ABORTION POLITICS AFTER *DOBBS*

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In the almost three years since the Supreme Court decided Dobbs v. Jackson Women's Health Organization, *overturning the right to abortion established by* Roe v. Wade, *the scholarly response has coalesced into two major streams, corresponding to the two dominant themes in Justice Alito's majority opinion. The first criticizes Alito's narrowly originalist reading of the Due Process Clause of the Fourteenth Amendment. The second, sounding in democracy and political theory, questions Alito's claim that* Dobbs *is democracy-restoring; several recent articles have charged that Supreme Court-sanctioned gerrymandering and voting restrictions may stymy efforts to protect abortion rights.*

This Article assesses this second set of claims. We emerge skeptical. Our own state-by-state analysis of gerrymandering patterns, as well as recent developments in the Court's own jurisprudence, suggest that the democracy concerns are greatly overstated. Further undermining these concerns is the backlash that has followed the Dobbs *decision, as manifested in a string of pro-choice victories in abortion-restrictive states. We situate these victories in the broader context of backlash to judicial decisions on controversial social issues, a comparison that highlights an important phenomenon: the side that gains the upper hand legally often loses ground in the social and cultural debate. Unlike other social issues such as same-sex marriage, however, permanent resolution of the abortion debate is impeded by significant obstacles including the incommensurable interests at stake and the inconvenient truths of pregnancy faced by each side.*

Based on the historical pattern of these and other controversial social issues, ranging from slavery to gambling and the manufacture and sale of alcohol, this Article predicts that pressure will mount for a federal response. American voters have never been content simply to live in a state whose stance on a contested social issue reflects their own view. They will be unhappy that other states diverge from their view, a tendency already reflected in abortion opponents' efforts to chill travel to states that allow abortion, and in abortion rights advocates' efforts to facilitate abortions for pregnant people in states that ban abortion. This Article assesses the three federal approaches that have been proposed, considering both their political

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plausibility and the likelihood that the Supreme Court would deem them to be constitutional under the reasoning it employed in Dobbs.

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INTRODUCTION

In the two years since the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*,[1] overturning the right to abortion established by *Roe v. Wade*,[2] the scholarly response has coalesced into two major streams, corresponding to the two dominant themes in Justice Alito's majority opinion.[3] The first stream concerns the source of due process rights under the U.S. Constitution. Justice Alito's opinion is narrowly originalist, requiring a historical basis for any new right. "The Constitution makes no reference to abortion," he wrote:

> [A]nd no such right is implicitly protected by any constitutional provision, including the one on which the defenders of [abortion rights] now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[4]

Far from being deeply rooted in American history, in 1868, when the Fourteenth Amendment was adopted, Justice Alito observed, "[T]hree quarters of the states made abortion a crime at all stages of pregnancy."[5]

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1. 597 U.S. 215 (2022).
2. 410 U.S. 113 (1973).
3. *Dobbs*, 597 U.S. at 231, 232.
4. *Id.* at 231 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).
5. *Id.* at 231.

The scholars who focus on this originalist requirement that substantive due process rights be grounded in history and tradition critique Justice Alito's opinion in a variety of ways. Professor Reva Siegel, the leading scholar of the Court's abortion jurisprudence, challenges Justice Alito's originalist methodology as particularly indefensible in the abortion context.[6] Among other things, Siegel highlights the incongruity of denying women a right of abortion unless the right existed in 1868, pointing out that women did not even have the right to vote in 1868. She also contends (in an article written with Professor Cary Franklin) that "nineteenth-century abortion bans were enacted not simply because of a constitutionally legitimate interest in protecting unborn life but also because of a constitutionally illegitimate interest in enforcing women's marital roles and in preserving the religious and ethnic character of the nation . . . ."[7] Siegel also co-authored an influential amicus brief in *Dobbs* arguing that pregnancy should be treated as an equal protection issue and abortion protected under the Equal Protection Clause.[8]

Professor Aaron Tang has questioned Alito's historical analysis on its own terms. Even if 1868 was the relevant starting point, Tang contends that Justice Alito got the history wrong.[9] As noted, Justice Alito claimed that three-quarters of the states completely prohibited abortion in 1868.[10] Based on his own analysis of nineteenth century state law, however, Tang concludes that many of the states that purportedly banned abortion actually permitted it in some cases, often until

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6. *See, e.g.*, Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 906 (2023) ("The tradition-entrenching methods the Court employed to decide *Bruen* [a Second Amendment case] and *Dobbs* tie the Constitution's meaning to lawmaking of the past and so elevate the significance of laws adopted at a time when women and people of color were judged unfit to participate and treated accordingly by constitutional law, common law, and positive law.").

7. Cary Franklin & Reva Siegel, *Equality Emerges as a Ground for Abortion Rights In and After* Dobbs, *in ROE* V. *DOBBS* 22, 35 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024) (footnote omitted); *see also* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023).

8. Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392); *see also* Reva Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & LAW 67 (2023) (outlining and further developing the equality arguments the authors made in an influential amicus brief in the *Dobbs* case).

9. Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1128 (2023).

10. *See supra* note 5 and accompanying text.

quickening.[11] After redoing the tally, Tang concludes that as few as 16, rather than 28, of the 37 states actually prohibited abortion in 1868.[12]

The second major theme of *Dobbs* sounds in democracy and political theory. Echoing a longstanding critique of *Roe v. Wade*,[13] including by liberal stalwarts such as Justice Ruth Bader Ginsburg,[14] Justice Alito condemned *Roe* as having cut off democratic debate by enshrining a right to abortion in constitutional law.[15] Numerous state legislatures had been revisiting their abortion regulation in the 1960s and early 1970s, but *Roe* took the issue out of their hands by construing the Constitution to provide a right to abortion.[16] Whereas *Roe* "usurped the power to address a question . . . that the Constitution unequivocally leaves for the people,"[17] Justice Alito proclaimed, *Dobbs* will "return the issue of abortion to the people's elected representatives."[18] The *Dobbs* decision is thus a victory for democracy.

An important new literature questions Justice Alito's claim that *Dobbs* is democracy-restoring, finding the democracy theme to be profoundly ironic. Although the *Dobbs* Court purports to return the issue of abortion to the democratic process, this literature argues, the same Court has permitted practices that seriously undermine democracy. "*Dobbs*'s invocation of democracy has obvious intuitive appeal," Professors David Landau and Rosalind Dixon write, "but it is a deeply problematic claim. It ignores systemic distortions in state legislatures caused by gerrymandering and other factors."[19] Dixon and Landau illustrate their point with a

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11. Tang, *supra* note 9, at 1097. "Quickening" consists of the first fetal movements felt by the mother, often in the first or second trimester of pregnancy. *See First Fetal Movement: Quickening in Pregnancy*, AM. PREGNANCY ASS'N, https://americanpregnancy.org/healthy-pregnancy/pregnancy-health-wellness/first-fetal-movement/ [https://perma.cc/788J-J5BH] (last visited Jan. 13, 2025).

12. Tang, *supra* note 9, at 1099. Other scholars explore other dimensions of the historical analysis in *Dobbs*. Professor Sherif Girgis, who generally defends the *Dobbs* ruling, notes that the Court did not limit its historical discussion to 1868. Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1479 (2023) ("In case after case, . . . originalists have relied on post-ratification practices that do not shed special light on original meaning and do not reflect prior actors' deliberate efforts to interpret the legal text (or answer the legal question) at issue.") (emphases removed). The Court also considered more recent history, including the prevalence of state abortion bans in 1973 when *Roe v. Wade* was decided. *Id.* at 1485–86. Acknowledging that this discussion appears to have been dicta, Girgis dubs the use of post-constitutional history by originalist judges in *Dobbs* and other cases "living traditionalism" and concludes that the outcomes in these cases should be given less deference than other constitutional decisions. *Id.* at 1485–87.

13. 410 U.S. 113 (1973).

14. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385–86 (1985).

15. *See, e.g.*, *Dobbs*, 597 U.S. at 269 ("[T]he Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.").

16. *Id.* at 269–70.

17. *Id.* at 269.

18. *Id.* at 232.

19. David Landau & Rosalind Dixon, Dobbs, *Democracy, and Dysfunction*, 2023 WIS. L. REV. 1569, 1569 (2023).

table that juxtaposes states enforcing extreme abortion bans with those at a severe risk of being gerrymandered, showing a high correlation between the two.[20] "Empirically," they say, "high levels of partisan gerrymandering are also often correlated with draconian—and anti-majoritarian—restrictions on access to abortion."[21]

In addition to making similar arguments about gerrymandering in an op-ed with Professor Leah Litman and in a subsequent article, Professors Melissa Murray and Kate Shaw criticize the hands-off approach the Court has adopted to recent state laws that impose restrictions on voting. "[M]inority groups will have difficulties voicing their objections to abortion restrictions in electoral politics," they write[22]:

> Just last term, for instance, the court blessed two voting rules in Arizona that disproportionately limit the votes of members of minority groups. In another far-reaching opinion [*Brnovich v. Democratic National Committee*[23]] by Alito, the court allowed Arizona to disallow anyone but the voter from returning an absentee ballot and to throw out ballots mistakenly cast in the wrong precinct.[24]

Murray and Shaw also point to Supreme Court rulings upholding state voter identification laws and purging of registered voter lists, and the Court's handling of voting issues during the COVID-19 pandemic.[25] Both sets of scholars warn that in the current environment, the democratic process cannot be trusted to reflect the true views of American citizens, a majority of whom favor abortion rights.

Although the final Part of this Article will engage some of the recent literature assessing *Dobbs*'s originalism, the Article's principal contribution is to provide a new and more complete account of the political and democratic implications of the ruling. It fits most fully into, and broadens, the second stream of the *Dobbs* literature.

The first thing to note is that the contention that democracy is being choked off stands in puzzling tension with the results in actual elections around the country. Pro-choice forces enjoyed an unprecedented string of victories for two years after *Dobbs* was decided.[26] Democrats averted a "red wave" that was expected in November 2022 and won several key state supreme court races, at least in part by foregrounding the abortion issue; and the abortion rights side won every state referendum on the abortion issue during that period.[27]

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20. *Id.* at 1581–83.
21. *Id.* at 1580.
22. Leah Litman, Melissa Murray & Kate Shaw, *The Link Between Voting Rights and the Abortion Ruling*, WASH. POST (June 28, 2022), https://www.washingtonpost.com/outlook/2022/06/28/dobbs-voting-rights-minority-rule/ [https://perma.cc/NJ2M-A66B]; *see also* Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 778–81 (2024).
23. 594 U.S. 647 (2021).
24. Litman, Murray & Shaw, *supra* note 22.
25. Murray & Shaw, *supra* note 22, at 782–84.
26. *See infra* Section II.B.
27. See *infra* Section II.B for a discussion on these developments.

The streak finally ended with the November 2024 elections. But even here, the pro-choice movement was remarkably successful, winning seven out of ten abortion measures that were on state ballots, including in several that had voted for President Trump.[28] At first glance, at least, democracy seems to be functioning effectively.

These developments would be noteworthy under any circumstances, but they are especially striking given that *Dobbs* itself was fueled by backlash—the decades-long backlash to *Roe*.[29] Under *Roe*, a great loss for abortion opponents, the anti-abortion movement steadily gained strength. Under *Dobbs*, a devastating loss for abortion rights, abortion rights advocates have seized the upper hand. To make sense of current abortion politics, we should begin by trying to better understand the strange effect that big legal victories seem to have in the battle over abortion rights.

This Article takes up this challenge by exploring the nature of backlash, both with social issues generally and in the abortion context. To assist in the endeavor, we draw on and augment a framework devised by Professor Michael Klarman.[30] The first of Klarman's seven factors is the salience of judicial opinions, which serve as a focal point for debate about fraught social issues.[31] Second, the judges or justices who decide a controversial case face less pressure to forge a compromise solution and are more isolated from the views of ordinary Americans than law makers.[32] Third, the winners often implement their victory in a fashion that maximizes resentment, and fourth, the loss may magnify the intensity of the losers' concern about the issue.[33] Fifth, opportunistic politicians may stoke the backlash,[34] and sixth, geographical variation in views keeps the embers glowing in areas where the losing view predominates.[35] Seventh, if the issue lacks a stable equilibrium, backlash may continue.[36] This Article adds a crucial final factor to complete the framework: the media opportunities enjoyed by the losing side, as the losers highlight problematic cases that arise under the ruling.

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28. *See, e.g.*, Erin Geiger Smith & Kathrina Szymborski Wolfkot, *Voters in Seven States Pass Measures to Protect Abortion*, STATE CT. REP. (Nov. 6, 2024), https://statecourtreport.org/our-work/analysis-opinion/voters-seven-states-pass-measures-protect-abortion [https://perma.cc/U3WS-BY3D]; Emily Bazelon, *America's Split Screen on Abortion*, N.Y. TIMES, https://www.nytimes.com/2024/11/09/magazine/abortion-election-trump-ballot-measures.html [https://perma.cc/A2LG-SBHK] (Nov. 22, 2024).

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

30. *See* Michael J. Klarman, *Why Backlash?* (Aug. 2010) (unpublished manuscript) (on file with authors). Professor Reva Siegel has done important work in this area as well, including a co-authored project with Linda Greenhouse. Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028 (2011) [hereinafter Greenhouse & Siegel, *Before (and After)* Roe]. Their article is part of a larger project and book. *See generally* LINDA GREENHOUSE & REVA SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING (2012).

31. Klarman, *supra* note 30, at 4 (summarizing the factors of backlash).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

These factors help explain both the intensity of the backlash against the *Roe* and *Dobbs* rulings and a key difference between the two. Each case was marked by a missed opportunity to agree to a compromise ruling that would have been less devastating to the losing side. In *Roe*, Justice Blackmun, a Republican appointee, initially proposed to limit the right to abortion to the first trimester, but he agreed to a more expansive right at the prodding of Justice Lewis Powell, another Republican.[37] In *Dobbs*, Justice Alito rejected a compromise position advocated by Chief Justice Roberts and initially pursued by Justice Breyer as well, which would have upheld Mississippi's ban on abortion after 15 weeks of pregnancy without overruling *Roe*.[38] Similarly, the winners' behavior after each case increased the backlash. After *Roe*, abortion rights advocates raced to open abortion clinics across the nation, breaking ground on hundreds within the first few years.[39] After *Dobbs*, abortion opponents rushed to enact abortion bans.[40] In each case, opportunistic politicians have attempted to tap the unhappiness of the losers for electoral advantage: Republicans used the abortion issue to lure Catholic voters away from their traditional Democratic home after *Roe*, and Democrats have foregrounded *Dobbs* in appeals to women, suburban voters, and the young.[41]

The big difference in the backlash to the two cases is the immediacy and urgency of the backlash to *Dobbs*. Whereas the backlash to *Roe* developed slowly, with *Dobbs* the backlash was instantaneous. The most obvious reason for this distinction is that *Dobbs* took away a right that had been in place for nearly 50 years—something American women had come to see as a constitutional entitlement. The backlash was magnified by the political maneuverings of Republican lawmakers that secured a 6–3 conservative advantage on the Supreme Court.[42] In 2016, Senate Majority Leader Mitch McConnell refused to allow President Obama to fill the Supreme Court vacancy created by the death of Justice Antonin Scalia in the last year of Obama's presidency.[43] But in 2020, the last year of Donald Trump's first presidency, Senate Republicans quickly filled the late Justice Ruth Bader Ginsburg's seat with Justice Amy Coney Barrett.[44]

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37. *See, e.g.*, Klarman, *supra* note 30, at 15–16 (discussing the shift in the scope of the opinion).

38. *See* Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of* Roe v. Wade, N.Y. TIMES (Dec. 15, 2023), https://www.nytimes.com/2023/12/15/us/supreme-court-dobbs-roe-abortion.html [https://perma.cc/2ZNG-5E2F].

39. *See infra* Part I for discussion and citations.

40. *Id.*

41. *Id.*

42. *See* Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO, https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248 [https://perma.cc/LA5A-KMVP] (Feb. 13, 2016, 9:56 PM).

43. *Id.*

44. Anne Gearan, Seung Min Kim & Josh Dawsey, *Trump Expected to Nominate Amy Coney Barrett to Fill Ginsburg Seat, Kicking Off Supreme Court Fight Weeks Before Election*, WASH. POST (Sept. 25, 2020), https://www.washingtonpost.com/politics/name-supreme-court-trump/2020/09/25/618d6eac-fc53-11ea-b555-4d71a9254f4b_story.html [https://perma.cc/FL3E-UP24].

The backlash to *Dobbs*, the wave of abortion rights victories, and the surging support for abortion rights raise the question whether the abortion debate has been permanently transformed. We are skeptical. The recent articles warning that the Supreme Court is allowing states to stifle democracy suggest that robust abortion rights might be established in most of the country if it weren't for gerrymandering, voting restrictions, and other interferences with democracy.[45] A closer look at these developments, however, shows that the concerns are exaggerated. Supreme Court decisions in the last two years have moved to increase anti-gerrymandering protections, striking down a racial gerrymander[46] and upholding the ability of state courts to police partisan gerrymandering,[47] respectively. While legislation restricting voting rights has been promulgated by several states, voter turnout has been extremely high over the past three election cycles.[48] Normal distortions in the democratic system do exist, but at a broad level, the system appears to be functioning much as it has for decades.

Even if these distortions disappeared, it is unlikely that a stable equilibrium would be achieved. Abortion has qualities that make the issue uniquely intractable. The most obvious, though often denied in current debate, is that perceptions of the fetus vary at different stages of a pregnancy. Most Americans do not see an early-stage fetus but do see a late-stage fetus, as a human baby.[49] Similarly, the fetus and the pregnant woman are interdependent; neither can be considered in isolation.[50] Abortion rights advocates emphasize that access to abortion promotes gender equality and counteracts the effects of racial discrimination; however, abortion opponents counter that abortion ends a human life that depends on the pregnant person.[51]

The comparison to same-sex marriage is quite revealing in this regard. Among the key factors that led to the remarkable triumph of same-sex marriage were increasing numbers of gays coming out of the closest, the emergence of a younger generation of Americans who supported same-sex marriage, emphasis on the analogy between racial discrimination and discrimination against gays in work and marriage, and a sharp rise in the intensity of preference of those favoring same-sex marriage.[52] The same factors also figure in the abortion debate, but much less decisively. Advocates of abortion rights seek to demystify abortion by publicly

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45. *See, e.g.*, Landau & Dixon, *supra* note 19; Murray & Shaw, *supra* note 22.

46. Allen v. Milligan, 599 U. S. 1, 9 (2023) (overturning Alabama district map).

47. Moore v. Harper, 600 U.S. 1, 23 (2023) (rejecting independent state legislature theory).

48. *See, e.g.*, Drew Desilver, *Turnout in U.S. Has Soared in Recent Elections but by Some Measures Still Trails That of Many Other Countries*, PEW RSCH. CTR. (Nov. 1, 2022), https://www.pewresearch.org/short-reads/2022/11/01/turnout-in-u-s-has-soared-in-recent-elections-but-by-some-measures-still-trails-that-of-many-other-countries/ [https://perma.cc/7Q38-CTTC].

49. See *infra* Section III.A for discussion and citations.

50. See *infra* Section III.B for discussion and citations. Because the terms "pregnant woman" and "pregnant person" are so contested, and each tends to be associated with one side of the abortion debate, we use both in this Article, rather than one or the other.

51. See *infra* Section III.C for discussion and citations.

52. *See id.*

describing their abortions, for instance.[53] This may increase support for early-stage abortions, especially by medication, but it is unlikely to have the same effect with late-stage abortions. Similarly, although young Americans favor abortion rights more strongly than their elders, the support of those between the ages of 18 and 29 wanes from 83% for first trimester abortions to only 32% for the third trimester.[54] The racial dimension also is more complicated with abortion. With same-sex marriage, the discrimination analogy decisively favored marriage advocates because gays could point to a historical pattern of discrimination while opponents could not.[55] With abortion, by contrast, both sides can use the analogy. Abortion rights advocates can point to racist motives for abortion bans in the past and highlight the perceived benefits of abortion access for racial minorities in the present. On the other hand, abortion opponents can compare the abortion of Black babies to the dehumanization of enslaved Black Americans and decry the loss of Black babies because of abortion today.[56] Unlike the debate over same-sex marriage, which is over, the abortion debate will continue.

The venue for the debate is almost certain to shift, however, from state lawmakers and courts to decision makers in Washington, D.C. This has been the pattern with every major fraught social issue in American history—including slavery, of course, but also gambling, prostitution, prohibition of alcohol, and same-sex marriage. Each makes its way from the states to federal legislation or the U.S. Supreme Court, despite the apparent benefits of allowing different states to make different decisions about the issue. Citizens in a state that bans or permits a controversial practice are never content simply to live in a state that reflects their views. Because they are motivated by moral principle, they are unhappy that citizens in another state are barred from or permitted to engage in the controversial practice. This tendency suggests that the abortion debate cannot be contained in the states. All roads will lead back to Washington, as does this Article.

Three different federal approaches have been proposed: a complete abortion ban, a legislative reenactment of *Roe*, and a ban after 15 weeks. Legal scholars have focused on the first, worrying that Congress may pass a ban or that the Supreme Court may be moving toward recognizing fetuses as a "discrete and insular" minority.[57] Both are highly unlikely, especially given the backlash to *Dobbs* and the recent rise in support for abortion rights.[58] Reinstating *Roe* is much more

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53. *See infra* notes 230–31 and accompanying text.

54. *See* Lydia Saad, *Broader Support for Abortion Rights Continues Post-*Dobbs, GALLUP (June 14, 2023), https://news.gallup.com/poll/506759/broader-support-abortion-rights-continues-post-dobbs.aspx [https://perma.cc/U99V-S5U6].

55. *See infra* Section III.C.

56. *Id.*

57. *See* Tang, *supra* note 9 (devoting an article to the possibility of an abortion ban and arguing that it should be deemed unconstitutional under the historical methodology the Court employed in *Dobbs*); Murray & Shaw, *supra* note 22, at 806 (concluding that "the *Dobbs* majority can also be viewed as laying the groundwork for greater protections for the fetus as a 'discrete and insular' minority").

58. Even some Republicans who previously supported fetal personhood legislation are now backing away from it. *See, e.g.*, Annie Karni, *With* Roe *Gone, Some House*

plausible, since a majority of Americans now tell pollsters they would support a return to *Roe*.[59] But a full return to *Roe* would likely meet unified Republican resistance. And even if such a law were enacted, it might well be struck down as unconstitutional by the Supreme Court, because no state allowed abortion after quickening in 1791, when the Fifth Amendment (which would potentially limit a federal abortion law) was adopted.[60]

The most logical focal point would be 15 weeks, the very dividing line at issue in *Dobbs*. A 15-week rule is irrational in some respects, since it does not correspond to any particular stage in a pregnancy. In addition to being artificial, the 15-week line is currently quite unattractive both to abortion rights activists and to abortion opponents. But it would almost certainly be constitutional, and it accords with most Americans' intuition that early-stage abortions should be permitted and late-stage abortions prohibited.[61] It also would reduce the skirmishing over issues such as women traveling to pro-choice states to get abortions and whether abortion drugs can be mailed to women in pro-life states. A rule that permitted abortions up to 15 weeks and prohibited them after would not end the abortion wars. But it might provide a compromise for the short and perhaps medium term.

This Article proceeds as follows. Part I explores the backlash to *Roe* and *Dobbs*, explaining the general determinants of backlash in the abortion context and the much more immediate response to *Dobbs* than to *Roe*. Part II evaluates the recent literature arguing that the Supreme Court has permitted state lawmakers to cripple democracy and that this will enable abortion restrictions that do not reflect the preferences of state voters. Part III explains why the abortion debate is uniquely intractable and shows that the factors that contributed to the success of same-sex marriage are far less decisive with abortion. Part IV predicts, based on the long historical pattern with American social issues, that the current maneuvering over state law will be displaced by congressional intervention and suggests that 15 weeks is a potential focal point. A brief conclusion follows.

I. BACKLASH TO *ROE* AND *DOBBS*

To make sense of the backlash to *Dobbs*, we begin by revisiting the backlash to *Roe v. Wade*, which was quite similar in some respects but strikingly different in others. The comparison will help to explain the remarkable string of abortion rights victories in recent political and judicial elections and the implications of those victories.

Republicans Back Away from National Abortion Ban, N.Y. TIMES (Jan. 12, 2024), https://www.nytimes.com/2024/01/12/us/politics/house-republicans-abortion-ban.html [https://perma.cc/D42D-LGXH].

59. *See, e.g.*, *Poll: Growing Majority of Americans Want Congress to Restore* Roe v. Wade *Protections Nationwide*, YAHOO!NEWS (Apr. 21, 2024, 11:59 AM), https://www.yahoo.com/news/poll-growing-majority-americans-want-185938716.html [https://perma.cc/CRT4-UGKU] (showing 54% of Americans support return to *Roe*).

60. Tang was the first to emphasize the relevance of state law as of 1791 for the purposes of determining the constitutionality of a federal abortion law. Tang, *supra* note 9, at 1107–11 (arguing that a complete abortion ban should be deemed unconstitutional because states allowed abortion until quickening in 1791).

61. See *infra* Section III.A for discussion and citations.

According to the traditional account of *Roe v. Wade*, Justice Blackmun's majority opinion spurred an immediate backlash that magnified the controversy over abortion and eventually led to important victories for opponents of abortion.[62] Before she joined the Supreme Court, Ruth Bader Ginsburg famously rued *Roe*, arguing that it cut off state abortion reforms that might have led to widespread acceptance of abortion rights.[63]

More recently, former *New York Times* Supreme Court reporter Linda Greenhouse and Professor Reva Siegel have suggested that Justice Blackmun's opinion in *Roe* has perhaps been singled out unfairly as the cause of the backlash that followed.[64] When it was first released, *Roe* did not provoke serious controversy. At the time, most Americans—including most Republicans—broadly supported abortion rights.[65] It wasn't until the late 1970s that opposition mounted. In Greenhouse and Siegel's account, the increasing emphasis on abortion by feminists made it an attractive target for Republican politicians, who linked abortion with the anti-traditionalism of the 1960s, calling both an assault on family values.[66] Republicans also viewed opposition to abortion as a way to reach Catholic voters, who were the leaders of the anti-abortion movement.[67]

Professor Michael Klarman has identified seven factors that contribute to the backlash sparked by judicial decisions on contested social issues.[68] These factors, plus another we introduce below, provide a framework for further understanding the backlash to *Roe* and comparing it to the reaction to *Dobbs*. The first salient feature of judicial opinions, according to Klarman, is just this, their salience: judicial rulings direct attention to controversial social issues and can invite backlash as a result.[69] Even more important is a second factor, the cloistered nature of judicial decision-making. Courts face less pressure to compromise than legislative bodies; they are not guided by the preferences of the median voter,[70] and the judges themselves are elites who may be significantly removed from ordinary

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62. *See, e.g.*, Greenhouse & Siegel, *Before (and After)* Roe, *supra* note 30, at 2073 (stating and questioning the view that "*Roe* not only is believed by many to have ignited conflict over abortion but also is commonly represented as having single-handedly caused societal polarization and party realignment around the question of abortion").

63. *See* Ginsburg, *supra* note 14, at 385–86; *see also* MARY ZIEGLER, *ROE*: THE HISTORY OF A NATIONAL OBSESSION 151 (2023) (noting that Ginsburg "often argued that Roe went too far too fast and undermined the pro-choice movement's earlier progress").

64. Greenhouse & Siegel, *Before (and After)* Roe, *supra* note 30, at 2073.

65. *Id.* at 2031 (referencing a Gallup poll the summer before *Roe* finding that even more Republicans (68%) than Democrats (59%) believed that the decision whether to have an abortion should be left to a woman and her doctor).

66. *Id.* at 2055–58 (describing the Nixon campaign as using these themes against George McGovern).

67. *See, e.g.*, *id.* at 2067 (discussing efforts "to incorporate Protestant evangelicals and the Catholic antiabortion movement into a new coalition").

68. Klarman, *supra* note 30, at 4. Although *Why Backlash?* is unpublished, some of its themes can be found in Klarman's history of the campaign for same-sex marriage. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013) [hereinafter KLARMAN, FROM THE CLOSET].

69. Klarman, *supra* note 30, at 4.

70. *Id.*

citizens.[71] Third, the winners often implement their victory in a fashion that maximizes resentment, and fourth, the loss may magnify the intensity of the losers' concern about the issue.[72] Fifth, opportunistic politicians may stoke the backlash,[73] and sixth, geographical variation in views keeps the embers glowing in areas where the losing view predominates.[74] Seventh, if the issue lacks a stable equilibrium, backlash may continue.[75]

The second factor, the absence of pressure to compromise, was on vivid display in *Roe*. In its initial incarnation, Justice Harry Blackmun's opinion would have roughly tracked the views of most Americans, protecting abortion only for the first trimester.[76] But Justice Lewis Powell—like Blackmun, a Republican appointee—prodded Blackmun to a more sweeping ruling, which extended the new abortion right through the second trimester of pregnancy.[77] "[W]ith little discussion and apparently no comprehension of the gravity of the change," Klarman writes, "the justices expanded the abortion right from the end of the first trimester to the end of the second, thereby almost certainly generating much more resistance to their ruling."[78]

The steps abortion rights advocates took to implement their victory, the intensification of abortion opponents' concern about the issue, and the efforts by politicians to use the ruling to generate support—the third, fourth, and fifth factors—all fueled the backlash against *Roe*. After *Roe*, abortion rights advocates quickly opened abortion clinics in every state.[79] "Four years after abortion became legal," Mary Ziegler reports, "over five hundred clinics were operating across the country."[80] Whereas more than 50% of abortions took place in hospitals in 1973, "[b]y 1982, over 80 percent of abortions were performed in freestanding clinics."[81] It was obvious what the clinics were for, and the abortion rate surged, increasing by nearly 80% from 1973 to 1980.[82]

As abortion clinics proliferated and the number of abortions climbed after *Roe*, the pro-life movement mobilized, a mobilization both encouraged and taken

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71. KLARMAN, FROM THE CLOSET, *supra* note 68, at 169 ("[E]ven though judges are part of contemporary culture and thus not impervious to public opinion, they are more insulated than legislators from its influence because they live a more cloistered existence and are less politically accountable.").

72. Klarman, *supra* note 30, at 4.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 15.

77. *Id.*

78. *Id.*

79. ZIEGLER, *supra* note 63, at 21.

80. *Id.*

81. *Id.*

82. *See* CENTER FOR DISEASE CONTROL, ABORTION SURVEILLANCE ANNUAL SUMMARY 1973, at 9 (1975) (showing an abortion ratio of 195.1 abortions per 1,000 live births); CENTERS FOR DISEASE CONTROL, ABORTION SURVEILLANCE ANNUAL SUMMARY 1979-1980, at 26 (1983) (showing an abortion ratio of 359 abortions per 1,000 live births).

advantage of by Republican politicians.[83] Abortion was a signature theme of Reverend Jerry Falwell, the most prominent figure in the Moral Majority, which formed in the 1970s.[84] In 1979, Falwell, Howard Phillips (chairman of Conservative Caucus), and several others founded the Moral Majority to promote conservative values on abortion, pornography, and other issues, in close coordination with the Republican Party.[85] "The key for Phillips and his fellow conservatives was to use the abortion issue to divide the Catholic vote," Falwell's biographer has written.[86] "Republicans who were mostly concerned about communism or high taxes would not leave the GOP over an issue like abortion, but the issue might strip off enough Catholics from the Democratic Party to win the 1980 election."[87] The abortion rights movement, meanwhile, was more complacent about organizing for political action. *Roe* had given abortion rights advocates what they were looking for. "In 1979, a prochoice U.S. congressman complained at a [National Abortion Rights Action League] conference that he heard from pro-lifers nearly every day and almost never from the other side."[88]

A geographic separation would compound an ideological one. In 1973, as today, views on abortion varied widely across the country.[89] The unhappiness in states where majorities opposed abortion "naturally jolted abortion opponents into action."[90]

Further enhancing backlash over shifts in the Supreme Court's abortion jurisprudence is a factor that Greenhouse, Siegel, and Klarman do not highlight but is uniquely powerful with abortion—the likelihood that media imagery will home in on, and often exaggerate, the worst effects of the legal ruling favoring one side or the other.[91] In the 1960s, when abortion was illegal in many states, media accounts often focused on the back-alley abortions some women turned to.[92] An influential story in *Newsweek* asserted that 5,000 women a year died after illegal abortions, and

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83. *See, e.g.*, Greenhouse & Siegel, *Before (and After)* Roe, *supra* note 30, at 2052–58.

84. *See, e.g.*, MICHAEL SEAN WINTERS, GOD'S RIGHT HAND: HOW JERRY FALWELL MADE GOD A REPUBLICAN AND BAPTIZED THE AMERICAN RIGHT 118–20 (2012) (describing Falwell's embrace of the abortion issue).

85. *Id.* at 115–17.

86. *Id.* at 117.

87. *Id.*

88. Klarman, *supra* note 30, at 51 (noting that *Roe* dramatically altered the landscape in "midwestern states such as Illinois, Ohio, and Michigan, where the influence of the Catholic church had defeated abortion reform efforts before *Roe*").

89. *See generally* Rachel Benson Gold, *Lessons from Before* Roe*: Will Past be Prologue?*, GUTTMACHER POL'Y REV., March 2003, at 8 (describing variation in abortion laws across the country). This is the sixth factor. The seventh factor—absence of an equilibrium—is the subject of Parts II–IV of this Article.

90. Klarman, *supra* note 30, at 51.

91. The point developed in this paragraph was first made by William Stuntz, alone and in co-authored work with one of us. *See* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1886–89 (2000); David A. Skeel, Jr. & William J. Stuntz, *Christianity and the Modest Rule of Law*, 8 U. PA. J. CONST. L. 809, 832–33 (2006).

92. Skeel & Stuntz, *supra* note 91, at 833.

a three-part series in *Saturday Night Post* used the same figure.[93] After *Roe*, the emotionally wrenching imagery was often associated with partial-birth abortions made possible by the newly permissive abortion regime.[94] In each case, the side that had the legal upper hand lost ground in the social and cultural debate, with the losers successfully focusing attention on egregious, though uncommon, effects of the prevailing legal regime.

Turn now to *Dobbs*. With *Dobbs*, as with *Roe*, the Supreme Court eschewed an obvious compromise position that would fit more closely with the preferences of the median American voter: upholding Mississippi's ban on abortion after 15 weeks but declining to directly overrule *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[95] This is, in fact, precisely what the State of Mississippi had asked for until after the Supreme Court granted certiorari.[96] The Court could have easily declined to consider the frontal attack on *Roe*, as it often does with arguments raised for the first time in the Supreme Court. Recent reporting on the Court's internal deliberations suggests that Justice Steven Breyer, one of the Court's liberals, sought to broker precisely this outcome.[97] But he was unable to assemble a majority. In the end, only Chief Justice John Roberts voted to draw the line at 15 weeks, as reflected in his lonely concurring opinion.[98] The complete repudiation of *Roe*, despite the public support for retaining a constitutional right to abortion, is an important reason for the backlash that followed. *Dobbs* ranged even further from the views of the average American voter than *Roe* had.

The implementation of the victory has also played a crucial role. Even before *Dobbs* was decided, pro-life lawmakers had enacted trigger laws in multiple states.[99] Illegal when they were enacted—since they restricted abortion more than *Roe* and *Casey* allowed—these laws were intended to spring into effect as soon as *Roe* was overturned, immediately and drastically altering the legal landscape. Abortion opponents also made clear that they intended to enforce abortion restrictions that states enacted long ago,[100] which had never been formally repealed

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93. *See* Stuntz, *supra* note 91, at 1887 (describing the stories).

94. *Id.* at 1888. Ziegler recounts the advent of the term "partial birth abortion" and the Supreme Court's upholding a ban on the procedure after striking down an earlier ban as vague in her recent history of *Roe*. ZIEGLER, *supra* note 63, at 81–97.

95. 505 U.S. 833 (1992).

96. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 352 (2022) (Roberts, C.J., concurring) (noting that "[a]fter we granted certiorari, . . . Mississippi changed course," and "bluntly announced that the Court should overrule *Roe* and *Casey*").

97. Kantor & Liptak, *supra* note 38.

98. *Dobbs*, 597 U.S. at 359 (Roberts, C.J., concurring).

99. *See, e.g.*, Jesus Jiménez, *What is a Trigger Law? And Which States Have Them?*, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/us/abortion-trigger-laws.html [https://perma.cc/WB95-JMUT] (identifying and describing 13 state trigger laws).

100. *See, e.g.*, Bill Keveney, *After* Roe v. Wade, *Abortion Bans from the 1800s Became Legal Matters in These States*, USA TODAY (Oct. 1, 2022, 7:00 AM), https://www.usatoday.com/story/news/nation/2022/10/01/abortion-laws-1800-s-became-legal-issue-after-supreme-court-ruling/10454537002/ [https://perma.cc/ZE39-TUCZ] ("At the request of Arizona's Republican attorney general, a judge ruled Sept. 23 that the state could enforce

after *Roe* was decided.[101] In other states, pro-life lawmakers quickly enacted new abortion restrictions.[102] Fourteen states currently ban abortion in all or almost all cases.[103]

The intensity of preference among abortion rights advocates is also extraordinarily high. If the Supreme Court had adopted the 15-week compromise, abortion rights supporters would have been unhappy, but the underlying right to abortion would have remained. By repudiating *Roe*, the Court took away a constitutional right that a generation of American women had grown up assuming was theirs. Although the Court concluded that any reliance interest was not great enough to call for adherence to the prior precedent,[104] the perception that an important right had been taken away has magnified the reaction to *Dobbs*.

The tenor of Justice Alito's opinion, while not a primary factor, exacerbated the outrage. If Justice Alito were trying to minimize unhappiness with the *Dobbs* ruling, he would have fully acknowledged not only that abortion ends a human life, but also the concerns about equality for women asserted by abortion rights advocates.[105] But the opinion never wrestles with the gender equality issues. It doesn't acknowledge the historical subordination of women or the pain many would feel at the loss of a constitutional right.[106] An effort to demonstrate "the fair-minded comprehension of contraries," as Professor James Boyd White, a leading law-and-literature theorist, once put it,[107] would not have averted the backlash to *Dobbs*. But failing to make the effort magnified it.

The final factor is the media opportunities that accrue to the losing side when a judicial ruling reshapes existing abortion regulation. Because *Dobbs* completely repudiated *Roe*, abortion rights advocates have been able to seize control of the public narrative, focusing attention on excruciating consequences of abortion bans. In summer 2022, the travails of a ten-year-old Ohio girl who was raped, got pregnant, and traveled to Indiana to get an abortion drew sustained coverage in the media.[108] More recently, coverage focused on the Supreme Court of Texas's refusal

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an abortion ban passed by the territorial legislature in 1864 and recodified in 1901, years before Arizona became a state in 1912.").

101. *Id.*

102. The *New York Times* keeps a running summary of the status of abortion laws in the states. Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Bans Across the Country*, N.Y. TIMES, https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html [https://perma.cc/WPC6-ST78] (Feb. 19, 2025, 4:04 PM).

103. *Id.* (listing states).

104. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 287–90 (2022).

105. *See supra* notes 6–8 and accompanying text.

106. After briefly noting some of these concerns, Justice Alito wrote, "These are important concerns. However, the dissent evinces no similar regard for a State's interest in protecting prenatal life." *Dobbs*, 597 U.S. at 263.

107. James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669, 1696 (1984).

108. For details, see, e.g., Nicole Narea, *A 10-Year-Old Ohio Rape Victim Got an Abortion. Now Her Doctor is Being Punished*, VOX (May 26, 2023, 11:00 AM), https://www.vox.com/2023/5/26/23738974/indiana-abortion-doctor-caitlin-bernard-ohio [https://perma.cc/A5BP-EWXK].

to construe the exception for maternal health in the state abortion ban as covering a woman whose baby was likely to die at or shortly after birth and who might lose the ability to have additional children if she carried the pregnancy to term.[109] Stories of women who nearly died because their doctors delayed treatment for a miscarriage or ectopic pregnancy have also appeared regularly in the press.[110]

The perception that the reversal of *Roe* was made possible by political maneuvering to solidify conservative control of the Supreme Court, the gap between the result and American public opinion, the dismay at losing a constitutional right that had been in place for almost 50 years, the way the opinion was handled, and the media attention to excruciating effects of bans have put the pro-choice movement in an extraordinarily strong position. These factors underlie the remarkable string of pro-choice victories in the political and judicial elections of the past two years, as described in Part II of this Article.

II. IS DEMOCRACY BEING FORECLOSED?

The *Dobbs* majority opinion made recurring invocations to the democratic process in turning the issue of abortion back over to the states. The question some critics are raising is whether Court-sanctioned interference with the democratic process has caused this reasoning to ring hollow. Our ultimate conclusion is that the democratic process is working well, if not perfectly, to respond to the abortion issue.

A. The Concerns

Many years ago, Professor Michael McConnell illustrated the benefits of resolving contested moral issues at the local level with a simple hypothetical:

> [A]ssume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if some smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A. In the absence of economies of scale in government services, significant externalities, or compelling arguments about justice, this is a powerful reason to prefer decentralized government. States are preferable governing units to the federal government, and local government to states.[111]

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109. Eleanor Klibanoff, *Texas Supreme Court Blocks Order Allowing Abortion; Woman Who Sought It Leaves State*, TEX. TRIBUNE, https://www.texastribune.org/2023/12/11/texas-abortion-lawsuit-kate-cox/ [https://perma.cc/S8VB-HJPW] (Dec. 11, 2023, 6:00 PM).

110. Some of these stories appeared even before the ruling, which was widely expected. *See, e.g.*, Katherine Stewart, *Why Was a Catholic Hospital Willing to Gamble With My Life?*, N.Y. TIMES (Feb. 25, 2022), https://www.nytimes.com/2022/02/25/opinion/sunday/roe-dobbs-miscarriage-abortion.html [https://perma.cc/2MZ6-MCYC].

111. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494 (1987).

The logic is simple: Americans will be more satisfied overall if issues like abortion are regulated by states rather than by a one-size-fits-all national rule.[112] This was a key feature of the pro-life case against *Roe*, and it applies to other moral issues as well. The logic is especially strong with issues that people in different parts of the country hold divergent views on, as with abortion.[113]

An emergent line of scholarship, however, questions the feasibility of a democratic resolution to the abortion issue. The central concern was articulated by Professors Shaw, Murray, and Litman in their op-ed on the subject: the majority in *Dobbs* sent the abortion issue back to a democracy so hopelessly snarled that "advocates for abortion rights [won't be able to] register their support politically."[114] In other words, the invocations of democracy by the *Dobbs* majority were made with the awareness that the effective disenfranchisement of pro-choice voters would almost certainly lead to a pro-life resolution of the issue.

These scholars worry that gerrymandering by state legislatures can be used to systemically distort the democratic process, facilitating restrictive abortion laws that conflict with majority preferences;[115] that Supreme Court case law permitting restrictions on voting, such as voter identification laws and purging voter registration lists, has severely undermined the democratic process;[116] and that in the face of all of this, direct initiatives, not available in all states and subject to interference by the legislature,[117] effectively leave residents of states with abortion bans no way out. If these claims are accurate, they have significant implications for the democratic resolution of social issues beyond abortion.

In this Part, we explore the validity of these concerns. We conclude that while they highlight legitimate weaknesses in the current system, their effects have been exaggerated, and they will not impede local resolution of the abortion issue to the extent suggested.

B. Gerrymandering

Both Professors Dixon and Landau and Professors Murray and Shaw point to gerrymandering as a way Republicans might impose their policy preferences over those of the majority.[118] Gerrymandering in a Republican state that favors Republican (typically pro-life) constituents over a majority of Democratic (typically

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112. David A. Skeel & William Stuntz, *The Criminal Law of Gambling: A Puzzling History*, *in* GAMBLING: MAPPING THE AMERICAN MORAL LANDSCAPE 257, 267 (Alan Wolfe & Erik C. Owens eds., 2009) (discussing McConnell's hypothetical).

113. *See supra* note 89 and accompanying text.

114. Litman, Murray & Shaw, *supra* note 22; *see also* Murray & Shaw, *supra* note 22, at 778–81.

115. Landau & Dixon, *supra* note 19, at 1580–83.

116. Murray & Shaw, *supra* note 22, at 782–84 (discussing the Court's decisions in *Husted v. A. Philip Randolph Institute*, 584 U.S. 756 (2018), holding that a state may purge voters for failing to vote; *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), regarding Indiana voter identification law; and *Republican National Committee v. Democratic National Committee*, 589 U.S. 423 (2020) (per curiam), granting a stay of extension of ballot receipt deadline).

117. Landau & Dixon, *supra* note 19, at 1606.

118. *Id.* at 1577; Murray & Shaw, *supra* note 22, at 766.

pro-choice) constituents could well lead to anti-majoritarian restrictions on abortion. Asymmetrical gerrymandering over the past decade has mostly benefited Republicans.[119] And because polling in a number of abortion-restricted states indicates widespread resident support for abortion rights, these scholars fear that Republican gerrymandering could prevent voters from registering their views come election season.[120]

While lack of representation is one concern associated with gerrymandering, another goes to the severity of the restrictions themselves. Professors Dixon and Landau point to research suggesting that "an increase in measures of gerrymandering in state legislatures is associated with significant shifts in the identity of the median legislator, and significant shifts in policy outcomes."[121] To support this idea, Dixon and Landau collect data indicating that states with laws "governing redistricting processes that create an 'extreme' or 'high' risk of partisan gerrymandering" are more likely to have "draconian restrictions on abortion" than those that don't.[122]

The reliability of such data to sustain sweeping future predictions, however, is questionable. Measures of the *risk* of gerrymandering do not tell us about the state of democracy on the ground. Dixon and Landau themselves acknowledge that "[t]he threat measure is a measure of the *risks* posed by a state's legal system of a gerrymandered outcome; it does not measure the severity of gerrymandering directly."[123] Our own research on actual rates of gerrymandering suggests that only 9 of the 21 states (or roughly 42%) with abortion bans or significant restrictions currently in place are subject to some actual degree of Republican gerrymandering.[124] But neither a measure of the risks of gerrymandering or current levels of gerrymandering is enough to prove Dixon and Landau's argument—nor is it enough to prove its opposite. To "measure" gerrymandering assumes stasis: that gerrymandering is not reversible and that it benefits one political party over the other consistently. Gerrymandering, of course, *is* reversible, and the rates of Democratic versus Republican gerrymandering were about equal as of 2022.[125] To the extent that such arguments make pronouncements about the future,

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119. *See* David A. Lieb, *Analysis Indicates Partisan Gerrymandering Has Benefited GOP*, AP NEWS (June 25, 2017, 1:07 PM), https://apnews.com/article/elections-race-and-ethnicity-voting-rights-census-2020-election-2020-fa6478e10cda4e9cbd75380e705bd380 [https://perma.cc/WSX4-R6P3].

120. *See* Landau & Dixon, *supra* note 19, at 1602–03; Murray & Shaw, *supra* note 22, at 771–72.

121. Landau & Dixon, *supra* note 19, at 1580.

122. *Id.* at 1580–81.

123. *Id.* at 1584 (emphasis added).

124. *See* GERRYMANDERING TRACKER, 2020 REDISTRICTING CYCLE (on file with authors); *see also* REPRESENTUS, GERRYMANDERING THREAT INDEX (2021), https://represent.us/wp-content/uploads/2021/05/Gerrymandering-Threat-Index-May-6.pdf [https://perma.cc/P6PF-R83Q]; Princeton Gerrymandering Project, *Redistricting Report Card*, PRINCETON ELECTION CONSORTIUM BLOG, https://gerrymander.princeton.edu/ [https://perma.cc/GAU6-WKTC] (last visited Feb. 11, 2025).

125. *See* Andrew Prokop, *How Democrats Learned to Stop Worrying and Love the Gerrymander*, VOX (Apr. 14, 2022, 4:00 AM), https://www.vox.com/22961590/redistricting-

the realities on the ground are too subject to change to lend their conclusions any real support.

Moreover, recent developments indicate that in fact, the democratic process is favoring pro-choice voters.[126] It is worth briefly recounting the elections that have taken place since a near-final draft of the majority opinion in *Dobbs* was leaked in May 2022 and then officially released the following month.[127]

The first major post-*Dobbs* elections took place on November 8, 2022. Commentators almost universally predicted a "red wave," where Republicans would surge to complete control of Congress due to concerns about inflation, Democratic President Joe Biden's low popularity, and the historical pattern of big losses for the incumbent party two years after a presidential election.[128] The red wave, however, did not materialize.[129] Democrats held the Senate and narrowly lost control of the House.[130] Exit polls suggested that backlash against the *Dobbs* ruling was a key reason for the unexpected outcome.[131] Moreover, in every state where abortion was directly on the ballot, advocates of abortion rights prevailed: California, Michigan, and Vermont all passed measures protecting the right to abortion, and voters in Kentucky and Montana rejected proposals favored by anti-abortion groups.[132]

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gerrymandering-house-2022-midterms [https://perma.cc/Y6BU-P2NQ] ("Ambitious Democratic gerrymanders . . . canceled out much of the Republican advantage. . . . Currently, it looks like there will be close to an *equal number of districts leaning left and right* of the national average, with a slight edge to Republicans in the median district." (emphasis added)).

126. Murray and Shaw note that abortion rights advocates have achieved successes since *Dobbs*, but they consider only "state level-direct democracy"—voter referendums and focus on efforts to restrict voters' ability to propose referendums. Murray & Shaw, *supra* note 22, at 774–76. As the discussion below chronicles, the pattern of abortion rights victories is broader than voter referendums alone.

127. *See, e.g.*, Ariane de Vogue, Tierney Sneed & Devan Cole, *Supreme Court Issues Report on* Dobbs *Leak but Says It Hasn't Identified the Leaker*, CNN (Jan. 19, 2023, 5:48 PM), https://www.cnn.com/2023/01/19/politics/supreme-court-dobbs-report-leak/index.html [https://perma.cc/RW9G-WV8S] (discussing the leak and efforts to determine the source).

128. *See, e.g.*, Andrew Prokop, *Why the Red Wave Didn't Come*, VOX (Nov. 9, 2022, 6:31 PM), https://www.vox.com/policy-and-politics/23448972/midterms-results-democrats-senate-red-wave [https://perma.cc/8ECL-XJNG].

129. *Id.*

130. *See, e.g.*, Sahil Kapur & Allan Smith, *The Seven Most Shocking Results from the 2022 Midterm Elections*, NBC NEWS (Dec. 27, 2022, 5:30 AM), https://www.nbcnews.com/politics/2022-election/seven-shocking-results-2022-midterm-elections-rcna61462 [https://perma.cc/QZS2-XG59].

131. *See, e.g.*, Ashley Kirzinger, Audrey Kearney, Mellisha Stokes, Alex Montero, Liz Hamel & Mollyann Brodie, *How the Supreme Court's* Dobbs *Decision Played in 2022 Midterm Election: KFF/AP VoteCast Analysis*, KFF (Nov. 11, 2022), https://www.kff.org/other/poll-finding/2022-midterm-election-kff-ap-votecast-analysis/ [https://perma.cc/GS2V-GEKE].

132. The Kentucky proposal would have explicitly excluded abortion rights from the state constitution, and the Montana proposal would have required doctors to make efforts to save babies born alive during an attempted abortion. Kansas voters had rejected a proposal to exclude abortion rights from their constitution in August 2022. For a description of these

The trend continued the following year. "Abortion rights advocates celebrated victory after victory in state elections this week," according to a summary of the November 2023 election results in *The Week*.[133] "By a resounding 57 percent to 43 percent," voters in Ohio, a Republican-leaning state, "approved a ballot measure establishing the right to reproductive choice [until the fetus is viable] in the state constitution."[134] Republicans failed to take control of the state legislature in Virginia, and a Democratic governor was re-elected in heavily Republican Kentucky, buoyed in each case by a heavy emphasis on abortion rights.[135] The winning streak has extended to judicial elections as well. In April 2023, Wisconsin voters elected a Democratic candidate for the state supreme court who broke the tradition of judicial candidates avoiding comment on particular issues by highlighting her support for abortion rights; her victory shifted the majority to the Democrats for the first time in 15 years.[136] And a Democratic candidate won the election for an open seat on the Supreme Court of Pennsylvania after he ran abortion-focused ads, preserving a Democratic majority on that court.[137]

The string of victories was finally broken with the November 2024 elections.[138] But the pro-choice movement continued to attract remarkable support, winning seven out of ten abortion measures that were on state ballots.[139]

To be sure, the *Dobbs* ruling itself was not the only abortion-related factor that shaped these election results. Prior to *Dobbs*, anti-abortion advocates in 13 states had secured enactment of state laws that were more restrictive than *Roe* had permitted—so-called trigger laws that were designed to spring into effect as soon as *Roe* was overturned, and a handful of other states had even older laws restricting abortion on their books.[140] In addition to rejoicing at the potential validity of these pre-*Dobbs* laws, anti-abortion advocates also secured enactment of new, post-*Dobbs*

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results, see Amanda Terkel & Jiachuan Wu, *Abortion Rights Have Won in Every Election Since* Roe v. Wade *Was Overturned*, NBC NEWS (Aug. 9, 2023, 12:50 PM), https://www.nbcnews.com/politics/elections/abortion-rights-won-every-election-roe-v-wade-overturned-rcna99031 [https://perma.cc/5MM2-7ZQH].

133. *Democrats Score State Wins with Focus on Abortion*, THE WEEK, Nov. 17, 2023, at 5 [hereinafter *Democrats Score*].

134. *Id.*

135. *Id.*

136. *See, e.g.*, Reid J. Epstein, *Liberal Wins Wisconsin Court Race, in Victory for Abortion Rights Backers*, N.Y. TIMES (Apr. 4, 2023), https://www.nytimes.com/2023/04/04/us/politics/wisconsin-supreme-court-protasiewicz.html [https://perma.cc/H4BR-ZG2F] (noting that Judge Protasiewicz "shattered long-held notions of how judicial candidates should conduct themselves by making her political priorities central to her campaign").

137. *See* Marc Levy, *Democrat Dan McCaffery Wins Open Seat on Pennsylvania Supreme Court*, AP NEWS, https://apnews.com/article/pennsylvania-election-state-supreme-court-5303f2c0d2145c3c0d162e565cfda7b7 [https://perma.cc/8QW3-S2X4] (Nov. 7, 2023, 9:52 PM).

138. *See, e.g.*, Bazelon, *supra* note 28.

139. *See, e.g.*, Smith & Wolfkot, *supra* note 28.

140. *See, e.g.*, Jiménez, *supra* note 99.

abortion restrictions in a few states, such as Florida.[141] Overall, roughly 16 states currently ban abortions in most or all cases.[142]

Backlash to these maneuvers, as well as to *Dobbs* itself, appears to have increased support for abortion rights in some states. The link is especially direct in Ohio, a Republican-leaning state. In 2019, the Ohio legislature enacted, and the governor signed, a trigger ban that outlawed abortion once a fetal heartbeat could be detected.[143] After *Dobbs*, abortion rights advocates countered by gathering the thousands of signatures needed to put the abortion rights referendum on the Ohio ballot.[144] Several months before the November 2023 vote, a group of Ohio lawmakers tried to amend the law to require a 60% vote for approval of changes to the state constitution.[145] The effort failed,[146] and the abortion rights referendum was approved overwhelmingly.[147]

The results of the 2024 election further complicate the claim that Republican gerrymandering, or Republican dominance writ large, necessarily has a negative or nefarious impact on the availability of abortion in a particular state. In the seven states where pro-choice ballot measures saw success in the 2024 cycle, voters simultaneously supported Donald Trump over Kamala Harris, highlighting an apparent disconnect between public sentiment on abortion and voting behavior.[148] As reporter Laura Kusisto noted, "[A]bortion rights [are] in essence [more] popular than Democrats right now."[149] This suggests that Republican dominance in these states not only reflects a more complex electoral landscape than previously suggested but also undermines the argument that majority Republican states put women's healthcare rights at stake.

That's not to say that the backlash to *Dobbs* and the ascendancy of the abortion rights perspective isn't masking serious interference with the democratic process. Voting may be distorted in states that have not seen abortion rights victories

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141. Florida passed a ban on abortions after 15 weeks shortly after *Dobbs*, then subsequently passed a 6-week ban. *See, e.g.*, Stephanie Colombini, *Florida's 6-Week Abortion Ban is Now in Effect, Curbing Access Across the South*, NPR (May 1, 2024, 5:01 AM), https://www.npr.org/2024/05/01/1247990353/florida-6-week-abortion-ban-south [https://perma.cc/3UF6-L86W].

142. *See* McCann & Walker, *supra* note 102 (tracking abortion access by state).

143. *See, e.g.*, *Democrats Score*, *supra* note 133, at 5.

144. *See, e.g.*, Peter Slevin, *The Lessons of Ohio's Abortion Rights Victory*, NEW YORKER (Nov. 9, 2023), https://www.newyorker.com/news/daily-comment/the-lessons-of-ohios-abortion-rights-victory [https://perma.cc/UGX8-EN9D].

145. *See, e.g.*, Michael Wines, *Ohio Voters Reject Constitutional Change Intended to Thwart Abortion Amendment*, N.Y. TIMES (Aug. 8, 2023), https://www.nytimes.com/2023/08/08/us/ohio-election-issue-1-results.html [https://perma.cc/HMQ8-9VS7].

146. *Id.*

147. *See, e.g.*, *Abortion in the United States Dashboard*, KFF, https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/ [https://perma.cc/VYK5-PFFP] (last visited Feb. 11, 2025).

148. *See Abortion Was a Winning Issue – Just Not for Kamala Harris*, WSJ PODCASTS, at 09:43–11:15 (Nov. 12, 2024, 3:48 PM), https://www.wsj.com/podcasts/the-journal/abortion-was-a-winning-issue-just-not-for-kamala-harris/3dcd3589-b2e0-4fce-a755-1377b673947d [https://perma.cc/B7HJ-YN6A]; *see also* Bazelon, *supra* note 28.

149. *Id.* at 2:07–2:11.

since *Dobbs*, for instance. And some states currently do have complete abortion bans.[150] But the most obvious theme of the post-*Dobbs* era has been resounding abortion rights victories and not a stifling of democracy. In fact, many states are liberalizing abortion. Indeed, these developments suggest that taking a hardline, pro-life stance is a portent of failure. As right-wing pundit Ann Coulter put it, "Pro-life is the 'defund the police' of the GOP."[151]

Given the failure of the doom predictions, it is important to identify the mechanisms that may serve as checks on the perceived weaknesses in the democratic process. Professors Shaw, Murray, and Litman seem to suggest that the Supreme Court wishes to set in constitutional stone obstacles to fixing gerrymandering. But the Court's jurisprudence in the past two years suggests the opposite. Pointing to a challenge to an Alabama districting map that left African-American voters in control of only one of the state's seven congressional districts, Shaw, Murray, and Litman had predicted that the Supreme Court would "give its blessing to the scheme—which will invite other states to follow suit."[152] And they worried that the Supreme Court would rule that state courts do not have the authority to police gerrymandering by one political party or the other, under the so-called independent state legislature theory of the Redistricting Clause in the U.S. Constitution.[153] As it turned out, the Supreme Court invalidated the Alabama district map, and it rejected the independent state legislature theory.[154]

These rulings make clear that state courts can police gerrymandering. Wisconsin, one of the most highly gerrymandered states in the country, and one of the authors' principal illustrations of severe gerrymandering,[155] provides a good example. A few months after Democrats secured a majority on the state supreme court, the court invalidated Wisconsin's electoral map.[156] New York's highest court

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150. *See, e.g.*, *Democrats Score*, *supra* note 133.

151. Ann Coulter, *'Pro-life' is the 'Defund the Police' of the GOP*, UNSAFE (Nov. 7, 2023), https://anncoulter.substack.com/p/pro-life-is-the-defund-the-police [https://perma.cc/B8UX-M9YJ] (internal quotations omitted).

152. Litman, Murray & Shaw, *supra* note 22.

153. *See id.*

154. Allen v. Milligan, 599 U. S. 1, 9–10 (2023) (overturning the Alabama district map); *see* Moore v. Harper, 600 U.S. 1, 26 (2023) (rejecting the independent state legislature theory). In May 2024, the Court decided *Alexander v. S.C. State Conference of the NAACP*, 602 U.S. 1, 12–13 (2024), finding no evidence of racially discriminatory intent in a South Carolina congressional district drawn to exclude thousands of Black voters, in a decision that many contend will make it more difficult for plaintiffs to bring racial gerrymandering claims in the future. *See* Lawrence Hurley, *Supreme Court Throws Out Race Claim in South Carolina Redistricting Case in Win for GOP*, NBC NEWS (May 23, 2024, 12:39 PM), https://www.nbcnews.com/politics/supreme-court/supreme-court-rules-gop-south-carolina-redistricting-case-rcna127946 [https://perma.cc/E4C9-VT9V]. While the decision appears to support the arguments of Shaw, Litman, and Murray, it does not demonstrate a trend toward pro-choice disenfranchisement. If anything, this line of recent decisions suggests decision-making largely dependent on the facts of a particular case.

155. Murray & Shaw, *supra* note 22, at 771–72, 779–80.

156. *See* Julie Bosman, Justices in Wisconsin Order New Legislative Maps, N.Y. TIMES (Dec. 22, 2023), https://www.nytimes.com/2023/12/22/us/wisconsin-redistricting-

also invalidated an electoral map that favored Republicans.[157] Even apart from judicial intervention, gerrymandering is not static.[158] Gerrymandering is an unfortunate feature of the political process, to be sure. But it is dynamic, engaged in by both parties,[159] and has not been able to strangle democracy.

C. Restrictive Voter Legislation

The story is similar with the voting reforms recently made in some states. It is undeniable that lawmakers expect their party to benefit when they enact rules like the Arizona provisions upheld by the Supreme Court in *Brnovich v. Democratic National Committee*, which required election officials to discard ballots cast in the wrong precinct and prohibited most third parties from collecting and delivering completed ballots, respectively.[160] And the Supreme Court clearly loosened enforcement of the Voting Rights Act of 1965 when it ended pre-screening of voting rule changes of southern states that historically discriminated against African Americans.[161] Georgia, for instance, one of the southern states previously subject to pre-screening, passed controversial legislation in 2021 that, among other things, reduced the availability of drop boxes and limited absentee voting to 67 days (down from six months) before an election.[162] Given that nearly two-thirds of Georgia's

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maps-gerrymander.html [https://perma.cc/65NJ-R8GD] (describing invalidation of Wisconsin's electoral maps and requirement that they be changed before the 2024 election).

157. *See* Gloria Pazmino & Fredreka Schouten, *New York's Highest Court Orders Congressional Districts to Be Redrawn*, CNN (Dec. 12, 2023, 7:14 PM), https://www.cnn.com/2023/12/12/politics/new-york-redistricting/index.html [https://perma.cc/RV7Q-NE38].

158. The recent redistricting efforts in New York are a good illustration of Democratic efforts to enhance their position through gerrymandering. *See, e.g.*, Jeffrey M. Wice & Piper Benedict, *New York Redistricting: What Happened and Where Are We Going?*, CITYLAND (June 7, 2024), https://www.citylandnyc.org/new-york-redistricting-what-happened-and-where-are-we-going/ [https://perma.cc/EAE7-MLDG].

159. The most gerrymandered state in the country currently is Illinois, a heavily Democratic state. *Anti-Gerrymandering Group: Illinois Worst in Nation for Political Redistricting*, CRUSADER (Oct. 13, 2023, 10:05 AM), https://chicagocrusader.com/anti-gerrymandering-group-illinois-worst-in-nation-for-political-redistricting/ [https://perma.cc/TED5-JWMY].

160. Brnovich v. Democratic Nat'l Comm., 594 U.S. 647 (2021). Murray and Shaw also discuss *Brnovich* as retrenching on challenges to voting rules. Murray & Shaw, *supra* note 22, at 778. The Supreme Court's recent order in *Republican National Committee v. Mi Familia Vota*, 145 S. Ct. 108 (2024) (mem.), allows Arizona to enforce its proof of citizenship requirement for state voter registration forms but blocks the state from preventing voters who lack such proof from participating in presidential elections or voting by mail.

161. Shelby Cnty. v. Holder, 570 U.S. 529, 534–35, 537, 557 (2013). Although *Shelby County* was widely expected to reduce minority representation, a new study finds that "minority ability districts" have actually increased since the ruling. Nicholas O. Stephanopoulos, Eric McGhee & Christopher Warshaw, *Non-Retrogression Without Law*, 2023 U. CHI. LEGAL F. 267, 269 (2024).

162. The number of drop boxes is limited to one per 100,000 voters in a county and drop boxes can only be used during voting hours. *See* Stephen Fowler, Sam Gringlas & Huo Jingnan, *A New Georgia Voting Law Reduced Ballot Drop Box Access in Places that Used Them Most*, NPR (Jul. 27, 2022, 4:31 PM), https://www.npr.org/2022/07/27/1112487312/georgia-voting-law-ballot-drop-box-access [https://perma.cc/9MKA-KK6K]. For an

absentee ballots were cast for Democrat Joe Biden in 2020,[163] these adjustments had obvious appeal for Republicans.

But there are plausible rationales for many (though not all) of the changes,[164] and the turnout in Georgia since the reforms has been extraordinarily high.[165] Indeed, the last few election cycles have seen record high turnouts. "Voter turnout in the 2020 U.S. general election soared to levels not seen in decades . . . [and] [t]he 2020 voting surge followed unusually high turnout in the 2018 midterm elections."[166] And Georgia's record voter turnout in the 2022 midterm elections was mirrored in other states—"voter turnout for [the 2022 midterms] was the second highest for a midterms since 2000."[167] While the effects of restrictive legislation should not be discounted, this data suggests that other forces are at work in determining levels of voter turnout.

Moreover, although some are unsavory, the Georgia reforms constitute acceptable, though partisan, lawmaking. It's true that recent election results and voter-friendly legislation don't disprove the existence of deeper distortions in the electoral system that might emerge with time.[168] But what evidence does exist indicates that democratic resolution of the abortion issue is underway, and it's strongly on the side of pro-choice voters.

D. Referenda

Even if gerrymandering and restrictive voter legislation prevent some from voting in ways that align with their policy preferences, a number of states permit

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overview of these and other changes, see Nathan Layne, *Explainer: Big Changes Under Georgia's New Election Law*, REUTERS (June 14, 2021, 3:07 AM), https://www.reuters.com/world/us/big-changes-under-georgias-new-election-law-2021-06-14/ [https://perma.cc/9ECD-P4L3].

163. *See, e.g.*, Nathaniel Rakich & Jasmine Mithani, *What Absentee Voting Looked Like in All 50 States*, FIVETHIRTYEIGHT (Feb. 9, 2021), https://fivethirtyeight.com/features/what-absentee-voting-looked-like-in-all-50-states/ [https://perma.cc/5AK4-W5CB] (showing that Biden received 65% of Georgia absentee votes in 2020, versus 34% for Trump).

164. Lawmakers could reasonably conclude, for instance, that six months before an election is too early for voters to be casting their ballots, since they will not have the benefit of knowing about months of developments that might be relevant to their voting decision.

165. *See, e.g.*, *Georgia Voters Lead Southeast in Turnout, Federal Study Shows*, WRDW (May 17, 2023, 3:12 PM), https://www.wrdw.com/2023/05/17/georgia-voters-lead-southeast-turnout-federal-study-shows/ [https://perma.cc/E2ZN-9ZUK].

166. Drew Desilver, *Turnout in U.S. Has Soared in Recent Elections but by Some Measures Still Trails that of Many Other Countries*, PEW RSCH. CTR. (Nov. 1, 2022), https://www.pewresearch.org/short-reads/2022/11/01/turnout-in-u-s-has-soared-in-recent-elections-but-by-some-measures-still-trails-that-of-many-other-countries/ [https://perma.cc/F6DK-D7FR].

167. Hansi Lo Wang, *Voter Turnout for the 2022 Elections Was the 2nd Highest for Midterms Since 2000*, NPR (May 2, 2023, 1:29 PM), https://www.npr.org/2023/05/02/1173306918/midterm-elections-2022-turnout [https://perma.cc/R8T3-K98F].

168. *See* Ayanna Alexander & Gary Fields, *Effect of Georgia's Voting Law Unclear, Despite High Turnout*, AP NEWS (Dec. 10, 2022, 9:07 AM), https://apnews.com/article/2022-midterm-elections-georgia-state-government-89b374bfafdba5b673a46b240a5e3e1f [https://perma.cc/2G63-RTXH].

voters to work around such obstacles by popular initiative. Professors Landau and Dixon emphasize that state popular initiatives "are clearly not a panacea."[169] They point out that the mechanisms of direct democracy don't exist in over half of states with bans on abortion. And where they are available, "an absence of deliberation, . . . concerns about the impact of a highly majoritarian procedure on minority groups," and questions of how differential turnout would affect the results of any such initiative make these measures less effective at counteracting snarls in the electoral process.[170] Professors Murray and Shaw highlight efforts in a few states to increase the number of signatures required or otherwise restrict the use of referenda, although these maneuvers have had mixed success.[171]

Where available, popular initiatives have worked in favor of pro-choice voters. Both Arizona and Ohio saw the success of pro-choice ballot measures against restrictions on abortion.[172] Where such initiatives are limited by the legislature or are otherwise unavailable, citizens can register their discontent via the electoral process or other civic means. If state popular initiatives were the final frontier in a hopelessly broken democratic system, broader conclusions could be drawn from their lack of ubiquity and efficacy. But as discussed in the preceding Sections, the mechanisms of democracy don't yet seem to be as strangled as critics assume.

III. INCONVENIENT TRUTHS ABOUT ABORTION

The real political issue preventing resolution of the abortion issue is not interference in the democratic process. It is instead the irreconcilable commitments and complicated voter preferences on abortion that impede a definitive victory for either side in the debate. Sections III.A and III.B first explore two inconvenient truths about abortion: the inability of either side to convincingly pinpoint the beginning of a human life, and the interdependence of mother and fetus. Section III.C concludes by comparing abortion to same-sex marriage.

A. When Does a Fetus Become a Baby?

The argument between abortion opponents and abortion rights advocates often starts at the beginning: whether life begins at conception. In one sense, this question is less complicated than it seems. Biological definitions of life suggest that even the single-celled zygote meets the criteria for being "alive" at fertilization.[173] The controversial issue, then, is not whether this fertilized thing—this zygote—is

169. Landau & Dixon, *supra* note 19, at 1606.

170. *Id.* at 1606–07.

171. Murray & Shaw, *supra* note 22, at 775–76. The most spectacular failure was in Ohio, discussed earlier. *See supra* notes 146–47 and accompanying text.

172. Chantelle Lee, *How the 10 States' Abortion Ballot Initiatives Fared in the 2024 Election*, TIME, https://time.com/7173410/abortion-ballot-results-2024-election/ [https://perma.cc/WA5W-UTV5] (Nov. 6, 2024, 6:01 PM).

173. That a zygote is technically "alive" has been acknowledged even by those who disagree that a zygote constitutes a "human individual." *See* Richard J. Paulson, *The Unscientific Nature of the Concept that "Human Life Begins at Fertilization," and Why It Matters*, 107 INKLINGS 566, 566 (2017) ("The egg cell is alive, and it has the potential to become a zygote (a single-celled embryo) if it is appropriately fertilized and activated by a live sperm. If fertilization is successful and the genetic complement of the sperm is added to that of the egg, the resulting zygote is also alive.").

alive, but rather whether "this genetically unique cell should be considered a human person."[174]

The issue of "when" human life starts, and what exactly that means, implicates important moral and philosophical questions. But the more concrete question, and thus the one most often at the center of debates, is a biological one—does the fetus have the biological characteristics of a human being? What this often boils down to in practice for many Americans is whether the fetus *looks* enough like a human being to support the idea of its humanity.[175] Accordingly, those on both sides of the abortion debate will attempt to demonstrate or deny the personhood of a fetus by focusing on its appearance and characteristics at the latest or earliest stages of pregnancy.

Both sides face inconvenient facts. Abortion opponents run into trouble trying to compare a fetus in the earliest weeks of the pregnancy to a more developed "unborn child." The contention that the early mass of cells is a human being simply does not resonate with the intuitions of most Americans. But abortion advocates run up against similar intuitive blockades in trying to downplay the problematic realities of late-stage abortions, where the fetus is much more human-like.[176] These intuitions are reflected in the decades of polls showing that a significant majority of Americans do not favor either unconditional abortion rights or a complete ban.[177]

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174. Jason T. Eberl, *The Beginning of Personhood: A Thomistic Biological Analysis*, 14 BIOETHICS 134, 135 (2000); *see also* Elizabeth Dias, *When does life begin?*, N.Y. TIMES (Dec. 31, 2022), https://www.nytimes.com/interactive/2022/12/31/us/human-life-begin.html [https://perma.cc/Y2RH-LZWX] ("'From the biologist point of view, I'd need to say life of a mammalian organism begins at fertilization,' [Amander Clark, president-elect of the International Society for Stem Cell Research] said. 'But if the question is, when is a human a human being, to me that is very different.'").

175. We don't mean to oversimplify the debates by suggesting that there are no deeper moral and metaphysical questions at play, ones that cannot be so easily solved by returning to questions of biology. *See, e.g.*, Paul Bloom, *The Duel Between Body and Soul*, N.Y. TIMES (Sept. 10, 2004), https://www.nytimes.com/2004/09/10/opinion/the-duel-between-body-and-soul.html [https://perma.cc/24Z8-WWTK] (arguing that the question at stake is not one of science, but rather "about the magical moment at which a cluster of cells becomes more than a mere physical thing. It is a question about the soul."). But the surface-level rhetoric, for the most part, consists of appeals to appearance and biology. The persuasiveness of an argument on the pro-life or pro-choice side often depends on personification (or depersonification) of the fetus.

176. For an example, see Cohen, Donley and Rebouché's defense of partial-birth abortion as giving the "pregnant patient . . . the possibility of holding the fetus"—not baby—after the late term abortion. David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. 317 (2024) (Feb. 1, 2023 draft) (available at https://scholarship.law.pitt.edu/fac_articles/554).

177. *See* Jamie Ballard, *Most Americans Would Limit Abortion After a Certain Stage of Pregnancy and Allow Certain Exceptions*, YOUGOV (Mar. 15, 2024, 7:58 AM), https://today.yougov.com/politics/articles/48938-americans-would-limit-abortion-after-a-certain-stage-of-pregnancy [https://perma.cc/W6ME-T4T8]; The Short Answer, *Where Do Americans Stand on Abortion?*, GALLUP (July 7, 2023), https://news.gallup.com/poll/321143/americans-stand-abortion.aspx [https://perma.cc/6EUF-HKFS].

Because over 90% of abortions occur in the first trimester,[178] the stakes are high for abortion opponents' uphill battle of countering the intuition that an early-stage fetus is not a human child. The biological intricacies of early-stage fetal development are often called upon as evidence. Abortion opponents emphasize the unique DNA, distinct from that of either parent, created at the moment of conception.[179] They highlight the emergence, within the first trimester, of recognizably "human" features, such as an eye spot, arm buds, and heartbeat, and the initial development of the brain.[180] Some studies purport to demonstrate that fetuses can feel pain as early as the 15-week mark.[181] Such findings are meant to "resolve" the abortion debate by demonstrating that because of what the science shows, the fetus, with its eye spot, arm bud, and brain, is a human being.

This science has been in general circulation for some time now. But no matter how much biological proof is marshaled, it is still difficult for many people to accept the idea that the early-stage fetus is in fact a baby. Again, and rather crudely, the matter boils down to appearance: the fetus does not *look* like a baby. In pro-choice discourse, early-stage fetuses are referred to as "live cells" or "fertilized cells."[182] Professors Cohen, Donley, and Rebouché, legal scholars who have written extensively about abortion pills, use the term "pregnancy tissue":

> Almost all [abortions are] early[,] and pregnancy tissue in early pregnancy, especially in the first ten weeks, is difficult to personify as a baby or even only as a developed fetus. The six-to-eight-week image pregnant patients see during their first ultrasound looks like a circle with a miniscule flutter if cardiac activity is detected. To the naked eye, early pregnancy tissue looks like blood clots and tissue, which is what people see after an early abortion or miscarriage. Not until closer to the second trimester are fetal parts easily discernable without magnification.[183]

This description illustrates the challenge abortion opponents face in establishing the humanity of an early-stage fetus. Abortion rights advocates, however, face comparable rhetorical difficulties at the later stages of pregnancy

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178. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, ABORTION SURVEILLANCE – UNITED STATES, 2022, at 6 (2024), https://www.cdc.gov/mmwr/volumes/73/ss/pdfs/ss7307a1-H.pdf [https://perma.cc/L6YE-Y4W6].

179. *See, e.g.*, DANIELLE D'SOUZA GILL, THE CHOICE: THE ABORTION DIVIDE IN AMERICA 28–30 (2020); *see also* Julie Knapp, *Baby's Development in the Womb: A Week-By-Week Guide*, PARENTS, https://www.parents.com/pregnancy/week-by-week/baby-development/ [https://perma.cc/VQW4-FELM] (Sept. 23, 2022).

180. *See* Knapp, *supra* note 179.

181. *See, e.g.*, *Fact Sheet: Science of Fetal Pain*, CHARLOTTE LOZIER INST. (Sept. 13, 2022), https://lozierinstitute.org/fact-sheet-science-of-fetal-pain/ [https://perma.cc/W76J-KDQS]. This assertion has been contested. *See Facts Are Important: Gestational Development and Capacity for Pain*, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, https://www.acog.org/advocacy/facts-are-important/gestational-development-capacity-for-pain [https://perma.cc/VFK8-WCTK] (last visited Jan. 23, 2025).

182. *See, e.g.*, Darcy Reeder, *A Fertilized Egg Is Not a Human Being*, MEDIUM (June 17, 2019), https://medium.com/fearless-she-wrote/a-fertilized-egg-is-not-a-human-being-a68109f4eabe [https://perma.cc/B6G7-2Y5B].

183. Cohen, Donley & Rebouché, *supra* note 176, at 392.

when they argue for a completely permissive abortion regime. Depersonification of the fetus requires insisting that an unborn fetus is not a human being even at the end of pregnancy. For some, this includes any fetus that has not yet been delivered.[184]

As a pregnancy progresses into the second and third trimesters, and the fetus takes on the more obvious characteristics of a human child, however, "clump of cells" arguments become harder to make. Fetuses in the second and third trimester have started to stretch and kick as their muscles develop and their bones form.[185] Their eyes have begun to open, and all major organs have developed and are fully functioning, with the exception of the lungs.[186] The abortion of a late-stage fetus cannot be accomplished with abortion drugs.[187] Most abortions performed at this stage are done through "dilation and evacuation," in which a fetus is extracted from the cervix, typically in parts, through a combination of aspiration and the use of forceps.[188] The more controversial but far rarer[189] procedure is "dilation and extraction," referred to by its opponents as "partial birth abortion," in which a fetus has its skull collapsed before it is delivered whole.[190]

Abortion rights advocates justify such procedures as necessary to maintain the health of the mother or as desirable in cases of fetal anomaly. Such procedures are indeed sometimes used in instances in which the health of the mother or viability

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184. In his concurrence in *Thornburgh v. American College of Obstetricians and Gynecologists*, Justice Stevens took this position, declaring that "the nine-month-gestated, fully sentient fetus on the eve of birth" is not a human being. Richard Stith, *Nominal Babies*, FIRST THINGS (Feb. 1, 1999), https://www.firstthings.com/article/1999/02/001-nominal-babies [https://perma.cc/XZX9-FHA3]. For some, this view is faith-informed, based, for instance, on the belief in Judaism that life does not begin until the first breath. *See In Pictures: Americans React After Supreme Court Overturns* Roe v. Wade, CNN https://www.cnn.com/2022/06/24/politics/gallery/roe-v-wade-supreme-court-reactions/index.html [https://perma.cc/XZ5K-H5B4] (June 28, 2022, 9:02 AM) (featuring a woman "pos[ing] for a portrait with the words 'not yet a human' written on her pregnant belly during an abortion rights demonstration in front of the Supreme Court on Friday. Herring, who is Jewish, told CNN that her religion has helped shape her views on abortion. 'Judaism says that life begins with the first breath, that is when the soul enters the body'").

185. *Fetal Development: The 2nd Trimester*, MAYO CLINIC (June 3, 2022), https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/fetal-development/art-20046151 [https://perma.cc/V6XA-C9CM].

186. Knapp, *supra* note 179.

187. *Medication Abortion Up to 70 Days of Gestation*, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (Oct. 2020), https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2020/10/medication-abortion-up-to-70-days-of-gestation [https://perma.cc/595T-Q98K].

188. *See* Katherine Rivlin & Anne R. Davis, *Contraception and Abortion*, *in* COMPREHENSIVE GYNECOLOGY 238, 252–53 (David M. Gershenson et al. eds., 8th ed. 2022).

189. In the year 2000, for instance, dilation and extraction procedures were estimated to make up 0.17% of all abortions. Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, GUTTMACHER, Jan.–Feb. 2003, at 6, 13, https://www.guttmacher.org/journals/psrh/2003/01/abortion-incidence-and-services-united-states-2000 [https://perma.cc/FD3H-66R2].

190. Greer Donley & Jill Wieber Lens, *Second Trimester Abortion Dangertalk*, 62 B.C. L. REV. 2146, 2157–58 (2021).

of the fetus are at stake or in question.[191] Yet the fact remains that while there are statistics on the *number* of late-stage abortions performed, "[t]here is currently no statistical information available on *why* 'dilation and extraction' abortions are performed."[192]

Abortion rights advocates characterize abortion opponents' reference to these procedures as mere fearmongering. The grisly reality of these procedures is often dismissed as a matter of framing, or as "plant[ed] images" that attempt to "manipulate."[193] Some abortion opponents do make use of unsettling images, at times in offensive ways. But most Americans, "danger talk" aside, intuitively see late-stage fetuses as human beings, and they do not believe that abortion should be permitted in the final weeks of pregnancy.[194]

A substantial majority of Americans do not find the purists' arguments on either side of the debate persuasive, as reflected by the polls showing much more support for early-stage than late-stage abortions.[195] The widespread perception that early-stage fetuses are not human beings but late-stage fetuses are is an inconvenient truth that complicates definitive resolution of the debate. This might suggest that a simple compromise is in order. Although we explore this possibility in Part IV, we note first that the incommensurable first order principles at stake—women's equality on one side, the value of human life on the other—make compromise extremely difficult. Abortion differs qualitatively from issues such as government spending on poverty or the military in this regard.

B. The Interdependence of Mother and Fetus

Read any abortion article by a pro-life intellectual, and chances are high that it will analogize the pro-choice movement to slavery.[196] When abortion rights advocates deny the humanity of a fetus, these scholars argue, they are using the same techniques as those who dehumanized Blacks during the era of slavery. The fetus, it is implicitly argued, as a being genetically distinct from its mother, can be compared to a walking, talking, enslaved individual. Other analogies utilized by abortion opponents also make this assumption. Fetuses have been compared to paralyzed people[197] and other "helpless" everyday individuals. Under this logic, the

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191. *See* Ivette Gomez, Alina Salganicoff & Laurie Sobel, *Abortions Later in Pregnancy in a Post-Dobbs Era*, KAISER FAM. FOUND. (Feb. 21, 2024), https://www.kff.org/womens-health-policy/issue-brief/abortions-later-in-pregnancy-in-a-post-dobbs-era/ [https://perma.cc/GN5L-XFXX].

192. Julie Rovner, *'Partial-Birth Abortion': Separating Fact from Spin*, NPR (Feb. 21, 2006, 9:44 PM), https://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin [https://perma.cc/72ZN-VE9Q] (emphasis added); *see also* MATTHEW B. BARRY, CONG. RSCH. SERV., R45161, ABORTION AT OR OVER 20 WEEKS' GESTATION: FREQUENTLY ASKED QUESTIONS 2–3 (2018), https://sgp.fas.org/crs/misc/R45161.pdf [https://perma.cc/8ZYS-FBLV].

193. Cohen, Donley & Rebouché, *supra* note 176, at 392.

194. *See supra* note 177 and accompanying text.

195. *See, e.g.*, Saad, *supra* note 54.

196. *See, e.g.*, Hadley Arkes, *On Overruling* Roe, FIRST THINGS, Mar. 2022, at 35, 37; Robert P. George, Roe *Will Go*, FIRST THINGS, Oct. 2021, at 18, 20.

197. *E.g.*, D'SOUZA GILL, *supra* note 179, at 32.

impermissibility of abortion is obvious. If we wouldn't do it to a fellow man or woman, why would we do it to a fetus?

The problem with these arguments is that they fail to recognize that a fetus is not a self-sustaining, independent individual. It is of necessity attached to and dependent on the pregnant person who is carrying it. Just as the life and health of a fetus depends on this person, so too is the life and health of the person affected by the fetus. An ectopic pregnancy, for instance, in which the fetus develops outside of the uterus, is often life-threatening to the person carrying it.[198] Other complications from pregnancy are possible, and the risks grow as the pregnancy develops.[199] Parent and fetus are inescapably interconnected.

Abortion rights advocates take precisely the opposite tack: the woman's interests are placed at the fore, while the fetus is hardly recognized as a distinct being at all. The issue becomes entirely about equality and a woman's right to her body: "My body, my choice," as the slogan puts it. The fetus disappears from the picture. A good articulation of this view comes from philosopher and gender studies writer Judith Butler:

> The right to abortion is based on the right of every individual woman to assert freedom over her own body, but follows from the collective demands of women to be able to live their desires freely without state intervention and without the fear of violence, retribution and imprisonment.[200]

The erasure of the fetus is also evident when the abortion debate is framed as a battle over the woman's womb. This view, again, was espoused by Butler:

> The state is claiming that it has interests in the womb, and *it is figuring the womb as its province, rather than the province of those who actually have them*. It is precisely the anti-feminist forces that figure the womb in that way that we must oppose. Otherwise, we attribute the existence of oppressive systems to biology, when we should be asking how those oppressive systems contort biological claims to their own ends.[201]

Even otherwise nuanced accounts by abortion rights proponents sideline the fetus. In recent work advocating that a robust social safety net be a prerequisite to any

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198. *Ectopic Pregnancy*, MAYO CLINIC (Mar. 12, 2022), https://www.mayoclinic.org/diseases-conditions/ectopic-pregnancy/symptoms-causes/syc-20372088 [https://perma.cc/BX6Z-RE7H].

199. Indeed, "[t]he risk of death associated with childbirth is approximately 14 times higher than that with abortion." Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215–18 (2012).

200. George Yancy, *Judith Butler: When Killing Women Isn't a Crime*, N.Y. TIMES (July 10, 2019), https://www.nytimes.com/2019/07/10/opinion/judith-butler-gender.html [https://perma.cc/N8K5-5FT3].

201. Alona Ferber, *Judith Butler on* Roe vs Wade*, Trans Rights and the War on Education*, NEW STATESMAN (July 21, 2022) (emphasis added), https://www.newstatesman.com/international-content/2022/07/judith-butler-roe-v-wade-more-dangerous-backlash [https://perma.cc/7EVV-X9Q8].

abortion restrictions, for instance, Cary Franklin and Reva Siegel foreground the needs of the woman, while the fetus fades from view.[202]

When abortion rights advocates do emphasize the relationship between woman and fetus, they sometimes characterize it in derogatory terms. The fetus may be depicted, for instance, as a "parasite" or a "growth." The best-known articulation of the "fetus as parasite" argument was devised by Judith Jarvis Thomson in her article, *A Defense of Abortion*.[203] Thomson argued that even if the premise that a fetus is a human being is accepted, it is logically unsound to conclude that abortion is morally impermissible.[204] To make her argument, Thomson posed her well-known hypothetical of a woman chained for nine months to an unconscious world-famous violinist who will die if she detaches herself.[205] On its face, that argument seems to acknowledge the interdependence dynamic absent in other pro-choice reasoning. But it doesn't really do so. That is because Thomson makes the same move—ironically enough—as many abortion opponents: she treats the fetus as an entirely distinct individual.[206]

The relationship between a pregnant person and her fetus is qualitatively different from any relationship we can currently conceive between two individuals. The fetus is not totally alien to the mother; without the mother's input, the fetus would not exist. They are inherently and inextricably interconnected—not independent, and not artificially dependent.

Pro-choice and pro-life advocates each tend to isolate either the mother or the fetus/baby without sufficiently acknowledging their inextricable interdependence. The distortion once again reflects the first order principles at stake: women's equality and the value of human life. But the arguments on each side are complicated by the inconvenient reality that the pregnant person and the fetus are not independent of one another.

C. Is Abortion like Same-Sex Marriage?

The rise and triumph of same-sex marriage, the other great social issue of the past generation, provides an equally revealing perspective on the political intractability of the abortion debate. Although the two debates are superficially similar, they differ in crucial respects.

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202. *See, e.g.*, Franklin & Siegel, *supra* note 7, at 22–23; *see also* Siegel, Mayeri & Murray, *supra* note 8, at 68, 70, 72 (outlining and extending the equality arguments the authors made in an influential amicus brief in the *Dobbs* case).

203. *See* Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47, 48–49 (1971).

204. *Id.*

205. *Id.*

206. For a more thorough response to Thomson's argument, see Gilbert Meilaender, *The Fetus as Parasite and Mushroom: Judith Jarvis Thomson's Defense of Abortion*, 46 LINACRE Q. 126, 130–32 (1979).

Before the 1990s, a right to same-sex marriage was nearly unthinkable—and for many gay rights advocates, unsought.[207] In 1996, the Defense of Marriage Act—which permitted states to refuse to recognize out-of-state same-sex marriages—passed overwhelmingly in the House and Senate and was signed by President Clinton.[208] When the Vermont Supreme Court held that same-sex couples must be given the same legal rights as married couples in 1999, and then the Massachusetts Supreme Judicial Court ruled in 2003 that same-sex couples have the right to marry under the state constitution, significant backlash ensued.[209] The same-sex marriage issue cost the Democrats two Senate seats in 2004, and some think it secured the presidential election for George W. Bush.[210] Yet by 2015, when the U.S. Supreme Court held in *Obergefell v. Hodges* that the U.S. Constitution guarantees same-sex couples the right to marry,[211] public opinion had shifted so much that the ruling surprised almost no one. Since 2015, support for same-sex marriage has continued to grow and currently garners 71% approval.[212] The right is now so well-established that Justice Alito felt the need to assure readers of his *Dobbs* opinion that *Dobbs* didn't jeopardize same-sex marriage in any way.[213]

Many factors contributed to this success, but for purposes of comparison, we highlight four. First, support for gay rights and later for same-sex marriage grew as more gays came out of the closet.[214] In 1986, when he cast the deciding vote in *Bowers v. Hardwick*,[215] the Supreme Court case upholding anti-sodomy laws, Justice Lewis Powell told his (gay) law clerk that he had never met a gay person.[216] As more gays became public about their sexual orientation, and as gay couples were portrayed more favorably in popular programs such as *Will and Grace*,[217] the

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207. A key early event was the ruling in 1993 by the Hawaii Supreme Court in *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), which held that a law limiting marriage to a man and a woman was subject to strict scrutiny. For discussion of the backlash to *Baehr*, see KLARMAN, FROM THE CLOSET, *supra* note 68, at 56–60.

208. *See, e.g.*, KLARMAN, FROM THE CLOSET, *supra* note 68, at 63 (describing the overwhelming support for the Defense of Marriage Act).

209. *Id.* at xi.

210. *Id.* at 109–11 (describing the victory of vulnerable Kentucky Republican incumbent Senator Jim Bunning and the loss of Democratic Senate Minority Leader Tom Daschle of South Dakota and stating that "the outcome of the [2004 presidential] election quite possibly turned on gay marriage").

211. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

212. Justin McCarthy, *Same-Sex Marriage Support Inches Up to New High of 71%*, GALLUP (June 1, 2022), https://news.gallup.com/poll/393197/same-sex-marriage-support-inches-new-high.aspx [https://perma.cc/Y548-UQ9Y].

213. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 290 (2022) ("And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right.").

214. KLARMAN, FROM THE CLOSET, *supra* note 68, at 197 (stating that "as more gays and lesbians have come out of the closet, the social environment has become more gay-friendly").

215. 478 U.S. 186 (1986).

216. *Id.* at 37.

217. *See, e.g.*, Reid Nakamura, *How 'Will & Grace' Had a Real-Life Political Impact on Marriage Equality*, THEWRAP (Sept. 28, 2017, 1:45 PM), https://www.thewrap.

likelihood that a person in Justice Powell's position wouldn't realize that friends or colleagues were gay dropped significantly. In 1985, roughly 25% of Americans reported that they knew a gay person; in 2000, three-quarters did.[218]

Second, the emerging generation of Americans was much more supportive of same-sex marriage than their elders. In 2011, same-sex marriage had 65% support among those between the ages of 18 and 29, as compared to only 30% of those 65 and older.[219] This support was strengthened by the higher likelihood that young Americans knew someone who was gay and by the higher percentage who believed that homosexuality is immutable rather than a choice.[220] The high levels of support among young Americans made it clear that legal endorsement was inevitable.

A third factor was the analogy to slavery and racial discrimination. Although gays did not endure slavery and could more easily hide their identity than Black Americans, they too suffered serious discrimination. For much of the twentieth century, homosexual behavior was commonly prosecuted.[221] Advocates for same-sex marriage argued effectively that prohibiting same-sex marriage was like banning interracial marriage prior to *Loving v. Virginia*.[222] As support for same-sex marriage grew, advocates appealed to marriage equality by insisting that asking gays to settle for civil unions would be "separate but equal" treatment.[223]

The fourth factor was a sharp rise in the intensity of preference on the "pro" side of the same-sex marriage debate as it became a possibility. As late as the early 2000s, opponents were much more strongly opposed to same-sex marriage than supporters were in favor.[224] Many gays were ambivalent about same-sex marriage and felt more strongly about securing protection from discrimination in the workplace.[225] The ambivalence shrank as the prospect of same-sex marriage became more realistic. Substitutes such as civil unions, which had once been a potential compromise, now seemed inadequate.

At the same time, the intensity of the opposition weakened. Much of the opposition to same-sex marriage came from Christians—especially theologically conservative Catholics and evangelical Protestants—and other religious groups, such as Orthodox Jews and Muslims.[226] Although most of these religious groups

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com/will-grace-real-life-political-impact-marriage-equality/ [https://perma.cc/4USL-5YAH] (describing Joe Biden's reference to *Will & Grace* in his 2012 statement supporting same-sex marriage).

218. KLARMAN, FROM THE CLOSET, *supra* note 68, at 197.

219. *Id.* at 199.

220. *Id.* at 199–200.

221. *See, e.g.*, *id.* at 14.

222. 388 U.S. 1 (1967).

223. *See, e.g.*, *Civil Unions Are Not Enough*, LAMBDA LEGAL, https://legacy.lambdalegal.org/sites/default/files/publications/downloads/fs_civil-unions-are-not-enough.pdf [https://perma.cc/3MVL-GXEB] (last visited Feb. 28, 2025).

224. Klarman, *supra* note 30, at 30 (describing differential in 2004).

225. *See* KLARMAN, FROM THE CLOSET, *supra* note 68, at 213 (suggesting that the focus on same-sex marriage may have delayed realization of priorities such as protection against employment discrimination).

226. *See, e.g.*, McCarthy, *supra* note 212 (suggesting that religious believers continue to be the least supportive).

continued to oppose same-sex marriage, some reconciled themselves to same-sex marriage, so long as they remained free to adhere to traditional marriage within their religious institutions.[227] A few Christian leaders had long believed that churches should disentangle themselves from secular regulation of marriage. C.S. Lewis, one of the leading twentieth century Christian public intellectuals, advocated as early as the 1940s for "two distinct kinds of marriage: one governed by the State with rules enforced on all citizens, the other governed by the church with rules enforced by her on her own members."[228] With this option available, the stakes seemed lower than they would otherwise be, even for Christians who continued to believe that secular regulation should reflect a traditional understanding of marriage.

Each of these four factors can also be seen in the abortion debate. The similarities are most striking with the second factor, the views of younger Americans. As with same-sex marriage, support for abortion rights is much higher among the young than with older Americans.[229] And as with same-sex marriage, the divide can be seen within Christian churches, just as it is with Americans generally.

Advocates of abortion rights also have increasingly sought to demystify abortion, somewhat like how gays demystified homosexuality by coming out of the closet. The most assertive form this has taken is the movement to "shout your abortion."[230] More quietly, increasing numbers of women have written openly about having abortions,[231] and abortion rights advocates tout figures such as an estimate that 25% of women will have an abortion.[232] The suggestion is that even those of us who have not had abortions know many people who have.

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227. *See, e.g.*, David French, *Why I Changed My Mind About Law and Marriage, Again*, THE DISPATCH (Nov. 20, 2022), https://thedispatch.com/newsletter/frenchpress/why-i-changed-my-mind-about-law-and-marriage-again/# [https://perma.cc/5HH8-L6U3] (chronicling his evolving views as an evangelical Protestant).

228. C.S. LEWIS, MERE CHRISTIANITY 95 (1981).

229. For same-sex marriage, see, e.g., David Masci, Anna Brown & Jocelyn Kiley, *5 Facts About Same-Sex Marriage*, PEW RSCH. CTR. (June 24, 2019), https://www.pewresearch.org/short-reads/2019/06/24/same-sex-marriage/ [https://perma.cc/A6NZ-AYYC] (finding that 74% of Americans born 1981–1996 support same-sex marriage, as compared to 45% of those born 1928–1945). For abortion, see, e.g., *Abortion Trends by Age*, GALLUP, https://news.gallup.com/poll/246206/abortion-trends-age.aspx [https://perma.cc/4PJM-X3GP] (last visited Jan. 25, 2025) (finding that 53% of those aged 18–29 supported abortion under all circumstances in 2022, as compared with 27% of those aged 50 and older).

230. *See, e.g.*, Nicole Brodeur, *How 'Shout Your Abortion' Grew from a Seattle Hashtag into a Book*, SEATTLE TIMES, https://www.seattletimes.com/life/how-shout-your-abortion-grew-from-a-seattle-hashtag-into-a-book/ [https://perma.cc/RV54-TY4Y] (Dec. 13, 2018, 10:55 AM) (describing the movement as "aimed at humanizing, normalizing and de-stigmatizing the procedure").

231. *See, e.g.*, Cindi Leive, *Let's Talk About My Abortion (and Yours)*, N.Y. TIMES (June 30, 2023), https://www.nytimes.com/2018/06/30/opinion/sunday/abortion-kennedy-supreme-court.html [https://perma.cc/3BHN-M7T9].

232. Margot Sanger-Katz, Claire Cain Miller & Quoctrung Bui, *Who Gets Abortions in America?*, N.Y. TIMES (Dec. 14, 2021), https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html [https://perma.cc/YSJ7-5FBV] (citing finding that "25 percent of women will have an abortion by the end of their childbearing years").

Race also figures prominently in abortion rights advocacy. Abortion rights advocates point out that Black women—often poor Black women—comprise a disproportionate percentage of the women seeking abortions.[233] Scholars also have identified a tradition of support for abortion and other forms of family planning dating back to slavery, when slave owners discouraged efforts to limit children, since enslaved children were a valuable commodity.[234] They point out that nineteenth century critics of abortion often associated it with "homeopaths and midwives, many of whom were Black and indigenous women," and some feared that white women were producing too few children.[235]

The intensity of preference of abortion rights advocates is extraordinarily high, albeit for the opposite reason than with same-sex marriage a decade ago. With abortion, the spur has been loss of judicial protection rather than favorable judicial decisions. After *Roe*, a generation of women grew up with the constitutional right to abortion. The loss of this right has spurred passionate advocacy to regain it. Abortion rights have been a key factor in the recent political and judicial elections recounted earlier.[236]

Despite these similarities between same-sex marriage and abortion, each factor is far more complicated in the abortion context. Start with demystification. While the realization that many women have abortions may increase support for early-stage abortions—especially abortion by medication rather than by a surgical procedure—it is unlikely to create a consensus in favor of abortion at every stage of pregnancy. In the later stages of pregnancy, the fetus is too obviously a human being. For similar reasons, it is less likely that a dramatic generational shift will occur, with older abortion opponents dying out and younger advocates taking their place. Although greater percentages of young Americans support abortion, their support is noticeably stronger for early-stage than for late-stage abortions. While 83% of Americans between the ages of 18 and 29 support abortion in the first three months of pregnancy, only 32% support it in the last three months.[237]

Race also is more complicated with abortion than with same-sex marriage. With same-sex marriage, advocates drew on the analogy to interracial marriage,[238]

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233. *See, e.g.*, Fabiola Cineas, *Black Women Will Suffer the Most Without* Roe, VOX (June 29, 2022, 10:20 AM), https://www.vox.com/2022/6/29/23187002/black-women-abortion-access-roe [https://perma.cc/83QP-K6R2] (noting that Black women are 3.6 times more likely to have abortions as white women).

234. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 24 (Vintage Books, 2d ed. 2017); Melissa Murray, *Race-Ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2034–35 (2021).

235. Murray, *supra* note 234, at 2035–36.

236. *See supra* Part II.

237. Saad, *supra* note 54; *see also* Domenico Montanaro, *Poll: Americans Want Abortion Restrictions, but Not as Far as Red States Are Going*, NPR (Apr. 26, 2023, 5:00 AM), https://www.npr.org/2023/04/26/1171863775/poll-americans-want-abortion-restrictions-but-not-as-far-as-red-states-are-going [https://perma.cc/V4ZD-XQLC] (finding that only 22% of Americans support abortion at any point during a pregnancy as opposed to 37% of Americans supporting only first or second trimester abortions).

238. *See supra* note 222 and accompanying text.

while opponents could only question the relevance of the analogy. Same-sex marriage opponents' posture was entirely defensive; they did not have any affirmative argument that racial considerations favored their side.[239] With abortion, by contrast, opponents can draw on the ugly history of race in America for support, just as advocates do. Abortion opponents point to the racism of leading early twentieth century proponents of birth control such as Margaret Sanger.[240] Abortion opponents analogize the "dehumanization" of fetuses to the dehumanization of the enslaved.[241] Although abortion rights advocates question aspects of the historical argument,[242] many Black communities have been strongly opposed to abortion.[243] The analogy between dehumanization of the enslaved and of fetuses also is contested, but it cannot be dismissed altogether. Race does not clearly favor either side in the abortion debate.

The most recent development is the increasing emphasis by abortion rights advocates on "freedom" as the guiding principle for abortion rights.[244] Rather than emphasizing women's right to choose, abortions rights advocates now argue that pregnant people should be protected from the governmental intrusion that comes with abortion restrictions.[245] Appeals to "freedom" lack the link to racial equality that made the concept of marriage equality so powerful, but they have the benefit of appealing to conservatives who worry about governmental overreach. Labels do matter, in our view.[246] But they are unlikely to decisively shift the debate.

Although the political momentum has clearly shifted in favor of abortion rights, the differential in intensity is unlikely to continue. Because abortion

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239. One can perhaps imagine such an argument. Same-sex marriage undermines traditional marriage, which especially hurts Black Americans, the reasoning might go. But even this is attenuated, and it did not figure in the debate in any visible way.

240. Although she believed in eugenics, Sanger does not appear to have been an advocate for abortion. *See, e.g.*, Murray, *supra* note 234, at 2039.

241. *See supra* Section III.B.

242. Justice Thomas's reference to the state's "compelling interest in preventing abortion from becoming a tool of modern-day eugenics" in his concurring opinion in *Box v. Planned Parenthood*, 587 U.S. 490, 494 (2019), prompted a flood of criticism questioning his use of the history of eugenics. *See* Murray, *supra* note 234, at 2041–42; Tang, *supra* note 9, at 1126–28 (citing and describing numerous criticisms).

243. Murray notes that the Nation of Islam views abortion as "Black genocide." Murray, *supra* note 234, at 2041–42.

244. *See, e.g.*, Katie Rogers, *Biden Campaign Sharpens Its Post-*Roe *Message: Abortion Is About Freedom*, N.Y. TIMES (Jan. 20, 2024), https://www.nytimes.com/2024/01/20/us/politics/biden-harris-roe-abortion.html [https://perma.cc/J4MV-6NYB] (reporting that the "idea that preserving access to abortion is tantamount to preserving personal freedoms has been embraced by Biden administration officials, lawmakers and activists"). The shift is reflected in a name-change by the leading abortion rights organization. Caroline Vakil, *NARAL Pro-Choice America Rebranding as Reproductive Choice for All*, THE HILL (Sept. 20, 2023, 9:27 AM), https://thehill.com/homenews/campaign/4213613-naral-pro-choice-america-rebranded/ [https://perma.cc/Z9U9-V388].

245. *See, e.g.*, Rogers, *supra* note 244.

246. The label "partial-birth abortion," for instance, seems to have contributed to the success of campaigns to restrict late term abortions. *See generally* ZIEGLER, *supra* note 63, at 81–97.

opponents view abortion as the taking of a human life, they will never be reconciled to universal abortion to anywhere near the extent that most opponents have come to accept same-sex marriage. This suggests that even as older Americans die and are replaced by younger generations, and even as Americans become less religious, the debate over abortion will continue.

In short, a decisive victory for either side is highly unlikely, and even stable compromise will be difficult to achieve. The pendulum swings in both directions and does not come to a final, fixed resting point on either side.

IV. THE DEBATE WILL GO NATIONAL AGAIN

The early response to *Dobbs* has seemed to confirm the conclusions drawn by Professor McConnell in his argument on the benefits of local control discussed earlier.[247] In the tumult that ensued after *Dobbs*, the battles took place, and continue to take place, in the states. When Republican Senator Lindsey Graham introduced proposed legislation that would impose a national ban on abortion after 15 weeks, even other Republicans declined to join him.[248] Although Democrats in the House were more successful with their own abortion legislation, passing a bill that would reinstate *Roe v. Wade* as a matter of federal law, it was viewed as a symbolic victory, not a prelude to actual enactment.[249]

In practice, however, contested social issues never stay local in America. Citizens in a state that bans a controversial practice are not content simply to live in a state that reflects their views.[250] They are unhappy that citizens in other states engage in the controversial practice. They are motivated by moral principle, not just their own immediate well-being.[251] Slavery is the most obvious example, but it is not the only one. In the late nineteenth century, gambling and prostitution were both regulated by the states.[252] This approach made sense, since popular majorities in some states viewed lotteries as pernicious, while other states favored keeping lotteries legal, and different regions had different attitudes toward prostitution.[253] It wasn't clear that Congress could regulate these issues even if it wanted to, since states were the primary regulators and the Commerce Clause of the U.S. Constitution was construed much more narrowly than it is today.[254] Yet Congress enacted federal laws that criminalized portions of markets both for gambling and for

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247. See *supra* Section II.A.

248. *See, e.g.*, Colleen Long, *White House Says GOP's Abortion Ban Proposal Could Lead to a Nationwide Crisis*, PBS (Sept. 22, 2022, 3:49 PM), https://www.pbs.org/newshour/politics/white-house-says-gops-abortion-ban-proposal-could-lead-to-a-nationwide-crisis [https://perma.cc/7QXF-KJQR].

249. *See, e.g.*, Amy B. Wang & Eugene Scott, *House Passes Bills to Codify Abortion Rights and Ensure Access*, WASH. POST, https://www.washingtonpost.com/politics/2022/07/15/house-abortion-roe-v-wade/ [https://perma.cc/3H7M-TUX3] (July 15, 2022) (referring to the "bills' doomed futures").

250. *See* Skeel & Stuntz, *supra* note 112, at 268.

251. *Id.*

252. *See id.* at 271.

253. *See id.*

254. *See, e.g.*, *id.* at 269–70 (describing the expanding understanding of the Commerce Clause).

prostitution: several federal statutes outlawed the shipping of lottery tickets or other lottery materials through the mail in the 1890s, and the Mann Act prohibited interstate transportation intended to facilitate illicit sex in 1910.[255] The Supreme Court expanded its Commerce Clause jurisprudence far enough to uphold each of these laws.[256] The pattern continued in the decades that followed, with the advocates of prohibition securing a constitutional amendment banning the manufacturing or sale of alcohol from 1919 to 1933, and gay rights advocates securing a constitutional right to same-sex marriage in 2015.[257]

The historical pattern suggests that *Roe*'s nationalization of the abortion debate was not an aberration and that *Dobbs* will not be the final word. The battle over abortion will go national again.[258] The current dynamics of abortion make the shift back to Washington especially likely. With abortion, citizens of a pro-life or pro-choice state face more than just the unhappiness of knowing that citizens in other states are getting abortions or lack access to abortion, respectively. There is traffic between the two. A pregnant woman in a pro-life state can travel to a pro-choice state to get an abortion, and pro-life states cannot easily prevent their citizens from doing so.[259] The increased availability of abortion drugs, which are now used in more than half of all abortions, has made this much easier than in the past.[260] Pharmacists can dispense abortion drugs in some states, which obviates the need to get them from a doctor.[261] It may even be possible for a pregnant person to take the first of the two abortion drugs[262] in a pro-choice state, then return to her pro-life state to take the second drug; or for the pregnant person to arrange a Zoom call with a doctor in a pro-choice state and have the drugs mailed to her.[263]

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255. *See id.* at 268–69.

256. *Id.* at 269–70.

257. *Id.* at 271 (discussing Prohibition and gambling regulation).

258. With the fight over FDA approval of mifepristone, the battle over abortion has in a sense already gone national, since a district court judge issued a nationwide injunction and the case made its way to the Supreme Court, which held that the plaintiffs did not have standing. FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024). But we expect the larger debate over when, if ever, to ban abortion will also go national.

259. In his *Dobbs* concurrence, Justice Kavanaugh noted that the right to travel would likely preclude such efforts. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring); *see also* Yellowhammer Fund v. Marshall, 733 F. Supp. 3d 1167, 1188 (M.D. Ala. 2024) (holding that efforts at restricting the movement of women seeking abortions violates the constitutional right to interstate travel).

260. Professors David Cohen, Greer Donley, and Rachel Rebouché have published several important recent articles on the implications of this development. Cohen, Donley & Rebouché, *supra* note 176, at 320; David Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 29, 33–34, 51 (2023).

261. *See, e.g.*, Doina Chiacu, *CVS, Walgreens to Begin Selling Abortion Pill This Month*, REUTERS (Mar. 1, 2024, 11:44 PM), https://www.reuters.com/world/us/cvs-walgreens-begin-dispensing-abortion-pill-this-month-nyt-2024-03-01/# [https://perma.cc/C432-T3UR].

262. The first pill, mifepristone, halts the pregnancy. The second drug—misoprostol—which is taken one or two days later, "causes uterine contractions that expel fetal tissue." Cohen, Donley & Rebouché, *supra* note 176, at 324–25.

263. Professors Cohen, Donley, and Rebouché consider the possibilities in detail. *Id.* at 348–49.

Skirmishing between pro-choice and pro-life states is already well underway. Massachusetts, a strongly pro-choice state, has enacted a shield law that is intended to protect Massachusetts doctors who send abortion pills to pregnant people in pro-life states against prosecution for violating the laws of the pro-life state.[264] New York, another pro-choice state, has adopted a policy of facilitating abortions for those who come to the state seeking abortions.[265] As pro-choice states take steps to encourage travel for abortions, some pro-life states are trying to curb abortion travel. A new Idaho law polices "abortion trafficking," which is defined as helping a minor obtain an abortion "with the intent to conceal an abortion from the parents or guardian of a pregnant unemancipated minor," and explicitly excludes travel to another state as a defense.[266] Pro-life states also invoke the Comstock Act, a century-and-a-half-old law that outlaws the use of the mail for abortion-related products.[267]

It is possible that the jockeying among states will eventually lead to a passable equilibrium on abortion. One can imagine the states settling into a pattern characterized by abortion laws that vary by state, together with rough compromises as to what restrictive states can do to prevent travel to permissive states, and as to what permissive states can do to facilitate abortions in restrictive states. But given the intensity of the commitments at stake on each side, the frictions are far more likely to continue and to create pressure for national intervention. Assuming the intervention took the form of federal legislation (rather than, say, a Supreme Court ruling by a new liberal majority), three possible approaches have been suggested: a national abortion ban, reinstating *Roe* through federal legislation, or legislation using 15 weeks as the dividing line. We consider each in turn.

A few pro-life lawmakers have advocated a national abortion ban.[268] This effort has attracted the attention of legal scholars who worry that such a ban might actually be passed.[269] Other scholars have expressed concern that the Supreme Court

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264. *See, e.g.*, Adam Piore, *How Massachusetts Became the Center of Resistance to Anti-abortion Forces*, BOS. GLOBE, https://www.bostonglobe.com/2024/06/21/metro/massachusetts-is-the-center-of-the-post-dobbs-resistance/ [https://perma.cc/PA55-L294] (June 21, 2024, 6:28 AM) (describing the shield law).

265. *See, e.g.*, *Governor Hochul Announces Major Actions to Strengthen Abortion Protections and Access as Part of FY 2024 Budget*, GOVERNOR (May 3, 2024), https://www.governor.ny.gov/news/governor-hochul-announces-major-actions-strengthen-abortion-protections-and-access-part-fy [https://perma.cc/U2US-JH72] (stating that "Governor Kathy Hochul today announced major actions as part of the FY 2024 Budget to protect abortion access and solidify New York's status as a safe harbor for all who seek abortion care").

266. IDAHO CODE § 18-623(1), (3) (2023); *see also* Laura Kusisto & Jennifer Calfas, *Idaho Legislature Votes to Restrict Abortion Travel by Minors*, WALL ST. J. (Mar. 31, 2023, 2:59 PM), https://www.wsj.com/articles/idaho-legislature-votes-to-restrict-abortion-travel-by-minors-c8911e43 [https://perma.cc/XZ2C-2GYW] (describing the legislation).

267. Cohen, Donley & Rebouché, *supra* note 176, at 342–45.

268. *See, e.g.*, Andrew Perez, *House Republicans Endorse a National Abortion Ban*, ROLLING STONE (Mar. 21, 2024), https://www.rollingstone.com/politics/politics-news/house-republicans-national-abortion-ban-endorse-1234991746/ [https://perma.cc/XQ84-MRME].

269. *See* Tang, *supra* note 9, at 1094–96.

may be laying the groundwork for recognizing constitutional protection for fetal personhood.[270] Even before the backlash to *Dobbs*, the prospects for a national ban were trivially small. The legislative proposals have been largely symbolic. Absent a radical change in Americans' views on abortion, it is inconceivable that a majority of Congress would vote for such a law.[271]

Even if Congress somehow passed a federal abortion ban, it might be struck down as unconstitutional if the Court hewed to the logic of *Dobbs*.[272] Recall that in *Dobbs* the Court rejected on originalist grounds *Roe*'s holding that abortion is protected by the Fourteenth Amendment.[273] When the Fourteenth Amendment was adopted in 1868, a substantial majority of states prohibited abortion, and the Court concluded that abortion rights did not have a strong grounding in history and tradition.[274] The right to abortion therefore lacked the historical foundation the Court looks for when it determines which rights are constitutionally protected. The Court concluded that *Roe* wrongly struck down state laws that restricted or barred abortion.[275]

For a federal law, the constitutional analysis would focus on the Fifth Amendment, which was adopted in 1791, rather than the Fourteenth Amendment.[276] Many of the abortion prohibitions referenced by Justice Alito in *Dobbs* were passed by states in the 1830s and 1840s, well after the Fifth Amendment was adopted.[277] In 1791, states generally did not bar abortion prior to "quickening"—the point where movement can be detected in the womb.[278] This is generally at 16 to 20 weeks, but it can be either earlier or later.[279] In his historical analysis in *Dobbs*, Justice Alito suggested that common law authorities were hostile to abortion, even in the absence

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270. *See* Murray & Shaw, *supra* note 22, at 803–04 (speculating that "the Court's repeated references to 'fetal life,' 'potential life,' and 'unborn human being[s]' may have been designed both to lay the foundations for constitutionalizing such a rule and to broadcast receptivity to such claims to litigants and lower courts").

271. The Alabama Supreme Court recently ruled that an embryo is a person for some purposes, but even in this pro-life state, the legislature quickly acted to limit the effect of the ruling. *See, e.g.*, Praveena Somasundaram, *Alabama Governor Signs IVF Bill Giving Patients, Providers Legal Cover*, WASH. POST, https://www.washingtonpost.com/nation/2024/03/06/alabama-governor-signs-ivf-bill/ [https://perma.cc/AHU9-PK8C] (Mar. 7, 2024).

272. Professor Tang has made this point at length. Tang, *supra* note 9, at 1107–11.

273. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

274. *Id.* Rather than 28 out of 37 states prohibiting abortion, Tang argues that a more accurate number may be 16. Tang, *supra* note 9, at 1128.

275. *Dobbs*, 597 U.S. at 228–29.

276. Professor Tang has made this point most persuasively in the service of an argument that a complete federal ban on abortion would be unconstitutional. Tang, *supra* note 9, at 1107–11. We are considering the possibility of a more limited ban. Tang notes the possibility that a more limited ban may be constitutional. *Id.* at 1106 n.73 (speculating about a 16-week ban).

277. *See id.* at 1110.

278. *Id.* at 1097.

279. *See id.* (describing quickening as "often at sixteen to eighteen weeks").

of explicit prohibition.[280] But it is debatable whether a federal ban on early-stage abortions could be justified in originalist terms.[281]

Reinstating *Roe*, the second option, is more plausible politically and constitutionally, especially given the backlash to *Dobbs*. A majority of Americans currently support a return to *Roe*.[282] And during her presidential run, Kamala Harris vowed to remove the Senate filibuster so that legislation reinstating *Roe* could be enacted.[283] But this approach also has serious limitations. The chief attraction of reinstating *Roe* is that *Roe* is much closer to the preferences of the median voter than a complete or nearly complete ban. But any abortion legislation would need to be bipartisan so long as the Senate filibuster rule remains in place (and assuming neither party has 60 senators). It would be very difficult to secure Republican votes for a legislative return to *Roe*, since this would be perceived as a rejection of the current Supreme Court, and it would anger opponents of abortion, a key Republican constituency. In addition, although legislative reinstatement of *Roe* seems less constitutionally questionable than a complete federal ban on abortion, the Supreme Court might well strike it down as unconstitutional. The *Roe* approach permits abortions in the second and third trimesters, well after the "quickening" of the fetus that marked the last point at which most states allowed abortion in 1791.

A version of the last approach, which permits abortions up to 15 weeks and prohibits them after, is the most workable of the three. This may seem surprising given that the 15-week cutoff has not proven compelling either to the Supreme Court or to Congress: it garnered only Chief Justice Roberts's vote in *Dobbs*, and a legislative proposal to prohibit abortions after 15 weeks has attracted very little interest in Congress.[284] Fifteen weeks does not correspond to any particular stage of pregnancy or fetal development. The 15-week dividing line seems to have been chosen by Mississippi to push the boundaries of permissible abortion restrictions under *Roe*.

Fifteen weeks also would be fiercely resisted by many abortion rights advocates and abortion opponents. For abortion rights advocates, it would retreat from the victories they have won since *Dobbs* was decided,[285] which provide abortion access comparable to the *Roe* regime in many states. Many abortion opponents, particularly those in the 16 states that currently ban most or all abortions, would bitterly oppose the loss of these restrictions.

Despite these impediments, a federal 15-week rule is more plausible than it initially seems. Although it is more restrictive than the preferences of the median American voter, 15 weeks is not sharply inconsistent with those views. It would prohibit the abortions that Americans find most problematic, while allowing the

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280. See *Dobbs*, 597 U.S. at 250.

281. *See* Tang, *supra* note 9, at 1107–11.

282. *See, e.g.*, *Poll: Growing Majority of Americans Want Congress to Restore* Roe v. Wade *Protections Nationwide*, *supra* note 59.

283. *See* Robert Tait, *Harris Calls for End to Senate Filibuster to Restore US Abortion Rights*, THE GUARDIAN (Sept. 24, 2024, 3:40 PM), https://www.theguardian.com/us-news/2024/sep/24/election-harris-filibuster-abortion-roe [https://perma.cc/ULS3-NENF].

284. *See, e.g.*, Long, *supra* note 248.

285. *See supra* notes 128–37 and accompanying text.

early-stage abortions that are now often done with abortion drugs. As a result, it would reduce the skirmishing between pro-choice and pro-life states. In addition, many of the excruciating cases that have recently drawn media attention—such as the 10-year-old Indiana girl who was raped[286]—would disappear if there were a federal 15-week rule. A 15-week rule also would almost certainly be constitutional under the historical approach employed by the *Dobbs* Court. It does not correspond perfectly to quickening, the point where many states banned abortion in 1791, but it is a rough approximation.

A federal 15-week rule would not permanently resolve the abortion issue. The interests at stake are incommensurable and extraordinarily deeply held. The 15-week cutoff does not correspond to anyone's view of the ideal dividing line, including ours. But a 15-week rule would be more stable in the short term and would prompt less backlash than the principal alternatives. It is also worth noting that this rule would bring American abortion law more in line with abortion laws elsewhere in the world.[287] In many European countries, for instance, abortion is permitted up to roughly 12 weeks, although there are often exceptions allowing some later abortions.[288]

Whether or not Congress will actually gravitate toward a 15-week rule is, of course, currently unknowable. We are not intending to make any prediction in this regard. Our principal points are simply that the debate is destined to go national again, and that a 15-week demarcation is a more plausible approach than either of the federal alternatives currently on offer.

CONCLUSION

This Article has attempted to provide a complete account of abortion politics since the Supreme Court decided *Dobbs*. The Article began by analyzing a key puzzle of abortion politics: the fact that major victories in the Supreme Court proved counterproductive for the winning side both in *Roe* and in *Dobbs*. The backlash spurred by the rulings mirrored the backlash to judicial decisions on other social issues to some extent but also included features distinctive to the abortion debate. Although some commentators have suggested that practices such as gerrymandering and tightening restrictions on voting are the principal obstacles to a stable resolution of the abortion debate, this Article concludes that these developments are not nearly as problematic as these commentators fear. A much more significant obstacle to resolution is the incommensurability of the commitments underlying each side's position—women's equality for abortion rights advocates and the sanctity of human life for abortion opponents.

The *Dobbs* ruling envisions that the debate will be resolved through democratic processes at the state level, with some states sharply restricting abortion while other states expand access. Since *Dobbs*, state decision-makers have indeed responded in divergent ways. This pattern of state-by-state divergence is unlikely to

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286. Narea, *supra* note 108.

287. *E.g.*, Rachel Cohen, *Republicans' Abortion Bans Are Nothing Like Those in Europe*, VOX (June 6, 2023, 4:00 AM), https://www.vox.com/23741997/republicans-12-week-abortion-bans-europe-roe-dobbs [https://perma.cc/832M-5BTH].

288. *Id.*

continue for long, however. Based on the historical pattern with controversial social issues ranging from slavery to gambling, the manufacture and sale of alcohol, and same-sex marriage, this Article predicts that voters will not be content to live in a state whose stance on abortion reflects their own views. They will be unhappy that other states diverge from their views. This tendency is already reflected in abortion opponents' efforts to chill travel to states that allow abortion, and in abortion rights advocates' efforts to facilitate abortions for pregnant people in states that ban abortion. Pressure will soon begin to mount for a national response. This Article assessed the three federal approaches that have been proposed, considering both their political plausibility and the likelihood that the Supreme Court would deem them to be constitutional under the reasoning that the Court employed in *Dobbs*. A 15-week rule is the approach that is most likely to satisfy both constraints.