades, women who end their pregnancies,[397] or who lose their pregnancies, and are suspected of drug or alcohol use, have been prosecuted for manslaughter and murder.[398] There is no reason to believe that the trend toward criminalizing pregnant women's behavior will not continue.

Furthermore, the data demonstrates that criminalization of pregnant women and reproductive outcomes can have life-threatening consequences for women. Even when the consequences are not life-threatening, criminalization nevertheless causes undue humiliation—contrary to women's interest in human dignity. The Advocates Opposing Criminalization Brief highlights the harms that the criminalization of reproductive outcomes have on pregnant women. As they note, criminalization "prevents people from seeking medical care when they need it, subjects them to cruel and humiliating investigations in the midst of medical emergencies and consigns them to stigma and condemnation in their communities."[399] As with most harms, the harms of criminalization are not borne evenly by all the population. Instead, the data indicates that the harms of abortion criminalization, including self-managed abortion, are "disproportionately borne by those who are already marginalized due to racism, sexism, and socioeconomic disadvantage."[400]

Thus, in the increase of the use of self-managed abortion, a consequence of the fall of *Roe*, of which the Court was warned, we see yet another signal that the Court was aware that for women, the post-*Roe* world is smaller and bleaker than it had been for women in more than a generation. Now that *Roe* has fallen, contemporary women, their daughters, and their granddaughters have few options to end a pregnancy. If they are lucky enough to live in a "free state" and can afford to pay the medical fees, then

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396 *Id.* at 5; *see also* Moseson et al., *supra* note 394; *see also* B.S. v. State, 966 N.E.2d 619, 628–29 (Ind. Ct. App. 2012) (swallowing rat poison to commit suicide and kill thirty-three-week-old fetus not ambiguous under Indiana murder and feticide statutory language, charges can stand).

397 *See, e.g.*, *Texas Prosecutor Drops Murder Charge Against Woman Arrested for Self-Induced Abortion*, CBS NEWS (Apr. 10, 2022), https://www.cbsnews.com/news/lizelle-herrera-abortion-texas-murder-charge-dropped/; Martin Kaste, *Nebraska Cops Used Facebook Messages to Investigate an Alleged Illegal Abortion*, NPR (Aug. 12, 2022, 2:49 PM), https://www.npr.org/2022/08/12/1117092169/nebraska-cops-use-facebook-messages-to-investigate-an-alleged-illegal-abortion.

398 *See* Advocates Opposing Criminalization Brief, supra note 393, at 5; *see also* Moseson et al., *supra* note 394 ("Regardless of the legal climate, people may seek alternative models of abortion provision, such as self-managed abortion, when they cannot or do not want to access facility-based abortion care."); Josephine Taylor et al., *The Criminalization of Miscarriage Associated with Illicit Substance Consumption Whilst Pregnant*, 63 MED., SCI. AND THE L. 260, 260–61 (2023).

399 Advocates Opposing Criminalization Brief, supra note 393, at 5.

400 *Id.*

they might have access to abortion services; assuming they can procure an appointment within the gestational window—before fetal viability.[401]

If women live in a banned or restricted state and they can afford to travel to a "free" state or abroad, again, they will still need providence on their side. They will need to have ample luck to get the necessary appointments within the gestational window. Otherwise, contemporary women, their daughters, and their granddaughters will have to make yet another double-bind choice: carry a pregnancy to term that they are otherwise unwilling to do—for whatever reason—and parent the resulting child,[402] or

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401 Women who live in states where abortion is legal may be able to reduce their costs by using a United States-based telehealth abortion provider like Abortion on Demand or Hey Jane. In the states where these services are legal, these services provide pregnant women who are seeking abortions, with detailed information about medication abortion and with the necessary medication by mail after a video visit. Claire Cain Miller & Margot Sanger-Katz, *Virtual Clinics Have Been a Fast-Growing Method of Abortion. That Could Change*, N.Y. TIMES (Apr. 14, 2023), https://www.nytimes.com/2023/04/14/upshot/abortion-virtual-clinics.html.

402 Although the Court and Petitions argue that women who carry pregnancies to term are not required to parent the resulting children, we know that very few birth mothers make adoption plans for their children, even when the pregnancy is unplanned. Although a conservative talking point, adoption is not a solution for unintended pregnancy. The data suggests that only nine percent of women who are unable to access abortion care end up making an adoption plan for the resulting child. *See* Foster et al., *supra* note 266, at 304.

First, the argument that adoption as preferable to abortion ignores the health dangers that many women face carrying a pregnancy to term. POPULATION REFERENCE BUREAU, *supra* note 275 (Maternal mortality rates in the United States continue to rise. Black women are four to five times more likely to die from pregnancy related causes than White women. Maternal mortality rates are also high among poor and low-income women). The policy argument that states that adoption is a preferable substitute for abortion also presumes a world in which adoption is emotionally easy for birth mothers. At the foundation of the argument is a world in which women who make adoption plans for their newborns somehow bypass all the difficulties accompanying parenthood. The world imagined by this policy argument is imaginary. What this argument fails to recognize is that, while people who make adoption plans for their newborns may not raise their children, they still become parents. And as parents who release their children to be raised by others through the adoption process, they often experience considerable feelings of grief and loss—grief and loss not recognized or appreciated by the larger culture. Anna North, *Why Adoption Isn't a Replacement for Abortion Rights*, VOX (Dec. 8, 2021), https://www.vox.com/2021/12/8/22822854/abortion-roe-wade-adoption-supreme-court-barrett; *see also* Olga Khazan, *Why Women Choose Abortion Over Adoption*, THE ATLANTIC (May 2019), https://www.theatlantic.com/health/archive/2019/05/why-more-women-dont-choose-adoption/589759/. Speaking of Justice Comey Barrett's adoption of this argument, sociologist Gretchen Sisson, has noted that the Justice seems to be "assuming that people who terminate their rights are moving quickly past this termination . . . that is not something that I have ever seen in my research." North, *supra* note 402. Sisson also notes that many birth mothers feel intense grief not only in the initial period after the adoption, but also "as time goes by that initial grief can be compounded by a sense of alienation." *Id.* According to Sisson, the grief and alienation may be the result of the "politicized and religious messaging around adoption that tells birth mothers that they have made a very courageous, brave, and loving decision." *Id.* But at the same time, birth parents get very little support or help in understanding and managing their grief, nor do they get support in the context of open adoption, in negotiating and managing contact with their biological children. *Id.* Thus, many birth parents are left to deal

perform a self-managed abortion, with all its attendant risks. Again, if they are lucky, they will find access to medication to safely end the pregnancy.[403] If luck is not on their side, they might have to resort to unsafe abortion methods. In either case, by using self-managed abortion, these women risk their behavior being deemed criminal and, thus, they risk prosecution for providing themselves with medical care that the state denies to them.[404] This is an affront to the dignity of the person. It is an affront that only women seem to experience, with women at the margins experiencing it in greater measure.

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with their grief and loss by themselves, and according to Sisson, they simply "'feel very alone.'" *Id.*

403 There is some evidence that, with the help of the internet, there is coalescing, an "abortion underground," of informal groups that help provide medication abortion pills to people in states where abortion bans and restrictions are most grievous. *See* Jessica Bruder, *The Future of Abortion in a Post-Roe America*, THE ATLANTIC (Apr. 4, 2022), https://www.theatlantic.com/magazine/archive/2022/05/roe-v-wade-overturn-abortion-rights/629366/ (discussing the activities of one of the underground networks of community providers helping pregnant women to self-manage their abortions). Some pregnant women are also able to take advantage of international pharmacy websites that will ship abortion medication to patients inside the United States. *See* Patrick Adams, *Spreading Plan C to End Pregnancy*, N.Y. TIMES (Apr. 27, 2017), https://www.nytimes.com/2017/04/27/opinion/spreading-plan-c-to-end-pregnancy.html; *see also About Us*, PLAN C, http://www.plancpills.org/about (last visited Mar. 6, 2024). There is also a movement to provide abortion medication to people when they are not pregnant, so that they have the medication available if they wish to use it at a later date. *See* David Ingram, *A Dutch Doctor and the Internet Are Making Sure Americans Have Access to Abortion Pills*, NBC NEWS (Jul. 7, 2022), https://www.nbcnews.com/tech/tech-news/dutch-doctor-internet-are-making-sure-americans-access-abortion-pills-rcna35630 (discussing Aid Access, an online-only service run by Dutch physician, Rebecca Gomperts, and the difficulty that U.S. authorities have had in stopping it); *see also Who Are We*, AIDACCESS, https://aidaccess.org/en/page/561/who-are-we (last visited Mar. 6, 2024).

404 The Texas statute, for example, allows the state to prosecute women for self-managing abortions. Sophie Kasakove, *Woman in Texas Charged with Murder in Connection With 'Self-Induced Abortion'*, N.Y. TIMES (Apr. 9, 2022), https://www.nytimes.com/2022/04/09/us/self-induced-abortion-murder-charge.html (describing the indictment and arrest of a twenty-six-year-old woman on a murder charge in connection with the "death of an individual through a self-induced abortion"). Although under Texas law, S.B. 4, it is a felony to provide medication abortion to a pregnant woman after forty-nine days of pregnancy, self-managed abortions seem to be exempt under the statute as that statute exempts pregnant women from prosecution. TEX. HEALTH & SAFETY CODE § 171.204 (West 2023). Nevertheless, according to a statement by a local sheriff department official, Ms. Herrera was indicted on the murder charge after she "intentionally and knowingly" caused the death of an individual by self-induced abortion. Kasakove, *supra* note 404.

3. Abortion Bans and Restrictions Create Medical Emergencies for Women: Additional Failures to Recognize Women's Essential Dignity

The Idaho Law shows no understanding of the nature of emergency care that pregnant patients require, or of the impact of timing on patient care. It willfully disregards what it means to pregnant patients—and their doctors—to be told that, alone among all patients seeking emergency care and contrary to medical guidelines and ethics, they must wait until their life is in jeopardy to receive treatment.[405]

It should have been obvious to all, including the Court (and I believe it was), that the re-criminalization of abortion resulting from the removal of constitutional protection, would have an immediate impact on the work of obstetrician-gynecologists and other healthcare providers who work in the area of "women's health," physicians and public health experts and others Amici also warned the *Dobbs* Court that refusing to recognize women's constitutional right to bodily integrity, including the right to abortion care, would have a tremendous impact on the care that women received in the emergency room. These experts explained that many emergent conditions bring pregnant patients to the emergency department, and sometimes, these conditions require ending the pregnancy to preserve the woman's life or health.[406] Thus these experts explained to the Court that the abortion restrictions in the Mississippi statute, and in other statutes being passed in state legislatures around the country on abortion, would thus lead to increase maternal morbidity and mortality.[407]

Contrary to claims made by anti-abortion and anti-choice activists, jurists, and politicians, many medical conditions, depending upon the severity, require the termination of a pregnancy to avoid fatal complications for the pregnant woman.[408] Several of these conditions are complications of pregnancy, and present as emergent conditions; abortion of the fetus is the standard medical treatment used to save the pregnant woman's life or to preserve her health.[409] The most common pregnancy-related medical conditions that bring pregnant women into emergency departments,

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405 Brief for Am. Coll. of Emergency Physicians et al. as Amici Curiae Supporting Plaintiff, United States v. Idaho, No. 1:22-cv-00329-BLW, 2023 U.S. Dist. LEXIS 79235, at *9 (D. Idaho 2023) (No. 50) [hereinafter United States v. Idaho, ACEP & ACOG Brief].

406 Brief for Am. Coll. of Emergency Physicians, et. al. as Amici Curiae Supporting Respondents, Dobbs v. Jackson Women's Health Org., 141 U.S. 2619 (2021).

407 The Court continues to be flooded with this information because just months after the Court decided *Dobbs*, in August of 2022, the Department of Justice challenged Idaho's abortion trigger law that would force emergency room physicians to violate the Emergency Medical Treatment and Labor Act (EMTLA), a federal law that requires emergency departments to treat and stabilize anyone coming to their facilities needing emergency treatment. *See* United States v. Idaho, No. 1:22-cv-00329-BLW, 2023 U.S. Dist. LEXIS 79235, at *3 (D. Idaho May 4, 2023). *See generally* 42 U.S.C.A. § 1395 (2020); *see also* United States v. Idaho, ACEP & ACOG Brief, *supra* note 405.

408 *See* United States v. Idaho, ACEP & ACOG Brief, supra note 405.

409 *Facts Are Important: Abortion Is Healthcare,* AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare (last visited Mar. 6, 2024).

that often require the performance of abortion to prevent maternal death or disability are preterm labor with signs of infection and miscarriage.[410]

In the pre-*Dobbs* world, when a pregnant woman presented to the emergency department with preterm labor and signs of uterine infection, it was for the physician to strongly consider abortion where the pregnant woman's water breaks before her twentieth week of her pregnancy.[411] This condition, also referred to as pre-labor rupture of the membranes, is dangerous to the pregnant woman's health because it can lead to infection—and infection can quickly lead to sepsis.[412] If the pregnant woman becomes septic, she has a high likelihood of dying.[413] As one physician explained in the States' Amici Brief in *United States v. Idaho*, uterine infections are particularly dangerous "'because there is an extremely high risk that the infection inside of the uterus spreads very quickly into [the patient's] bloodstream and she becomes septic. If she continues the pregnancy it comes at a very high risk of death.'"[414] Thus, abortion in these cases continues to be the medical standard of care.[415]

The most common reason for an emergency department physician to perform an abortion is miscarriage.[416] A miscarriage, also known as early pregnancy loss or spontaneous abortion, is the unexpected ending of a pregnancy in the first twenty

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410 Preeclampsia is another common condition in pregnancy that can lead to the need for abortion to save the life of the pregnant woman or to preserve her health. It is a common cause for abortion in emergency departments because staying pregnant with preeclampsia dramatically increasing the risk of death for the pregnant woman where she develops the condition early in the pregnancy, before the twenty-fourth week. Errol R Norwitz, *Patient education: Preeclampsia (Beyond the Basics)*, WOLTERS KLUWER UPTODATE (Feb. 18, 2024, 8:00 PM), https://www.uptodate.com/contents/preeclampsia-beyond-the-basics#H22.

411 *Fact Check-Termination of Pregnancy Can Be Necessary to Save a Woman's Life, Experts Say*, REUTERS (Dec. 27, 2021), https://www.reuters.com/article/factcheck-abortion-false/fact-check-termination-of-pregnancy-can-be-necessary-to-save-a-womans-life-experts-say-idUSL1N2TC0VD.

412 *Premature Rupture of Membranes*, CLEV. CLINIC, https://my.clevelandclinic.org/health/diseases/24561-premature-rupture-of-membranes (last visited Mar. 6, 2024).

413 In the United States, sepsis is the fourth leading cause of maternal death. Mortality in pregnant patients rose consistently at an average of nine percent per year from 2001 to 2010 despite sepsis guidelines updates. Dr. Andrea Shields et al., *Top 10 Pearls for the Recognition, Evaluation, and Management of Maternal* Sepsis, 138 OBSTETRICS & GYNECOLOGY 289, 289 (2021). *See generally* Rachel E. Bridwell et al., *Sepsis in Pregnancy: Recognition and Resuscitation*, 20 WEST. J. OF EMERGENCY MED. 822, 822–32 (2019).

414 Brief for States of California et al. as Amici Curiae Supporting Plaintiff, United States v. Idaho, No. 1:22-cv-00329-BLW, 2023 U.S. Dist. LEXIS 79235, at *12 (D. Idaho 2023) (No. 45-1) [hereinafter United States v. Idaho, States' Brief].

415 *Id.* at 14.

416 *See* Patrick Adams, *Many ERs Offer Minimal Care for Miscarriage. One Group Wants That to Change*, NPR (Jan. 4, 2023), https://www.npr.org/sections/health-shots/2023/01/04/1146801914/many-ers-offer-minimal-care-for-miscarriage-one-group-wants-that-to-change.

weeks of the pregnancy.[417] The Cleveland Clinic reports that between 10% and 20% of all known pregnancies end in miscarriage, with 80% occurring within the first trimester.[418] The American College of Obstetricians and Gynecologists (ACOG), defining the gestational period for miscarriage more narrowly, as until twelve weeks and six days of the pregnancy, have determined that miscarriage is still common, occurring in 10% of all clinically recognized pregnancies, with approximately 80% of all cases occurring within the first trimester.[419] This translates to approximately 500,000 to 900,000 women who seek care in hospital emergency departments care each year for miscarriage-related concerns.[420]

Treatment of miscarriage varies depending upon the stage of the pregnancy. According to ACOG, the accepted treatment for a miscarriage in early pregnancy includes expectant management (do nothing), medical management (akin to medical abortion), or surgical evacuation (akin to surgical abortion).[421] In any case, surgical evacuation may be necessary if a complete expulsion of the embryonic tissue does not occur naturally.[422] When pregnant women present to the emergency department while in the process of miscarrying their fetus or have had an incomplete miscarriage and are suffering the effects of an incomplete miscarriage, they often need surgical management (surgical uterine evacuation), in order to preserve their lives and their health.[423] As ACOG notes in its practice guidance literature:

> Surgical uterine evacuation has long been the traditional approach for women presenting with early pregnancy loss and retained tissue. Women who present with hemorrhage, hemodynamic instability, or signs of infection should be treated urgently with surgical uterine evacuation. Surgical evacuation also might be preferable in other situations, including the presence of medical comorbidities such as severe anemia, bleeding disorders, or cardiovascular disease.[424]

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417 *Miscarriage: Causes, Symptoms, Risks, Treatment & Prevention*, CLEV. CLINIC, https://my.clevelandclinic.org/health/diseases/9688-miscarriage (last visited Mar. 6, 2024).

418 *Id.*

419 *See Early Pregnancy Loss*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2018/11/early-pregnancy-loss (last visited Mar. 6, 2024).

420 Carolyn A. Miller et al., *Patient Experiences with Miscarriage Management in the Emergency and Ambulatory Settings*, 134 OBSTETRICS AND GYNECOLOGY, 1285, 1285 (2019); Lyndsey S. Benson et al., *Early Pregnancy Loss in the Emergency Department*, J. OF THE AM. COLL. OF EMERGENCY PHYSICIANS OPEN, 1, 1–2 (2021).

421 AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, *supra* note 419.

422 *Id.*

423 *See id.*

424 *Id.* Where these patients can be seen in their personal physicians' office, these procedures can also be performed there. But the site of the procedure makes it not less emergent. *Id.*

Thus, it is not unusual for pregnant women to have medical complications that necessitate abortion to preserve the life or health of the pregnant woman. When this occurs, they often present to a hospital emergency room for medical care. As a result, abortion care has been a regular and critical part of emergency medicine,[425] and thus, emergency room physicians have developed some expertise in caring for pregnant women in medical crises.

In their Amici Brief in *United States v. Idaho*, filed shortly after the Court's decision in *Dobbs*, several states writing as amici in support of plaintiff's motion to enjoin Idaho's abortion ban explained that abortion is standard medical care, for which emergency departments play a crucial role. They assert:

> States regularly provide abortion care to stabilize many emergency medical conditions, including severe pregnancy complications, complications of early pregnancy loss or miscarriage, pre-labor rupture of membranes, ectopic pregnancy, emergent hypertensive disorders such as preeclampsia with severe features, and incomplete abortion. Often, pregnant patients face unforeseeable emergency medical conditions and need abortion care to protect their life and prevent severe and disabling injury to their health, regardless of whether they wanted and intended the pregnancy.[426]

In their Brief, the participating states note specific examples of patients whose lives have been saved, or whose health has been preserved, because of the availability of abortion. For example, the Brief notes that in Oregon:

> A physician at Oregon's public academic health center, Oregon Health & Science University, described receiving transfers that require urgent or emergent pregnancy termination, including pregnant patients presenting with hemorrhage due to placenta previa and placental abruptions, previable premature rupture of membranes with sepsis, peri-viable severe decompensating preeclampsia, acute leukemia, c-section scar ectopic pregnancies, cornual ectopic pregnancies, and hemorrhaging miscarriage, among other conditions.[427]

The report from Illinois included the stories of several life-saving treatments involving the termination of pregnancies. In Illinois:

> [A] provider treated a 30-year-old in the emergency room who was 15 weeks pregnant, had significant bleeding, ruptured membranes, and a dilated cervix, but the fetus still had cardiac activity. The patient had lost one-third of her blood volume, and her vital signs were deteriorating. The hospital provided the necessary surgery to end the pregnancy. In another case, an Illinois provider treated a 32-year-old patient with placenta previa (where the placenta covers the cervix) who was 20 weeks pregnant and came to the

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425 Kathryn E. Fay et al., *Abortion as Essential Health Care and the Critical Role Your Practice Can Play in Protecting Abortion Access*, 140 OBSTETRICS AND GYNECOLOGY 729, 730 (2022).

426 *United States v. Idaho, States' Brief*, *supra* note 414, at *8–11.

427 *Id.*

> hospital with vaginal bleeding and cervical dilation. Her bleeding increased rapidly and she developed low blood pressure, needing a blood transfusion and a uterine evacuation (i.e., abortion) to stabilize her condition. Another Illinois patient who was 22 weeks pregnant was brought to the hospital after having a seizure and was found to have elevated blood pressure, preeclampsia, and HELLP (hemolysis, elevated liver enzymes, and low platelet count) syndrome, a life-threatening pregnancy complication. Despite multiple medications to control her blood pressure, her liver function was rapidly deteriorating, necessitating a surgical termination of the pregnancy.[428]

The report from New Jersey came from providers of a state-owned hospital.[429] They reported "the regular use of terminating a pregnancy in emergency settings to treat septic abortion[,] . . . ectopic pregnancies, preeclampsia[,] . . . and molar pregnancy (nonviable abnormally fertilized egg that can act like a malignancy and is at high risk of metastasizing) for which no other treatment is available."[430]

Despite the fact that abortion has long been an essential part of emergency medical care for women, abortion bans and restrictions, like those that have been triggered by the fall of *Roe* or passed by state legislatures since the Court's holding in *Dobbs*, have caused chaos in hospital emergency departments. By removing the protection of women's right to bodily integrity, including the right to make decisions about abortion, the *Dobbs* Court removed the right to receive abortion care.[431] As a result, women have been unable to receive abortion care, even when this care is necessary to save their lives.[432]

Physicians and hospitals note that abortion bans conflict with their professional and ethical duties, causing them to violate their duty to care for their patients.[433] Hospitals and physicians also note that abortion bans compel them to violate the federal Emergency Medical Treatment and Labor Act ("EMTLA"), a law which requires physicians to provide "stabilizing treatment [to] prevent material deterioration" of all patients to "act prior to the patient's condition declining."[434] President Biden issued an Executive Order, and The Department of Health and Human

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428 *Id.*

429 *Id.* at 10.

430 *Id.*

431 Dobbs v. Jackson Women's Health Org., 597 U.S. 1, 5 (2022).

432 *See* Elizabeth Cohen & John Bonifield, *Texas Woman Almost Dies Because She Couldn't Get an Abortion*, CNN (June 20, 2023), https://www.cnn.com/2022/11/16/health/abortion-texas-sepsis/index.html.

433 Ayesha Rascoe, *In States with Abortion Bans, Hospital Ethics Boards Have the Power to Make Exceptions*, NPR (Mar. 12, 2023), https://www.npr.org/2023/03/12/1162917337/in-states-with-abortion-bans-hospital-ethics-boards-have-the-power-to-make-excep.

434 Memorandum from the Centers for Medicare and Medicaid Services to State Survey Agency Directors on Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss (July 11, 2022).

Services ("HHS") issued guidance on this law, affirming that the EMTLA protects providers (and therefore patients) when offering legally-mandated, life- or health-saving abortion services in emergency situations.[435] Xavier Becerra, the Secretary of HHS, also issued a letter to hospitals, making it clear that the federal statute preempts any state law restricting access to abortion in emergency situations.[436]

Nevertheless, emergency department physicians still face fear when treating pregnant women in crisis who come into their departments. They report that the fear of felony conviction has caused them to delay or restrict care while they consider questions such as: When is a pregnant woman sick enough to justify abortion? Does the woman's condition threaten her life enough to justify abortion? Or does the physician need to wait until she is sicker? How emergent is emergent?[437] Thus, women are left to get sicker, and sometimes die, despite being in the hospital—and with physicians who know how to heal them—because their physicians are afraid of criminal liability under abortion statutes.

As a result of abortion bans, women are being denied care. In fact, hospitals are routinely refusing or delaying care of pregnant women. For example, in an interview given shortly after the *Dobbs* decision was announced, an obstetrician in Milwaukee, Dr. Allison Linton, noted, "There's such confusion . . . and when doctors are hearing this risk of a felony charge, they're erring on the side of fear."[438] Dr. Linton also noted that she had seen instances where the law made her colleagues fearful of performing procedures that did not even fall within the purview of the statute, like the delivery of a stillborn infant, leaving women to carry dead fetuses until they could find physicians who were willing to deliver the dead infants.[439]

After the Texas abortion took effect on September 1, 2021, doctors and hospitals in Texas reported postponing caring for pregnant women "until a patient's health or pregnancy complication has deteriorated to the point that their life was in danger, including multiple cases where patients were sent home, only to return once they were

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435 *Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services*, THE WHITE HOUSE (July 8, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/08/fact-sheet-president-biden-to-sign-executive-order-protecting-access-to-reproductive-health-care-services/; Press Release, Dep't of Health and Human Serv., Following President Biden's Executive Order to Protect Access to Reproductive Health Care, HHS Announces Guidance to Clarify that Emergency Medical Care Includes Abortion Services (July 11, 2022), https://www.hhs.gov/about/news/2022/07/11/following-president-bidens-executive-order-protect-access-reproductive-health-care-hhs-announces-guidance-clarify-that-emergency-medical-care-includes-abortion-services.html.

436 Letter from Xavier Becerra, Secretary of Health and Human Serv., to Health Care Providers (July 11, 2022), https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf.

437 Kate Zernike, *Medical Impact of Roe Reversal Goes Beyond Abortion Clinics, Doctors Say*, N.Y. TIMES (Sept. 10, 2022), https://www.nytimes.com/2022/09/10/us/abortion-bans-medical-care-women.html. Some emergency department providers have stopped providing emergency contraceptives to sexual assault victims for fear that emergency contraceptives like Plan B might fall under the abortion ban as an abortifacient. *Id.*

438 *Id.*

439 *Id.*

in sepsis."[440] Other Texas physicians reported receiving pregnant women who were septic, after other hospitals had refused to perform the abortions when abortion was needed to save their lives.[441] The hospital refusals were due to evidence of fetal cardiac activity.[442] Dr. Lorie Harper, Chief of Maternal-Fetal Medicine at the University of Texas Medical School, has said that many of her colleagues are not offering abortions to patients when they need them.[443] They are instead waiting until their patients are near death in order to ensure that they are complying with the Texas abortion ban.[444] She said: "They are waiting until heart failure, waiting until hemorrhaging, waiting until a patient needs to be intubated, or is [having organ failure]. Patients have to be a lot sicker before they receive life-saving care—and not every patient who becomes that critically ill will recover."[445]

Following the Texas abortion ban, a study of two Dallas, Texas hospitals confirmed delays in care resulting from abortion bans. In the nine month period examined by the study, 93% of the pregnant women who came to the hospital with emergent conditions, were in preterm labor with premature rupture of membranes, a condition for which abortion is almost always indicated due to the risk of sepsis.[446] Twenty-five percent of the women who presented with emergent conditions, arrived with parts of the fetus's body or umbilical cord prolapsed into the vagina.[447] The study also found that women who presented with complications such as these, had to wait an average of nine days for their conditions to be considered sufficiently life threatening to justify treatment.[448]

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440 Eleanor Klibanoff, *Doctors Report Compromising Care out of Fear of Texas Abortion Law*, TEX. TRIB. (June 23, 2022), https://www.texastribune.org/2022/06/23/texas-abortion-law-doctors-delay-care/.

441 Lori R. Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 AM. J. PUB. HEALTH 1774, 1774–78 (2008).

442 *Id.*

443 Mary Tuma, '*At Death's Door': Abortion Bans Endanger Lives of High-Risk Patients, Texas Study Shows*, THE GUARDIAN (July 13, 2022), https://www.theguardian.com/world/2022/jul/13/texas-abortion-ban-maternal-health-risk.

444 *Id.*

445 *Id.*

446 Anjali Nambiar et al., *Morbidity and Fetal Outcomes Among Pregnant Women at 22 Weeks' Gestation or Less with Complications in 2 Texas Hospitals After Legislation on Abortion*, 227 AM. J. OF OBSTETRICS & GYNECOLOGY 648, 648–50 (2022) [hereinafter *Dallas Hospital Study*]; *Prevention of Group B Streptococcal Early-Onset Disease in Newborns*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (Feb. 2020), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2020/02/prevention-of-group-b-streptococcal-early-onset-disease-in-newborns.

447 *Dallas Hospital Study*, *supra* note 446, at 649.

448 *Id.*

Delays in treatment damage women's health and can cause death. Researchers found that the delays in treatment reported in the Dallas Hospital Study resulted in severe damage to the women's health, including maternal morbidity, such as hemorrhage and sepsis.[449] Some women required intensive care admission, and one woman required a hysterectomy.[450] In fact, one woman died as a result of one of the hospital's delay in treatment.[451] The Dallas Hospital Study confirms what other physicians and public health experts told the Court regarding the ways in which delays in medical treatment for pregnant women experiencing medical emergencies result in egregious harm to those patients. Delays in treatment resulting from laws restricting and banning abortion harm women's health—even leading to the death of pregnant women.

4. Limiting the Treatment of Other Diseases and Disorders

Abortion restrictions and bans also affect the treatment of women who are ill with chronic or life-limiting ailments, or life-threatening conditions, such as auto-immune diseases or cancer, or other diseases for which pregnancy makes the treatment difficult or impossible.

Pregnancy "can exacerbate underlying or preexisting conditions, like renal or cardiac disease, and can severely compromise health or even cause death."[452] In addressing the needs of these high-risk patients, Dr. Maria Small, Associate Professor at Duke University, argues: "So many cardiac diseases can result in a much higher risk of death in pregnancy. So sometimes individuals who are pregnant, with a cardiac condition, need to have the option to terminate a pregnancy, to end a pregnancy, as a life-saving action for themselves."[453]

Cancer treatment is another place where abortion bans have had an immediate effect on women's health care. Cancer treatment is time-sensitive. The sooner in the course of disease the treatment is started, the higher the likelihood of a better outcome for the patient. Most chemotherapy agents are known to harm the embryo/fetus during the first trimester, while some are teratogenic throughout the pregnancy.[454] When the patient is pregnant, the current standard of care is to start (or continue) treatment only after the patient is *no longer* pregnant.[455] For most patients, this means terminating

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449 *Id.*

450 *Id.*

451 *Id.*

452 *Abortion Can Be Medically Necessary*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (Sept. 25, 2019), https://www.acog.org/news/news-releases/2019/09/abortion-can-be-medically-necessary.

453 Eric Ferreri, *Abortion Bans Straining Health Care System, Medical Experts Say*, DUKE TODAY (Aug. 16, 2022), https://today.duke.edu/2022/08/abortion-bans-straining-health-care-system-medical-experts-say.

454 Pawl Basta et. al, *Cancer Treatment in Pregnant Women*, 19 CONTEMP. ONCOLOGY 354, 354–60 (2014).

455 *Id.*

their pregnancies so that they can begin treatment that they hope will be lifesaving because waiting means decreasing the chance that they will survive the cancer.[456]

Abortion bans can, and do, cause delays in cancer treatment. They prevent women from accessing cancer care in a timely manner. A recent Ohio case offers a good example of what women in states with abortion bans are facing:

> [A] 25-year-old woman with cancer was already undergoing chemotherapy before she learned she was pregnant. When she discovered her pregnancy, doctors told her she was unable to continue receiving her cancer treatment while pregnant. And at eight weeks pregnant, she could not legally obtain an abortion in Ohio.
>
> The woman's doctor . . . did not feel comfortable providing paperwork indicating that she medically qualified for an abortion, like many physicians who are nervous about the hefty criminal penalties possible if one is found to have provided an abortion. The woman had to travel out of state to terminate her pregnancy. Only upon returning could she continue her delayed chemotherapy.[457]

The patient in this case could not immediately end her pregnancy because she had to find an out of state abortion provider and had to make travel arrangements.[458] The delay in getting an abortion increased the cost of the abortion because the more advanced the pregnancy is, the more expensive the pregnancy is to terminate.[459]

There are additional consequences for a cancer patient in cases like this, including consequences for her cancer treatment. Having to leave the state to receive abortion care delays when patients can start cancer treatment. Because of the time-sensitive nature of cancer treatment, any delay risks the chance of developing more advanced disease. As one physician noted: "If you were open to terminating, I would say we need to do that as soon as possible. . . . You're fighting with a clock of this cancer that's growing."[460]

Thus, as with miscarriage and pregnancy-related illness, where the pregnant woman has a life-threatening illness that is not pregnancy-related, her treatment is still a medical emergency requiring time-sensitive treatment. Sometimes the standard of care requires ending the pregnancy before additional treatment can be provided.[461] Failure to have this treatment provided, or a delay in treatment puts a woman's life and health in further jeopardy. Where the state abortion laws allow abortion only when the

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456 Melissa Suran, *Treating Cancer in Pregnant Patients After* Roe v Wade *Overturned*, 328 J. OF THE AM. MED. ASS'N 1674, 1674–76 (2022).

457 Shefali Luthra, *Abortion Bans Are Preventing Cancer Patients from Getting Chemotherapy*, THE 19TH (Oct. 7, 2022), https://19thnews.org/2022/10/state-abortion-bans-prevent-cancer-patients-chemotherapy/.

458 *Id.*

459 *Id.*

460 *Id.*

461 AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, *supra* note 452.

pregnant woman's life is "at risk," or when death is imminent, physicians are forced to ask questions that are impossible to answer with any degree of certainty, including: When is a pregnant woman sick enough to justify abortion? One physician asked:

> How do we tell if someone's sick enough? It's really hard to say in each individual situation what constitutes enough illness. Do you need one organ failing? Do you need two organs failing? Do you need to be to the point where you're bleeding, where you need a blood transfusion?[462]

Physicians are thus forced to ask themselves: Does the law require them to wait until their patient gets sicker?[463]

Furthermore, these questions about the imminence of death and how sick is sick enough are impossible to answer. Thus, the pregnant woman's treatment is delayed or denied because predicting the point at which a patient's death is imminent is both difficult and pointless under these circumstances. The purpose of predicting death is so the physician can treat the pregnant patient without running afoul of the state's abortion ban. The physician has to wait until some point, close to the patient's death, in order to treat her. The result of such a system can only be injury to the patient. Consequently, this system can only result in an inordinate number of dead women.

And perhaps this leads to the most important question: Where is the dignity in this law for women? This law purportedly creates a healthcare system, but instead, it creates one in which women's lives carry so little value. These laws create a healthcare system in which some women, those who are pregnant, must wait. They must wait until they are almost dead before they can receive treatment if that treatment will result in the harming or the death of the embryos or fetus they are carrying.

These laws tell women, and everyone else who is willing to listen, that women cannot be trusted with assigning the proper value to their own lives or to the lives of the embryos or fetuses they carry. Why? Because women may miscalculate. They cannot have a "choice," because they may get it wrong. They may deem their own lives worth more than the lives of their fetuses. What abortion bans ultimately tell us

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462 Dr. Beverly Gray, *Abortion Bans Straining Health Care System, Medical Experts Say*, DUKE TODAY (Aug. 16, 2022), https://today.duke.edu/2022/08/abortion-bans-straining-health-care-system-medical-experts-say (Dr. Beverly Gray is an obstetrician and gynecologist, an associate professor in the Department of Obstetrics and Gynecology at the Duke School of Medicine, and founder of the Duke Reproductive Health Equity and Advocacy Mobilization team).

463 Aria Bendix, *How Life-Threatening Must a Pregnancy Be to End It Legally?*, NBC NEWS, (June 30, 2022) https://www.nbcnews.com/health/health-news/abortion-ban-exceptions-life-threatening-pregnancy-rcna36026. Professor Lisa Harris, a professor of reproductive health, addresses these issues in this way:

> There are many circumstances in which it is not clear whether a patient is close to death. . . . It's not like a switch that goes off or on that says, 'OK, this person is bleeding a lot, but not enough to kill them,' and then all of a sudden, there is bleeding enough to kill them. . . . It's a continuum, so even how someone knows where a person is in that process is really tricky. What does the risk of death have to be, and how imminent must it be? Might abortion be permissible in a patient with pulmonary hypertension, for whom we cite a 30-to-50% chance of dying with ongoing pregnancy? Or must it be 100%? *Id.*

is that women are not to be granted the dignity of giving value to their own lives when their lives are to be measured against the lives of the embryo or fetus. This is what the *Dobbs* Court is saying when it asserts that "[t]hese attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much."[464] Furthermore, the *Dobbs* Court asserts that if the fundamental right to autonomy includes the right to abortion, then activities it deems immoral, such as "rights to illicit drugs, prostitution, and the like," would be protected as well.[465] Thus, the Court holds that fundamental right to autonomy excludes the right to make poor or undignified choices or engage in poor or undignified behavior. Abortion, we should understand, is one of these undignified choices; it is like the other choices or behaviors that the Court deems immoral and unprotectable under substantive due process. The misogyny of the Court's opinion in *Dobbs*, and of the abortion bans that have both preceded and followed it, signal that we live in an era where the liberties of the Fourteenth Amendment do not apply to women's reproductive lives because women simply do not measure up.

B. Social & Economic Consequences: Consigning Women to Second-Class Citizenship

Not only are the individual women who are unable to access abortion care harmed by abortion restrictions and bans resulting from the Court's opinion in *Dobbs*, but all women in the United States are also harmed by the removal of constitutional protection of women's liberty interests in bodily integrity, including the right to access abortion care.

These harms take four interrelated forms. First, as indicated earlier, and by various Amici, the health of individual women is harmed by the lack of access to abortion.[466] Second, women are harmed economically—both individually and as a class. As the economist Amici testified, fifteen years of data demonstrates that access to legal abortion has been critical to women's ability to pursue education and employment.[467] This research demonstrates that abortion access has profoundly affected women's lives by determining whether, when, and under what circumstances they become mothers.[468] The result of this single incident continues to echo throughout their lives. Whether, when, and under what circumstances a woman becomes a mother affects her marriage patterns, her educational attainment, the intensity of her labor force participation, and her lifelong earnings.[469] The third harm, related to the first two harms, is without access to abortion care, women lack the ability to control their

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464 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 257 (2022).

465 *Id.*

466 *See* Economists' Brief, *supra* note 218, at 26.

467 *Id.* at 1–2, 13.

468 Caitlin Knowles Myers & Morgan Welch, *What Can Economic Research Tell Us About the Effect of Abortion Access on Women's Lives?*, BROOKINGS INST. (Nov. 30, 2021), https://www.brookings.edu/articles/what-can-economic-research-tell-us-about-the-effect-of-abortion-access-on-womens-lives/.

469 *Id.*

fertility. The inability of women to control their fertility not only affects an individual woman's education and employment attainment, it also works to consign women (as a social group) to their reproductive capacities and state-sanctioned gender roles. A fourth, and related harm, is that the diminution of women's constitutionally protected liberty interests, allowing states to reduce women to their reproductive capacities and state-sanctioned gender roles, consigns women to a form of second-class citizenship.

In another article regarding the compelled medical treatment of pregnant women, I argued that under *Roe* and its progeny, including *Casey*, "women's autonomy is dependent upon women conforming to state-sanctioned stereotypes regarding who women are and what their appropriate roles are in society."[470] This argument was made in two parts: That physical and decisional autonomy was an essential part of women's citizenship, and that women's autonomy would not be promoted nor protected unless it conformed to state-sanctioned mothering roles, including altruism.[471] In the context of pregnant women, I argued that when "only pregnant women make altruistic choices on behalf of their fetuses are their choices assured of state protection. When pregnant women wish to make themselves, their lives, their desires, or their values primary, courts have instead restricted women's autonomy by compelling unwanted, nonconsensual treatment on behalf of the fetus."[472]

The Supreme Court's opinion in *Dobbs* goes further. It tells us that women have no interest in bodily autonomy that the state has an obligation to protect. As such, women in the United States can only ever be something less—something considerably less than full citizens. Instead, as second-class citizens, their primary roles are those of child bearers and child carers. All other roles are secondary.

When I assert that, by eviscerating women's liberty interests in their rights to bodily autonomy under the Fourteenth Amendment, women's citizenship is lessened, I am of course suggesting that citizenship concerns legal status, but citizenship is complicated.[473] In liberal democracies like the United States, citizenship includes having civil, political, and social rights, as well as obligations.[474] Incorporated within citizenship is the right to share in the full gamut of the public life of the society of which one is a citizen.[475] As philosopher and political theorist Judith Shklar explains, citizenship in a liberal democracy includes both "[t]he equality of political rights" and

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[470] Cherry, *supra* note 39, at 740.

[471] *Id.*

[472] *Id.*

[473] "The concept of citizenship is composed of three main elements or dimensions. The first is citizenship as legal status, defined by civil, political and social rights. Here, the citizen is the legal person free to act according to the law and having the right to claim the law's protection . . . . The second considers citizens specifically as political agents, actively participating in a society's political institutions. The third refers to citizenship as membership in a political community that furnishes a distinct source of identity." Dominique Leydet, *Citizenship*, STAN. ENCYC. OF PHIL. (Sept. 5, 2023), https://plato.stanford.edu/entries/citizenship/#DimeCiti (citations omitted).

[474] *Id.*

[475] *Id.*

"[t]he dignity of work and of personal achievement," and the ability to control one's own life.[476]

The liberal model of citizenship is not without its problems. As many feminist scholars have pointed out, it prioritizes a division between the public and private spheres, noninterference by the state into the private sphere, political liberty, and formal rights.[477] The operating principle of liberal theory is that noninterference by the state protects and enhances the liberty of citizens.[478] But, historically, noninterference has enhanced the power of men in both the private and public spheres; it has marginalized and disadvantaged women.[479] Women are traditionally relegated to the private sphere, and the private sphere is protected from state interference.[480] As such, the traditional model of liberalism, including the liberal model of citizenship, hides women's needs and their subjugation. As such, the liberal concept of citizenship has traditionally excluded women from its definition of full citizenship.[481] As philosopher Susan James explains, the liberal model of citizenship excludes women from its definition by:

> [D]enying women the full complement of rights and privileges accorded to men, and more insidiously, by taking for granted a conception of citizenship which excludes all that is traditionally female. The cluster of activities, values, ways of thinking and ways of doing things which have long been associated with women are all conceived as outside the political world of citizenship and largely irrelevant to it.[482]

Once we understand that the liberal conception of citizenship has implicitly excluded "all that is traditionally female," it is easy to see how reproductive rights fall

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476 JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 1 (1991); *see also* Kenneth L. Karst, *The Supreme Court, 1976 Term - Foreword: Equal Citizenship Under the Fourteenth Amendmen*t, 91 HARV. L. REV. 1, 8–9 (1977) (describing every citizen's role in society).

477 *See, e.g.*, Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT 319, 320–22 (1993); Mary G. Dietz, *Context is All: Feminism and Theories of Citizenship*, 116 DAEDALUS 1, 4 (1987).

478 Olsen, *supra* note 477, at 321.

479 *See, e.g., id.* at 322–23 (explaining that public/private distinctions, which are part and parcel of liberal theory, draw boundaries that perpetuate women's subordination).

480 *See generally id.* at 325; Laura Sjoberg, *Where Are the Grounds for the Legality of Abortion? A 13th Amendment Argument*, 17 CARDOZO J.L. & GENDER 527, 532 (2011).

481 *See, e.g.*, IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 110–11 (Princeton University Press ed., 1990) (noting that marginalized groups, specifically women, gays and lesbians, and people of color have been excluded from citizenship); *see also id.* at 54–55 (arguing that marginalized groups should not be deprived of choice and respect in democratic society).

482 SUSAN JAMES, *The Good-Enough Citizen: Female Citizenship and Independence*, *in* BEYOND EQUALITY AND DIFFERENCE: CITIZENSHIP, FEMINIST POLITICS, AND FEMALE SUBJECTIVITY, 48, 48 (Gisela Bock & Susan James eds., 1992).

out of the Court's understanding of citizenship. Despite any equality and due process—reproduction is something that happens in the private sphere.[483]

Nevertheless, citizenship in a liberal democracy includes equal political rights, the right to have access to dignified work and personal achievement, and the ability to control one's own life.[484] Part of the ability to control one's own life is the ability to control one's fertility. In fact, the international community, including the United Nations and the World Health Organization, recognize access to legal and safe abortion care as a human right. As Craig Lissner, the Acting Director for the United Nations' Agency for Sexual and Reproductive Health and Research, said: "Being able to obtain a safe abortion is a crucial part of healthcare. Nearly every death and injury that results from unsafe abortion is entirely preventable. That's why we recommend women and girls can access abortion and family planning, when they need them."[485]

Moreover, human rights organizations also consider restrictive abortion laws as a form of gender discrimination against women. For example, the Committee on the Elimination of Discrimination against Women specifies that "it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women," and that denial of access to abortion is a form of gender-based violence against women—which can amount to torture or cruel, inhuman, and degrading treatment.[486] I spell out this international recognition of abortion access as

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483 *Id.*

484 SHKLAR, *supra* note 476; *see also* Karst, *supra* note 476 (discussing how equal citizenship offers full participation in society).

485 *WHO Issues New Guidelines on Abortion to Help Deliver Lifesaving Care*, UN NEWS (Mar. 9, 2022), https://news.un.org/en/story/2022/03/1113612; *see also Political Declaration of the High-level Meeting on Universal Health* Coverage, UN GEN. ASSEMBLY, 1, 9 (Sept. 23, 2019), https://www.un.org/pga/73/wp-content/uploads/sites/53/2019/07/FINAL-draft-UHC-Political-Declaration.pdf (restating the need to ensure universal access to sexual and reproductive healthcare services and reproductive rights). The need for legal abortion to be safe and accessible has been supported by the international community at least since the International Conference on Population and Development (ICPD), held in Cairo in 1994. *Information Series on Sexual and Reproductive Health and Rights-Abortion*, OFF. OF THE HIGH COMM'R FOR HUM. RTS. (2020), https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf. At that Conference, States recognized unsafe abortion as a major public health concern. *Id.* In Cairo, member States pledged to reduce the need for abortion through expanded and improved family planning services, while at the same time recognizing that, in circumstances where not against the law, abortion should be safe. *Id.* The same language on abortion used in Cairo, was adopted by member States in the Beijing Platform for Action, which was agreed at the 1995 Fourth World Conference on Women. *Id.*

486 OFF. OF THE HIGH COMM'R FOR HUM. RTS., *supra* note 485; *Women's and Girls' Sexual and Reproductive Health Rights In Crisis*, UN WORKING GRP. ON DISCRIMINATION AGAINST WOMEN AND GIRLS (June 15, 2021), https://unworkinggroupwomenandgirls.org/reports/womens-and-girls-sexual-and-reproductive-health-rights-in-crisis/; *Convention on the Elimination of All Forms of Discrimination Against Women New York*, OFFICE OF THE HIGH COMM'R FOR HUM. RTS. 5–6 (Dec. 18, 1979), https://www.ohchr.org/sites/default/files/cedaw.pdf; *see also US Abortion Debate: Rights Experts Urge Lawmakers to Adhere to Women's Convention*, UN NEWS (July 1,

a human right because included in citizenship is civil rights.[487] At the core of civil rights must be human rights.[488] Thus, if citizenship includes civil rights, then human rights must be encompassed as part of its substance.

Likewise, citizenship includes not only political rights but also economic and social rights. These rights protect our ability to control our own lives, and to chart our own course. Citizens are entitled to substantive state protection of these rights.[489] Thus, the right to bodily integrity, including the right to abortion, then becomes an essential part of citizenship. Why? Because even when accounting for other forces that impact fertility, access to legal abortion has changed the social, educational, and economic trajectory of women's lives.[490]

In *Dobbs*, both the Petitioner (the State of Mississippi) and then later, the Supreme Court, dismiss all of the data and research from well-regarded, unbiased sources that analyzed the effect that abortion access has had on women's lives. The Petitioner argues that abortion is not critical to the success of women's lives or to women's health for several reasons, none of which speak to the health conditions women face due to abortion refusal or the material issues that women face in their day to day lives.[491]

With respect to women's health, Petitioner's arguments focus on the assertion made by the American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG"), that abortion is a dangerous medical procedure after the fifteenth week of pregnancy, arguing that the "risk of death spikes 38% 'for each additional week of gestation.'"[492] But AAPLOG, the Petitioner, and the Court all disregarded the

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2022), https://news.un.org/en/story/2022/07/1121862 ("The committee has repeatedly stressed that denying access to safe and legal abortion is "a severe restriction on women's ability to exercise their reproductive freedom, and that forcing women to carry a pregnancy to full term involves mental and physical suffering amounting to gender-based violence against women and, in certain circumstances, to torture or cruel, inhuman or degrading treatment, in violation of the CEDAW Convention.").

487 James W. Fox Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 UNIV. PITT. L. REV. 421, 427, 493 (1999).

488 *Id.* at 564, 572–73.

489 *Cf.* Kenneth L. Karst, *The Supreme Court, 1976 Term - Foreword: Equal Citizenship Under the Fourteenth Amendmen*t, 91 HARV. L. REV. 1, 58 (1977) (discussing a person's right to make their own choices).

490 Myers & Welch, *supra* note 485.

491 *See, e.g.*, Brief for Petitioners at 29, Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019) (No. 18-60868) (arguing how women can pursue a career while having a family but remaining silent about health conditions faced by women who were refused abortions); *see also, e.g.*, *id.* at 29–30 (emphasizing the access and effectiveness of contraceptives but disregarding the health conditions women endure when denied abortions).

492 Reply Brief for Petitioners at 13–14, Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019) (No. 18-60868). The AAPLOG describes its mission:

> AAPLOG's organizational vision is to be the preeminent medical voice that informs the medical community, policy makers and the public on the importance of declining to use death as a therapeutic option, which respects

undisputed fact that second-trimester surgical abortion is one of the safest medical procedures, and complications from it are rare. Most second semester abortions are performed by D&E.[493] There is fifty years of data documenting the safety of the D&E procedure.[494] According to ACOG, D&E is the "predominant approach to abortion after 13 weeks," and it is "evidence-based and medically preferred because it results in the fewest complications for women compared to alternative procedures,[495] and "[c]omplications from a surgical abortion are considerably less frequent and less serious than those associated with giving birth."[496]

With regard to the social and economic effects of having access to legal abortion on women, the Petitioner and the Court focus on the social changes that they believe now relieve women of the burdens of parenting that existed at the time that *Roe* was decided and were important to the *Roe* Court. As the *Roe* Court noted:

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. . . . There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically, or otherwise, to care for it.[497]

> the dignity of all human life and prohibits the taking of a life by a medical practitioner, including the lives of pre-born children.

Id. AAPLOG supports a number of claims regarding abortion that are unsupported by science and are dangerous to women, including the claim that medication abortion can be reversed. *Give Your Patients a Second Chance at Life*, AM. ASS'N OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, https://aaplog.org/abortion-pill-reversal/ (last visited Oct. 29, 2023). The American College of Obstetricians and Gynecologists (ACOG) has repeatedly issued warnings about the AAPLOG claim. *See generally Medication Abortion "Reversal" Is Not Supported by Science*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, https://www.acog.org/advocacy/facts-are-important/medication-abortion-reversal-is-not-supported-by-science (last visited Mar. 7, 2024).

493 *Second-Trimester Abortion*, PRAC. BULL., (Am. Coll. of Obstetricians and Gynecologists (ACOG), Washington, D.C.), June 2013, at 1394.

494 *Id.* at 1395.

495 *ACOG Statement Regarding Abortion Procedure Bans*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, (Oct. 9, 2015), https://www.acog.org/news/news-releases/2015/10/acog-statement-regarding-abortion-procedure-bans.

496 *Surgical Abortion (Second Trimester)*, UNIV. OF CAL. S.F. HEALTH, https://www.ucsfhealth.org/treatments/surgical-abortion-second-trimester (last visited Mar. 7, 2024); *id.* ("Although rare, possible complications can include: a uterine blood clot that can cause pain or that require a repeat aspiration; an infection, which is generally easily identified and treated with antibiotics; a tear in the cervix that can or be easily repaired with suture; perforation; a retained pregnancy tissue requiring repeat aspiration; excessive bleeding requiring a transfusion.").

497 Roe v. Wade, 410 U.S. 113, 153 (1973).

Petitioner Dobbs argued that times have changed, and as a result, abortion is no longer needed to address the harms of an unintended pregnancy that the *Roe* Court sought to address. Petitioner's Reply Brief states:

> Respondents urge that abortion is critical to women's success and health. Yet respondents disregard the ubiquity of safe-haven laws that eliminate parenting burdens altogether, discount that the Act here includes a health exception, downplay laws that promote women's career and family success, and diminish contraceptive advances. Respondents even claim that abortion has driven women's success—while disparaging that success as 'incremental.' That incredible view writes off the robust career and family success that innumerable women have achieved without relying on abortion.[498]

The Court, in describing the Petitioners' argument, actually makes that argument more forcefully than Petitioners, saying:

> Americans who believe that abortion should be restricted press countervailing arguments about modern developments. They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy; that leave for pregnancy and childbirth are now guaranteed by law in many cases; that the costs of medical care associated with pregnancy are covered by insurance or government assistance; that States have increasingly adopted "safe haven" laws, which generally allow women to drop off babies anonymously; and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home. They also claim that many people now have a new appreciation of fetal life and that when prospective parents who want to have a child view a sonogram, they typically have no doubt that what they see is their daughter or son.[499]

But the *Dobbs* Court does not really address this issue of how abortion bans and abortion denial affect women. Nowhere in the *Dobbs* opinion does the Court address that despite the Petitioners' claims that access to contraception, family leave laws, and safe haven laws "facilitate the ability of women to pursue both career success and a rich family life,"[500] since the 2004 Status of Women in the States report was first published by the Institute for Women's Policy Research, the gender wage gap in Mississippi has widened.[501] Although a higher percentage of women in Mississippi

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498 Reply Brief for Petitioners at 3, Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019) (No. 18-60868) (citations omitted).

499 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 258–59 (2022).

500 Brief for Petitioners at 29, Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019) (No. 18-60868).

501 *Status of Women in the State*, INST. FOR WOMEN'S POL'Y RSCH. (March 2018), https://statusofwomendata.org/wp-content/themes/witsfull/factsheets/economics/factsheet-mississippi.pdf.

have college degrees, a larger share of women also live in poverty.[502] Moreover, Mississippi still ranks in the worst third of the Nation for both women's "[e]mployment & [e]arnings" and "[p]overty & [o]pportunity."[503] In 2018, Mississippi ranked fiftieth nationally for its share of women in poverty; 21.9% of women in the State, aged eighteen and older, are in poverty.[504]

Furthermore, despite what the Petitioners argue, or what the various state and federal laws seem to require, most women in the United States do not have access to "benefits" that make it possible for women to "pursue both career success and a rich family life."[505] For instance, most people in the United States do not have access to family leave at the birth or illness of a child because the federal statute requiring medical leave, the Family Medical Leave Act, does not require paid leave.[506] And despite laws that ban discrimination, women continue to suffer from a wage gap that widens more significantly even once women become mothers.[507]

Finally, the Court does not address the Petitioners' assumption that access to abortion is unnecessary because of the widespread availability of free contraception under the ACA ("Obamacare"). The fact that in 2019, 41.6% of pregnancies were unintended, speaks to the issue of the need for abortion despite the availability of contraception.[508] Moreover, a recent study by the Kaiser Family Foundation ("KFF") found that despite the ACA, 18% of women are not using their preferred method of contraception, 25% of whom reported it is because of the lack of affordability.[509] The same study found that, although almost two-thirds of women with private health insurance have full contraceptive coverage through their plans and are covered without cost-sharing, more than 20% of women with private insurance nevertheless continue

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502 *Id.*

503 *Id.*

504 *Id.* Compared with 16.4% of Mississippi's men. *Id.*

505 Brief for Petitioners at 29, Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019) (No. 18-60868).

506 *See* The Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 825.120.

507 *The Motherhood Penalty*, AM. ASS'N OF UNIV. WOMEN, https://www.aauw.org/issues/equity/motherhood/ (last visited Mar. 7, 2024); Choncé Maddox, *The Motherhood Penalty Affects Everything from A Woman's Wages to Hiring and Promotions After Having a Child*, BUS. INSIDER, https://www.businessinsider.com/personal-finance/motherhood-penalty (last visited Mar. 7, 2024); *The Simple Truth about the Gender Pay Gap*, AM. ASS'N OF UNIV. WOMEN, https://www.aauw.org/resources/research/simple-truth/ (last visited Mar. 7, 2024).

508 Lauren M. Rossen et al., *Updated Methodology to Estimate Overall and Unintended Pregnancy Rates in the United States Data Evaluation and Methods Research*, VITAL AND HEALTH STAT., April 2023 at 1, Series 2, No. 201.

509 Brittni Frederiksen et al., *Women's Sexual and Reproductive Health Services: Key Findings from the 2020 KFF Women's Health Survey*, KFF (Apr. 21, 2021), https://www.kff.org/womens-health-policy/issue-brief/womens-sexual-and-reproductive-health-services-key-findings-from-the-2020-kff-womens-health-survey/.

to pay some out-of-pocket costs for their contraceptive care.[510] Finally, the KFF study found that more than 30% of birth control pill users reported that they missed taking their birth control pills because they were not able to get their next supply promptly.[511] And lastly, some of the most highly effective contraceptives are expensive, but not covered through the ACA or through public health insurance mechanisms.[512]

By citing to the lack of need for the constitutional protection of legal abortion due to changes in American society that make motherhood voluntary (i.e., contraception, safe surrender, or adoption) or easier (i.e., employment discrimination laws) without critique, criticism, or annotation, this demonstrates that the Petitioners (and the Court) may live in a fantasy world where women have access to comprehensive sex education, where they have access to contraception they can actually use, where they can easily forget about the babies they birth, where there are no social consequences for decisions not to parent, and here women have economic power in the workplace. This is certainly not the world we currently live in, and while I would appreciate some of these changes, I am sure that this is not Petitioner's fantasy either. The other possibility is that Petitioner (and the Court) know that the world in which we live is one where the vast majority of women have limited options, and thus, they are simply acting in bad faith.

I guess it might be possible for the Court to be ignorant about the challenges that most women face navigating the world, but the Court had the benefit of the Amici to educate it. However, while I argue that understanding the challenges that women face is key to thinking about and understanding the meaning and content of liberty, this is an issue in which the Court and its members are largely disinterested. Perhaps they do not believe that these challenges are relevant to the constitutional issue of women's liberty interest. Clearly, they do not believe that women's bodily autonomy and reproductive liberty are concerns for the constitution; they say this explicitly.[513] They believe that these freedoms are issues for state legislatures.[514] They believe that legislatures should get to decide the extent of women's freedom. History teaches us that this is a recipe for disaster.

The Court's disinterest in the material conditions of women's lives was evident during the oral arguments in *Dobbs*. During her argument, Julie Rikelman, lawyer for the Respondents, the Center for Reproductive Rights, tried to explain the existence and the significance of the causal data regarding women's participation in society and women's access to legal abortion, some of which are spelled out in the Economists'

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510 *Id.*

511 *Id.*

512 *See generally* Michelle Andrews, *Contraception Is Free To Women, Except When It's Not*, NAT'L PUB. RADIO (July 21, 2021), https://www.npr.org/sections/health-shots/2021/07/21/1018483557/contraception-is-free-to-women-except-when-its-not.

513 Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 230–31 (2021).

514 *Id.* at 300.

Brief.[515] Rickelman was quickly interrupted by the Chief Justice, who instead directed his questioning toward the significance of viability, a chief concern of those who believe in the cause of fetal rights.[516] To the extent that the issue of women's material conditions was affected by abortion restrictions and bans, or how women's lives were enhanced by the availability of legal abortion, the Court did so by discussing these issues in the context of *Casey*.[517] They addressed whether, because of *Roe* and *Casey*, women have some sort of reliance interest in the right to abortion that the Court was now obliged to respect.[518] In answering this question, the *Dobbs* Court concluded that no reliance interests were present.[519] Again, there was no interest had by women that the Court was required to recognize or protect. The Court stated:

> Unable to find reliance in the conventional sense, the controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that "people [had] organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail" and that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." But this Court is ill-equipped to assess "generalized assertions about the national psyche." Casey's notion of reliance thus finds little support in our cases . . . .[520]

The *Dobbs* Court argued that a reliance interest "depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women."[521] Although the Court insisted that there are "conflicting arguments about the effects of the abortion right on the lives of women,"[522] by citing Amici Briefs from both sides of the case, the overwhelming data is clear.

The Court simply decided to close its eyes to the truth: Access to legal abortion allows women to pursue greater education and economic success. It has resulted in fewer women and children living in poverty. Access for all women has been important, but for low-income and BIPOC women, access to legal abortion can be transformative.

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[515] Oral Argument at 50:28, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No, 19-1392), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_bq7d.pdf; *see* Economists' Brief, *supra* note 218 at 2, 16.

[516] Oral Argument at 51:08, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_bq7d.pdf.

[517] *Dobbs*, 597 U.S. at 380.

[518] *Id.* at 287.

[519] *Id.*

[520] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 288 (2022).

[521] *Id* at 65.

[522] *Id.*

Other experts (besides economists) have observed the importance of legal abortion to the lives, hopes, and aspirations of women. For example, Dr. Ana Langer, Professor of the Practice of Public Health and Coordinator of the Women and Health Initiative at Harvard T.H. Chan School of Public Health, speaking about this issue, reiterated the causal connection between women's access to legal abortion and women's progress in their health, education, and economic opportunities.[523] She also noted that the more progress in these areas individual women make, the less need she tends to have for abortion, as they have better access to reliable methods of contraception.[524] Dr Langer stated:

> The legal status of abortion also defines whether girls will be able to complete their educations and whether women will be able to participate in the workforce, and in public and political life. Improving social safety net programs for women reduces gender gaps and improves girls' and women's health and chances to fulfill their potential, and could help reduce the number of abortions over time. Women who are better educated, have better access to comprehensive reproductive health care, and are employed and fairly remunerated will be better positioned to avoid a mistimed and unwanted pregnancy, hence the need for termination will become less common.[525]

Thus, if the ability to control one's own life is an integral part of citizenship in a liberal democracy, then the right to access legal abortion is just as important as the other rights of citizenship. The right to bodily integrity for women (as for men) is as important as the equality of political rights, and the right to dignity of work and of personal achievement. For women, access to legal abortion is part and parcel of the ability to control one's own life, without which women are consigned to second-class citizenship.[526] In *Dobbs*, in a rare joint dissenting opinion, the dissenting Justices also recognize that the majority has relegated women to second-class citizenship by removing from women the constitutional protection of bodily integrity and privacy that includes access to abortion. The dissent makes this abundantly clear, saying:

> Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." But no longer. As of today, this Court holds, a State can always force a

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523 Ana Langer, *The Negative Health Implications of Restricting Abortion Access*, HARV. T.H. CHAN SCH. OF PUB. HEALTH (Dec. 13, 2021), https://www.hsph.harvard.edu/news/features/abortion-restrictions-health-implications/.

524 *Id.*

525 *Id.*

526 SHKLAR, *supra* note 476; *see also* Karst, *supra* note 476 (discussing every citizen's role in society).

> woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women 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. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.[527]

The fact that three members of the *Dobbs* Court recognized the significant harms befalling women by overturning *Roe*, makes the majority's failure to take these harms seriously and their overall position even more callus.

VI. CONCLUSION

Hope is a song in a weary throat.
Give me a song of hope
And a world where I can sing it.
Give me a song of faith
And a people to believe in it.
Give me a song of kindliness
And a country where I can live it.
Give me a song of hope and love
And a brown girl's heart to hear it.[528]

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[527] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 360–61 (2021); *id.* at 362 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (citations omitted).

[528] Elizabeth Alexander, *Introduction* to PAULI MURRAY, *Dark Testament*, *in* THE DARK TESTAMENT AND OTHER POEMS 8, (2018) (Dark Testament poems were originally written between 1933–1941 and published in 1970).

The poem in its entirety reads:

Dark Testament: Verse 8

Hope is a crushed stalk

Between clenched fingers

Hope is a bird's wing

Broken by a stone.

Hope is a word in a tuneless ditty —

A word whispered with the wind,

A dream of forty acres and a mule,

A cabin of one's own and a moment to rest,

A name and place for one's children

In the decades immediately preceding the *Dobbs* decision, the Supreme Court, when considering personal freedoms, adopted an expansive understanding of the liberties protected by the Fourteenth Amendment consistent with contemporary notions of freedom and dignity in Western democracies. In cases including *Roe v. Wade*, *Planned Parenthood v. Casey*, *Lawrence v. Texas*, and *Obergefell v. Hodges*, cases heralded as among the most important decisions in the Court's history, the Court held that substantive due process protected a broad swarth of personal liberties. Included in these rights protected under substantive due process were the right to use contraceptive devices, to access abortion services—at least until fetal viability, the right to engage in consensual sexual activity and marriage equality—the right to marry the partner of one's choice, not defined by one's gender.

In developing its understanding of the personal freedoms protected by the Fourteenth Amendment, in the cases heard by the Court in the period from *Griswold* to *Dobbs*, with few notable exceptions, the Court justified the expansion of protected liberties by discovering and discerning the material conditions needed for people to be free. It did so by understanding the harms attendant to state intervention of these essential activities related to sexual freedom, the freedom to choose whether to beget and bear children, and the freedom of gays and lesbians to enter into a legally recognized marriage. In acknowledging the importance of these personal freedoms to the liberty protected by the Fourteenth Amendment, the Court protects individuals from, particularly some of those at the margins, from state override of what individuals deem as essential to their freedom.

However, at the same time the Court was expanding its understanding of the material conditions needed for liberty for the most vulnerable women, access to abortion was already being severely limited. During these same years, the Court was quite miserly in its understanding of the material conditions poor and BIPOC women needed to access the same quality of freedom. For example, in order for poor and BIPOC women to access these freedoms, they need financial support and an absence of unreasonable, and non-medically necessary regulation from the state. Thus, in order for poor and BIPOC women to gain the benefits of the freedoms articulated in *Roe*, that right had to include a reasonable opportunity to access those rights. When faced with restrictions that made it significantly more difficult—and for the most vulnerable

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And children's children at last . . .

Hope is a song in a weary throat.

Give me a song of hope

And a world where I can sing it.

Give me a song of faith

And a people to believe in it.

Give me a song of kindliness

And a country where I can live it.

Give me a song of hope and love

And a brown girl's heart to hear it.

women, virtually impossible—to access the abortion services they sought as part of their fundamental rights, the Court found a more limited right than needed by women at the margins of society. In coming to the conclusion that the right to abortion did not include a reasonable opportunity to access these rights, the Court failed to take the lived experiences of poor and BIPOC women into account in shaping abortion jurisprudence.

The analytical approach of the *Dobbs* Court mirrored the narrow view of women's constitutionally protected interests adopted by its counterparts in the cases where it constrained personal freedoms (i.e., other cases involving abortion regulations that made abortion much more difficult for some to access). Like the Court in the earlier cases, the *Dobbs* Court disregarded all available evidence of the harmful effects and disparate impact of abortion restrictions in the lives of poor and BIPOC women. In adopting this approach, the *Dobbs* Court further demoted the interests of women and further advanced the interests of others, resulting in the absolute destruction of abortion rights.

For women, access to abortion has wide-ranging and injurious consequences. These consequences, including detrimental health, healthcare, educational, and economic outcomes, were known to the Court before making its decision in *Dobbs*. The Court had access to these facts through the Amici process—women told their pregnancy and abortion stories in order to inform the Court as to the importance of abortion and fertility control in the lives of women. Nevertheless, the *Dobbs* Court proceeded to narrow women's constitutionally protected rights to exclude rights to abortion care.

At the end of the day, whether the outcomes the *Dobbs* opinion produced were intended, desired, or simply not on the Court's radar, is simply inconsequential. What is of substantial consequence are the outcomes themselves. What has happened and what will happen after *Dobbs* matters—because women and women's lives matter. The real-world effects of *Dobbs* to the lives of women should cause a reconsideration of our and the Court's ideas about the meaning and content of liberty and freedom. Liberty and freedom are meaningless if they do not include what is needed for women to live as free (and autonomous) people.[529]

In large part, liberty and freedom in the United States has been defined in the same way that liberal citizenship has been defined—as the right to engage in dignified work, to gain the necessary skills to gain personal achievement or personal realization, and to the ability to control one's own life. It has been the role of Due Process—to protect these values. If Due Process cannot protect women's ability to control their lives, including the right to bodily integrity, and to control their fertility through access to legal abortion and reproductive healthcare, then what we are saying is that women are simply not included in the fullness of the American vision of citizenship that the Constitution protects. This is what the *Dobbs* Court says. But I think two questions remain: Is this what the Constitution says? But, is this what we[530] think about the position of women in American society and in the American state? I sure hope not.

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[529] Cherry, *supra* note 39, at 742 (2004). Liberty may also include a recognition that it might differ that those needs differ from the needs of men. *Id.*

[530] *Dobbs*, 597 U.S. at 333. By "we" I mean "citizens" writ broadly—not simply those who are "legally" present in the United States, but all of us that make up the community.