Equality Emerges as a Ground for Abortion Rights In and After *Dobbs*

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## ABSTRACT

This chapter locates debates over abortion in equal protection and in an evolving understanding of women's citizenship. Sex discrimination law has grown from the time of *Roe* to *Dobbs*; and sex equality arguments can structure the debate about abortion that continues after *Dobbs*, in litigation and in legislation, in state and federal arenas. We draw on case law, history, and common sense to show that principles of equal citizenship require government to protect potential life in different ways today than it has in the past, when criminal bans on abortion enforced caste-based understandings of women's roles. The labor of lifegiving is no longer to be coerced or extracted by law—as states enforcing the law of gender status historically assumed it could be. Equal protection commitments give rise to an anti-carceral presumption in regulating abortion. As state laws inside and outside the abortion context attest: States that respect women as equal citizens do not turn, as a matter of first resort, to measures that rely on coercion and control when there are numerous less discriminatory and less restrictive ways to protect potential life. Reaching for carceral solutions perpetuates the forms of inequality that are the central concern of sex-based equal protection law. To opt for the maximally coercive approach—forced pregnancy and childbirth—when there are alternative means for enabling families to flourish is neither constitutional nor plausibly characterized as promoting life.

Is *Dobbs*[1] the end of the abortion right? Or is *Dobbs* a stage in the struggle over abortion rights? If the United States Supreme Court had invented the abortion right, the Court might have the power to kill it. But if in deciding *Roe v. Wade*,[2] the Court interpreted the Constitution's liberty guarantee in light of public belief that people ought to have control over certain life decisions, in particular the belief that it is wrong for government to coerce a woman to continue a pregnancy, then the Court cannot unilaterally eradicate that belief.

In 1973, a time when women barely had any role in the state or federal government, in the courts, or in the legal academy, converging movements for the decriminalization of abortion and for recognition of women's equal citizenship helped move a virtually all-male judiciary to extend the right to privacy to protect decisions about whether to carry a pregnancy to term.[3] At the time *Roe* was decided, Justice Blackmun had a Gallup poll showing supermajority support

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

[2] 410 U.S. 113 (1973).

[3] *See* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2042-49 (2021); Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1922-29 (2021).

for leaving the abortion decision to a woman and her doctor, support that consolidated after the Court's ruling and has remained remarkably steady.[4]

In the intervening half century, the constitutional framework the Court forged in 1973 has been the locus of conflict.[5] For a half century the Court vindicated that right, reaffirming it countless times, famously in 1992, in *Planned Parenthood v. Casey*,[6] and as recently as 2016 and 2020. But three Justices appointed, in procedurally contested circumstances, by President Donald Trump have formed a court to declare *Roe* and *Casey* egregiously wrong and reverse those decisions.[7]

In this chapter we consider the Supreme Court's repudiation of *Roe* and *Casey* as a time of transition in the form of abortion rights rather than as a time of their abolition. The Court's decision to repudiate *Roe* and *Casey* destroys protections that federal courts afforded the right for fifty years. At the same time, it opens the door for advocates of reproductive justice to defend the abortion right in terms consistent with twenty-first century understandings of women's equal citizenship.

The focal point of our attention is equal protection as a ground of abortion rights claims. In *Dobbs*, before reversing *Roe*, Justice Alito reached out in dicta to assert that equality supplied no basis for abortion rights—betraying his anxiety that the Equal Protection Clause in fact supplied abortion rights claims a natural constitutional home. As there was no equal protection claim asserted in *Dobbs*, Justice Alito could not rule on the claim in the *Dobbs* case.[8] The question of how equal protection speaks to the regulation of abortion is open now in a way it has

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[4] *See* LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 207-10 (2d ed. 2012), https://documents.law.yale.edu/sites/default/files/beforeroe2nded_1.pdf (discussing 1972 Gallup poll showing 57% of respondents supported the idea that "abortion should be a decision made by a woman and her physician"). Polling conducted in the immediate aftermath of *Roe* showed continuing popular support for abortion rights. William Ray Arney & William H. Trescher, *Trends in Attitudes Toward Abortion, 1972-1975*, 8 FAM. PLAN. PERSPS. 117, 117-18 (1976). In June of 2022 after the draft opinion leaked, 58% of Americans told Gallup they opposed overturning *Roe*, and 63% of Americans told Gallup that overturning *Roe* and allowing each state to establish its own abortion policies would be a "bad thing." Megan Brenan, *Steady 58% of Americans Do Not Want* Roe v. Wade *Overturned*, GALLUP (June 2, 2022), https://news.gallup.com/poll/393275/steady-americans-not-roe-wade-overturned.aspx. After the Court issued *Dobbs*, 57% of those polled told Pew they disapproved of the ruling, including 43% who strongly disapproved. *Majority of Public Disapproves of Supreme Court's Decision to Overturn* Roe v. Wade, PEW RSCH. CTR. (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade. Sixty-two percent said abortion should be legal in all or most cases. *Id.*

[5] *Roe* was engulfed in politics the decision itself did not cause. Republicans used *Roe* to realign conservative Catholics who had long voted with the Democratic Party. *See* GREENHOUSE & SIEGEL, *supra* note 4, 263-318.

[6] 505 U.S. 833 (1992).

[7] *See* Reva B. Siegel, *Memory Games:* Dobbs*'s* O*riginalism as Anti-Democratic Living Constitutionalism — and Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023) [manuscript pages will need updating].

[8] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245 (2022) (citing two amicus briefs focused on recent developments in sex-based equal protection law). In *Dobbs*, Justice Alito asserted that equal protection was not an independent ground for abortion rights even though he knew there was no equal protection claim in the case. (Judge Carlton Reeves pointed out that the plaintiffs had amended their complaint to drop their equal protection challenge to Mississippi's statute. Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 539 (S.D. Miss. 2018)).

not been open in a half century. Contestation over this question will unfold in federal court, in Congress and the executive branch, in state courts and legislatures, and in the court of public opinion – in every arena in which conflicts over abortion rights continue.

For fifty years, the framework the Court adopted in *Roe* has structured legal and popular contestation over abortion. That framework analyzed the abortion right as grounded in the Fourteenth Amendment's due process liberty guarantee, even as the Court increasingly came to reason about that liberty right as infused with equality values that advocates have asserted since the 1960s.[9] Now that the Court has overruled *Roe* and *Casey* and demolished the due process framework it created in 1973 for reasoning about the constitutional values at stake when government controls pregnancy and childbirth, it is time to ask in what ways the Equal Protection Clause might speak directly to the question.[10]

What is at stake in examining equal protection as an alternate constitutional ground for challenging laws criminalizing abortion if a conservative majority of the Court is now implacably hostile to abortion rights? First, even with this majority, there may be opportunities for advocates to challenge the vague and draconian abortion bans now causing doctors and hospitals to refuse or delay care until death is proximate in cases involving cancer treatment, ectopic pregnancies, miscarriages, and hemorrhaging.[11] A pregnant person who is deprived of needed medical care because providers fear prosecution under an abortion ban with a narrow or ill-defined life exception could assert liberty and equality claims that might split the coalition that overturned *Roe* and *Casey*.

The equal protection analytic can also guide actors in the executive branch and Congress, as well as actors in state courts and legislatures. The equal protection questions we raise are relevant in crafting new legislation and new constitutional provisions, in interpreting existing constitutional texts, and in everyday debates over the justice of abortion bans. This chapter is not a call for abandoning liberty-based arguments for reproductive justice, but for expanding the repertoire.

Because liberty-based arguments have taken center-stage for so long in contestation over abortion, the implications of modern equal protection law for the regulation of abortion are not well-understood. Women's rights advocates have long offered equality-based arguments against

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[9] *Casey*'s account of a woman's constitutionally protected liberty to make decisions about bearing children is deeply informed by the Court's sex-equality jurisprudence, in its restatement of the liberty interest, its discussion of reliance and stare decisis, and its application of undue burden to strike a spousal notice requirement. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852, 856, 895-98 (1992). Justice Blackmun made direct appeal to the Equal Protection Clause. *See id*. at 928 & n.4 (Blackmun, J., concurring in part) (quoted *infra* text at note 77).

[10] Justice Blackmun and Justice Ginsburg have each addressed this question. *See Casey*, 505 U.S. at 928 & n.4 (Blackmun, J., concurring in part); Gonzales v. Carhart, 550 U.S. 124, 171, 185 (2007) (Ginsburg, J., dissenting).

[11] *See, e.g.*, Kate Zernike, *Medical Impact of* Roe *Reversal Goes Well Beyond Abortion Clinics, Doctors Say*, N.Y. TIMES (Sept. 10, 2022), https://www.nytimes.com/2022/09/10/us/abortion-bans-medical-care-women-html; *see also infra* notes 49–54 and accompanying text.

stringent abortion regulation. The Court itself emphasized the conflict between such regulation and equal protection law as a key reason for reaffirming *Roe* in *Casey* and for applying *Casey*'s undue burden standard to strike down an abortion statute.[12] But the full implications of modern equal protection law for the regulation of abortion have not been explored and developed.

This chapter begins by showing how sex discrimination law has evolved since *Roe*, which was handed down at a time when the Court had decided only one sex-based equal protection case. Sex discrimination law today is a much more powerful body of law than it was fifty years ago. It declares sex-based state action presumptively unconstitutional, and especially suspect when it enforces traditional family roles. Before regulating by sex-based means that force people into such roles, government must show why it cannot achieve its ends by more inclusive, less restrictive means. This equal protection sex discrimination framework extends to laws regulating pregnancy, and thus, to abortion restrictions.

As Part II shows, the equal protection analytic provides powerful tools for probing the ways that antiabortion jurisdictions protect life. Asking equal protection questions of abortion bans raises disturbing questions about their sex-, class-, and race-based animus and impact. The *Dobbs* Court was itself sufficiently disturbed by the power of this alternate constitutional framework that it reached out in dicta to insist that laws governing pregnancy are not subject to heightened equal protection scrutiny, and to assert in its merits decision that nineteenth-century abortion bans protected unborn life and did not express constitutionally suspect judgments about women.

In Part III of this chapter we show how *Dobbs* misrepresents the past and present logic of abortion bans. Bans on abortion were adopted at a time when law enforced gender hierarchy in the public and private spheres. Advocates argued that abortion bans were needed to protect unborn life *and* to enforce women's roles and the procreative ends of marital sex. Over time, abortion was codified as a morals crime, a sex crime, a crime against the family. As we show, this understanding of abortion restrictions persists to the present day. Judgments about women's roles and about sex continue as a part of abortion argument, sometimes in the register of paternalism, sometimes in the register of punishment. Even when it is not openly expressed, sex-role-based reasoning continues to shape the structure of abortion regulation and its justifications, demonstrating why equal protection scrutiny is warranted.

Equal protection permits abortion regulation of some kinds, but the regulation of women in our constitutional order can no longer be premised on the view that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother," as Justice Brennan observed in *Frontiero v. Richardson*[13] a half century ago, just after the Court decided

[12] *See supra* note 9.
[13] 411 U.S. 677, 685 (1973) (plurality opinion) (quoting Bradwell v. State, 16 Wall. 130, 83 U. S. 141 (1873) (Bradley, J., concurring)).

*Roe*. This chapter's fundamental claim, set forth in Part IV, is that the regulation of abortion must take account of that fundamental shift in law and social understanding of women's civic membership. In the era in which abortion bans were first adopted, lawmakers understood women as caregiving dependents of male heads of household; today women are recognized as equal and independent members of the polity. Evolving understandings of women's citizenship have implications for *how* the state protects new life. The state must protect new life in ways that respect women as equals in the constitutional order, not simply in the formal sense—can we find a male comparator?—but with historical memory of the ways that the state for too long restricted women's civic status and instrumentalized women's lives in the service of family care.

Put differently, we argue in this chapter that women's status as equal citizens—recognized in Supreme Court equal protection case law—gives rise to an *anti-carceral presumption*. A state seeking to protect life must do so in ways that are consistent with women's equal citizenship; to demonstrate that a state regulating abortion is acting on a bona fide interest in protecting new life—rather than controlling and punishing those who resist maternity—the state must first endeavor to protect new life by supporting those who nourish new life. The labor of lifegiving is no longer to be coerced or extracted by law—as states enforcing the law of gender status historically assumed it could be, and abortion abolitionists still insist it can be.

In what ways must the forms of law employed to protect and respect new life evolve with evolving understandings of women's citizenship? This is a debate we need to be having in courts and legislatures and in the court of public opinion. Some decisionmakers might say that in 2023 the *only* way that public authorities can protect life consistent with equal protection is to employ noncoercive means. Others might question this exclusively noncoercive view and conclude that women's equal citizenship imposes a condition: that a jurisdiction must at least provide its citizens resources to avoid becoming pregnant and to navigate pregnancy in health and dignity *before* the state can adopt an abortion ban consistent with equal protection. The authors of this chapter are committed to the exclusively noncoercive view. But what we think most critical in the wake of *Dobbs* is that legislatures and courts conduct this debate on terms that make clear that women have rights as equal citizens that they did not when abortion bans were first enacted and that these rights need to be taken into account whenever Americans deliberate about the protection of potential life and the regulation of abortion.

## I. The Evolution of Equal Protection Law and Its Implications for Abortion Regulation

A half century ago, law protecting sex equality and sexual freedom was born under two different clauses of the Fourteenth Amendment. The Court's 1965 decision in *Griswold v. Connecticut*[14] was decided so early that the Court did not even see it as constitutionally relevant that Connecticut enforced its criminal ban against contraceptives used by women but allowed

[14] 381 U.S. 479 (1965).

drug stores to sell condoms over-the-counter to men.[15] In *Roe*, the Court famously had difficulty remembering whether doctors or women were the rights holders.[16]

Litigants were remarkably creative in devising ways to make women's voices heard in a system where women were still radically underrepresented,[17] and abortion so stigmatized from a century of criminalization that it was difficult to conduct ordinary democratic debate about the question. They used speak-outs and other story-telling techniques to point out the systemic inequalities that laws criminalizing abortion intensified. They emphasized that because a gender hierarchical society organized sex roles around reproduction, taking control over pregnancy from women not only took control over women's bodies but also took control over women's lives in matters of sex, health, family relations, education, work, and politics. They invoked most every constitutional clause to say so. And they emphasized that these harms were intersectional, enforcing inequality along lines of race and class as well as sex.[18]

An all-male court responded, slowly. As Justice Blackmun revised the *Roe* opinion in colloquy with his colleagues, the Court expanded *Roe* from a case about injuries to doctors to include the injuries to pregnant women[19] and expanded the time women's decision was protected to two trimesters to ensure that poor and young women could access the right.[20]

But *Roe* was still a transitional decision, unfolding in the footprint of the criminalization regime. *Roe* simply took for granted that the state has a benign interest in protecting potential life that becomes compelling over the course of pregnancy. The Court did not recognize that what *Roe* terms "the state interest in potential life" was at one and the same time a state interest in *regulating women's decisions about motherhood, the role determining women's civic status*—or recognize that this was state action that might warrant heightened scrutiny given what the Court would call only a few months later, the nation's "long and unfortunate history of sex discrimination."[21] Reasoning in a world before its equal protection sex discrimination opinions, *Roe* did not express concern about stereotyping or the coercive imposition of maternity. The

[15] *See* Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 23-24 (2018).
[16] *See* Reva B. Siegel, Roe'*s Roots: The Women's Rights Claims that Engendered* Roe, 90 B.U. L. REV. 1875, 1897 (2010) (quoting Roe v. Wade, 410 U.S. 113, 162-66 (1973)).
[17] *See* NeJaime & Siegel, *supra* note 3, at 1924 ("In 1968, only six women were federal judges and only twelve women served in Congress.") (citation omitted); Catherine J. Lanctot, *Women Law Professors: The First Century (1896-1996)*, 65 VILL. L. REV. 933, 957 (2020) ("As of 1965, only about thirty women had ever served as full-time tenure-track law professors.") (citation omitted).
[18] *See* Siegel, *supra* note 16, at 1889-92; NeJaime & Siegel, *supra* note 3, at 1928-29.
[19] *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 98-99 (2005); Nancy Stearns, Commentary, Roe v. Wade*: Our Struggle Continues*, 4 BERKELEY WOMEN'S L.J. 2-5 (1988-90).
[20] *See* GREENHOUSE , *supra* note 19, at 96-101.
[21] Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

Court built *Roe*'s trimester framework on a premise of "physiological naturalism."[22] Abortion laws regulate women because women are where the fetus happens to be. Any imposition on women is reasonable, explained by features of women's bodies.[23] The Court reasoned as if objective facts about the body—rather than assumptions about social structure or social roles—explained the architecture of its decision. It meted out privacy rights to women and their doctors in accordance with different stages of fetal development, never asking how laws that regulate abortion—past or present—expressed, enforced, or structured women's membership in the community. "When the fetus is considered as an object of regulatory concern distinct and apart from the woman bearing it, it becomes possible to reason about regulating women's conduct without seeming to reason about women at all."[24]

It is not surprising that the Court adopted this approach at the time of *Roe*. In 1973, the Court had not yet held that sex-based state action is subject to heightened scrutiny and it was not ready to integrate pregnancy, a so-called "real difference," into the logic of its nascent sex discrimination jurisprudence. Feminists in this period argued that laws regulating pregnancy were a core site of sex stereotyping. But in 1974, the Court held in *Geduldig* that a pregnancy classification was not a sex classification for the purposes of equal protection, based on the same physiological naturalism evident in *Roe*. The Court in this early period viewed pregnancy as a distinct physical condition, affecting some subset of women, and not as part of the sex role of motherhood. It could not yet recognize the ways in which regulation of pregnant women might enforce sex-role stereotypes, nor could it conceive of applying constitutional equality protections across biological difference.[25]

In dicta in *Dobbs* dismissing equal protection as an alternative ground of the abortion right, the Court invoked *Geduldig* as if equal protection law was fully formed in the early 1970s, before the Court had even adopted a framework for analyzing sex-based state action. But the law has evolved substantially since *Geduldig* and the very first sex discrimination cases. Over the past fifty years, there has been intense debate about the Equal Rights Amendment, a veritable stream of cases litigated under the Constitution, and the development of a rich body of case law under the nation's civil rights statutes, including debate over civil rights law addressing pregnancy. (In 1978, Congress repudiated the Court's efforts to import *Geduldig*'s reasoning into federal employment discrimination law and enacted the Pregnancy Discrimination Act (PDA),

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[22] Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 267 (1992) [hereinafter Siegel, *Reasoning from the Body*]; *see also* Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, GEO. L.J. 19TH AMEND. SPECIAL ED. 167, 189 (2020) [hereinafter Siegel, *The Pregnant Citizen*]; *id.* at 189 n.127 ("According to the logic of physiological naturalism, because reproductive differences are objective, real, and categorically distinguish the sexes, (1) judgments about pregnancy are free of stereotypes and constitutionally suspect assumptions about social roles and (2) laws imposing unique burdens on one sex are reasonable.").

[23] *Id*.

[24] Siegel, *Reasoning from the Body, supra* note 22, at 333.

[25] Siegel, *The Pregnant Citizen*, *supra* note 22, at 191-99 (discussing understandings of the feminist litigators and the Justices of the Burger Court in pregnancy cases of the 1970s).

which defines discrimination on the basis of pregnancy as discrimination on the basis of sex for purposes of Title VII of the 1964 Civil Rights Act.[26])

The all-male bench that decided *Geduldig* imagined women as equal to men only to the extent they were like men. Two decades later, in *United States v. Virginia*,[27] the Court summarized its equal protection sex discrimination cases emphasizing that women are entitled to be treated as men's equals notwithstanding "'[i]nherent differences' between men and women."[28] The Court affirmed that law classifying on the basis of sex "may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' [and] to advance full development of the talent and capacities of our Nation's people.'"[29] But, the Court explained, "such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."[30]

To make clear that pregnancy is the primary object of this analysis—the main "inherent difference" to which this passage refers—the Court points to a state law governing pregnancy (a maternity leave benefit, upheld under the PDA in *California Federal Savings & Loan Association v. Guerra*[31]) as a paradigmatic example of a law classifying on the basis of sex that is constitutional because it advances women's equality.[32] The Court explains in this passage that equal protection does not require the state to ignore the physical reality of pregnancy, but that regulation of pregnancy must be designed to promote equal opportunity and may not perpetuate women's subordination. Rather than "reasoning from the body"[33]—as the Court did when it declined to apply heightened scrutiny in *Geduldig* on the ground that "pregnancy is an objectively identifiable physical condition with unique characteristics"[34]—the Court in *Virginia* reasons about laws regulating pregnancy in an institutional context, asking whether the law regulating pregnancy is promoting equal opportunity or perpetuating the inferiority of women. To determine whether a law regulating pregnancy is consistent with equal protection, the Court does not consult a medical dictionary; it asks how the law structures social relationships.

By 2003, when Chief Justice Rehnquist wrote for the Court in *Nevada Department of Human Resources v. Hibbs*,[35] he emphasized not only that laws regulating pregnant women may constitute sex discrimination, but that redress of such discrimination is a core concern of sex-based equal protection law. In *Hibbs* the Court held that Congress could enforce the Equal

[26] Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).
[27] 518 U.S. 515 (1996).
[28] *Id*. at 533; *see also* Cary Franklin, *Biological Warfare: Constitutional Conflict Over "Inherent Differences" Between the Sexes*, 2017 SUP. CT. REV. 169.
[29] *Virginia*, 518 U.S. at 533 (citations omitted).
[30] *Id*. at 534.
[31] 479 U.S. 272 (1987).
[32] *Virginia*, 518 U.S. at 533.
[33] Siegel, *Reasoning from the Body*, *supra* note 22.
[34] Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (citations omitted).
[35] 538 U.S. 721 (2003).

Protection Clause by enacting the family leave provisions of the Family and Medical Leave Act in order to redress the stereotyping and exclusion of pregnant workers. Chief Justice Rehnquist held that Congress's provision of family leave was an appropriate means of enforcing equal protection because many states' maternity leave policies were "not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work."[36] The Court echoed Congress's observation that, "'[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second," and that "[t]his prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.'"[37]

The Court's equal protection decision in *Hibbs* reflects growing awareness of the central role that regulation of pregnancy has played in women's marginalization. Five of the six Justices in the majority in *Geduldig* were born before women obtained the right to vote (the sixth, Justice Rehnquist, was born just after, in 1924). All of those Justices came of age in an era in which the exclusion of pregnant women and mothers from the public sphere was viewed as entirely natural, an outgrowth of biological difference and a benign reflection of the fact that women's primary calling is to have children and care for their families. Justice Blackmun's views evolved over time as he lived through the firestorm directed at the *Roe* opinion he authored; Justice Rehnquist's shift in understanding may well be attributable to his role in helping his daughter, a lawyer who was a single mother, navigate work and childcare.[38]

Another major factor driving this evolution was the Court's involvement in enforcing the PDA. After the PDA's enactment, the Court was enlisted in enforcing the prohibition on pregnancy discrimination in the workplace and began to issue major opinions combatting such discrimination.[39] Once it started this work, the Court stopped invoking *Geduldig* in equal protection cases. We have not found a majority opinion (prior to *Dobbs*) invoking *Geduldig* to interpret the Equal Protection Clause since Congress repudiated its reasoning in the late 1970s. *Virginia* and *Hibbs* supersede *Geduldig*'s reasoning. In these cases, the Court reasoned from the experience it acquired enforcing the PDA and explained that laws regulating pregnancy must be closely scrutinized to ensure they do not stereotype, reinforce traditional assumptions about women's roles, or perpetuate their second-class standing.

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[36] *Id*. at 731.

[37] *Id*. at 736 (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 99th Cong., 2d Sess. 33, 100 (1986)).

[38] On Blackmun, see GREENHOUSE, *supra* note 19, at 72-101; on Rehnquist, see Reva B. Siegel, *You've Come A Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871, 1882-83 (2006).

[39] *See* Cal. Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987); United Auto. Workers v. Johnson Controls, Inc., 499 U.S. 187 (1991).

Yet Justice Alito invoked *Geduldig* in *Dobbs*. Before overturning *Roe* and *Casey*, Justice Alito reached out to assert that there are no equal protection grounds for challenging abortion bans under the federal Constitution. To tie his dicta to the litigation—the parties were not raising equal protection claims—he cited two amicus briefs, including one that relied on *Virginia* and *Hibbs* to show that *Geduldig* has been superseded and that the Court had identified the regulation of pregnancy as a key concern of sex-based equal protection law.[40] In keeping with the majority's nostalgia for the world before recognition of women's equal citizenship, Justice Alito cited *Geduldig* and a decision about abortion protests that had nothing to do with state action or sex-based classifications,[41] and, without addressing the arguments or the major equal protection cases on which the amicus brief relied, asserted that equality arguments were "squarely foreclosed by our precedents."[42] Justice Alito's fidelity to pregnancy discrimination precedent from a half-century ago, before the rise of sex discrimination law, was a fitting prelude to a decision that overturned a half century of substantive due process law—by tying the meaning of the due process liberty guarantee to laws enacted in 1868.

[40] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245 (2022) (citing Brief for the United States as Amicus Curiae Supporting Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4341731, and Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4340072); *see also* Reva B. 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 & L. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4115569.

[41] Justice Alito also attempted to bolster his claim that the Equal Protection Clause supplies no grounds for challenging abortion bans by citing a case about the applicability of a civil rights statute to Operation Rescue protests at an abortion clinic. *See id.* at 2246 (citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 273-74 (1993)). In *Bray*, Justice Scalia held that the protesters did not express "invidiously discriminatory animus" against women as a class under 42 U.S.C. § 1985(3), the Ku Klux Klan Act. *Bray*, 506 U.S. at 274. In construing the *mens rea* requirement of § 1985(3), Justice Scalia held that persons who oppose abortion do not (or do not necessarily?) reason from views, beliefs, or assumptions about women. He asserted that "opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women," and went on to observe "[w]hatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class . . . ." *Id.* at 270.

Justice Alito cited *Bray* to bolster his assertion in *Dobbs* that abortion regulations do not constitute sex-based state action under the Equal Protection Clause. But *Bray* is not an equal protection case. *Bray* was a statutory case about the purposes of private actors protesting at an abortion clinic. The case is concerned about whether "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the" protestors' actions, sufficient to trigger liability under § 1985(3). *Id.* at 268 (alteration in original). *Bray* has nothing to do with state action or the question of whether a law classifies.

[42] *Dobbs*, 142 S. Ct. at 2245 (citing Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 40, and Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, *supra* note 40).

## II. Applying Equal Protection to Criminal Abortion Bans Post-*Dobbs*

*Dobbs* unleashed—and sanctioned—a wave of anti-abortion regulation unlike any in living memory.[43] As of this writing there are now twelve states where abortion is banned entirely,[44] and several others where bans are in litigation in the pipeline.[45]

These new (and revived) abortion bans are breathtakingly extreme, surprising even many opponents of abortion with their rigidity and punitiveness.[46] On the one hand there is the shock of states enforcing abortion bans enacted before women were granted the right to vote.[47] On the other hand there are new laws that surpass the old laws in the severity of their penalties. A new Texas law threatens abortion providers with life or twenty years in prison.[48] A new Tennessee law makes it a felony to perform any abortion, providing doctors who acted to save the life of a woman an affirmative defense to this criminal charge if they carry that burden at trial.[49]

Many of these new laws ban abortion with no exceptions for rape or incest or the health of the pregnant person. The bans generally except abortions needed to protect maternal life. But as *Dobbs* allowed criminal bans to go into effect immediately with no transition period, it is

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[43] See *infra* notes 79-80 and accompanying text.

[44] *See State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (Dec. 1, 2022), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions.

[45] *See State Legislation Tracker*, GUTTMACHER INST. (Nov. 15, 2022), https://www.guttmacher.org/state-policy.

[46] *See* Oliver O'Connell, *South Carolina Lawmaker Chokes Up Describing How Teen Almost Lost Uterus Due to Abortion Law He Voted for*, INDEP. (Aug. 17, 2022, 4:50 PM), https://www.independent.co.uk/news/world/americas/abortion-law-ban-south-carolina-b2146982.html; Caitlin Cruz, *Republicans Are Surprised to See the Abortion Bans They Fought for in Effect*, JEZEBEL (Aug. 10, 2022), https://jezebel.com/republicans-are-surprised-to-see-the-abortion-bans-they-1849396750; Oriana Gonzalez, *How States Enforce Anti-Abortion Laws*, AXIOS (June 24, 2022), https://www.axios.com/2022/06/08/abortion-bans-penalty-fines-prison-us-states.

[47] For example, Wisconsin's 1849 ban, as amended in 1858, was revived by *Dobbs*. This threat became even more pressing after the Sheboygan County district attorney announced he would prosecute abortion cases under the 1849 ban. *Sheboygan County D.A. Advises Law Enforcement He'll Prosecute Abortion Cases*, WBAY (July 1, 2022, 12:33 PM EDT), https://www.wbay.com/2022/07/01/sheboygan-county-da-advises-law-enforcement-hell-prosecute-abortion-cases.

[48] Nadine El-Bawab, *Texas Abortion 'Trigger' Law Allowing Criminal Civil Penalties Set to Go into Effect in August*, ABC NEWS (July 27, 2022, 4:20 PM), https://abcnews.go.com/US/texas-abortion-trigger-law-allowing-criminal-civil-penalties/story?id=87485720; *see also* Blake Ellis & Melanie Hicken, *These Male Politicians Are Pushing for Women Who Receive Abortions to Be Punished with Prison Time*, CNN (Sept. 21, 2022, 12:33 AM EDT), https://www.cnn.com/2022/09/20/politics/abortion-bans-murder-charges-invs/index.html; Sabrina Tavernise, *The Effort to Punish Women for Having Abortions; An Extreme Wing of the Anti-Abortion Movement Wants to Criminalize the Procedure as Homicide*, THE DAILY, Aug. 23 2022, https://www.nytimes.com/2022/08/23/podcasts/the-daily/abortion-abolition-roe-v-wade.html?showTranscript=1.

[49] *See* Mark Kelly, *Lawyer Explains What Tennessee's Abortion Ban Means for Doctors*, WKRN (Nov. 3, 2022, 1:57 PM CDT), https://www.wkrn.com/special-reports/lawyer-explains-what-tennessees-abortion-ban-means-for-doctors; Kavitha Surana, "*We Need to Defend This Law": Inside an Anti-Abortion Meeting with Tennessee's GOP Lawmakers*, PROPUBLICA (Nov. 15, 2022, 12:00 PM EST), https://www.propublica.org/article/inside-anti-abortion-meeting-with-tennessee-republican-lawmakers.

unclear which medically necessary abortions the exceptions authorize.[50] With exceptions vaguely drafted, and prosecutors ready to enforce exorbitant criminal penalties, healthcare administrators and providers have proceeded cautiously, afraid to intervene to save their patients' lives. In most cases it is unclear how near death's doorstep a pregnant person needs to be before a life-saving abortion is legal.[51]

These draconian new (and old) bans have been in effect for only a few months, but they have already begun to present serious threats to the wellbeing of women and others capable of pregnancy. Pregnant women who are miscarrying or suffering ectopic pregnancies have been denied abortions because doctors have determined they are not yet close enough to death to qualify for care under the law.[52] Growing numbers of pregnant women experiencing various life-threatening complications have been turned away and told to return to hospitals only when they can prove their deaths are imminent.[53]

Some of these bans are so extreme it is not clear that equal protection heightened scrutiny would be required to establish their unconstitutionality. There is no rational basis for a law (let alone a law that purports to preserve life) that deters doctors from providing life-saving medical care. Even Justice Rehnquist, dissenting in *Roe*, declared that "the Fourteenth Amendment undoubtedly does place a limit . . . on legislative power to enact laws [that] . . . prohibit an abortion even where the mother's life is in jeopardy."[54] Doctors and hospital administrators are interpreting many of the laws enacted post-*Dobbs* as doing just that. The scope and contours of the life exceptions are so vague, doctors are deterred from providing care even in life-threatening circumstances.[55] Even under rational basis, that is constitutionally illicit. It is irrational to enact regulations designed to preserve and express respect for life that endanger people's lives in the way these regulations do. Indeed, even committed anti-abortion advocates are trying to disavow these consequences and the extreme disregard these laws show

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[50] *See* Elizabeth Nash, *Focusing on Exceptions Misses the True Harm of Abortion Bans*, GUTTMACHER INSTITUTE, Dec. 2022, https://www.guttmacher.org/article/2022/12/focusing-exceptions-misses-true-harm-abortion-bans? ("Anti-abortion policymakers see exceptions as loopholes and designed them to be difficult if not outright impossible to use even for the few who qualify under their narrow limits.")

[51] *See* Dov Fox, *Medical Disobedience*, 136 HARV. L. REV. (forthcoming 2023) (manuscript at 47-50), https://ssrn.com/abstract=4152472; Kate Zernike, *What Does 'Abortion' Mean? Even the Word Itself Is Up for Debate*, N.Y. TIMES (Oct. 18, 2022), https://www.nytimes.com/2022/10/18/us/abortion-roe-debate.html.

[52] *See* Pam Belluck, *They Had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. TIMES (July 17, 2022), https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html; Leah Torres, *Doctors in Alabama Already Turn Away Miscarrying Patients. This Will Be America's New Normal*, SLATE (May 17, 2022, 3:12 PM), https://slate.com/news-and-politics/2022/05/roe-dobbs-abortion-ban-reproductive-medicine-alabama.html.

[53] *See* Zernike, *supra* note 11; Carrie Feibel, *Because of Texas Abortion Law, Her Wanted Pregnancy Became a Medical Nightmare*, NPR (July 26, 2022, 5:04 AM ET), https://www.npr.org/sections/health-shots/2022/07/26/1111280165/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare.

[54] Roe v. Wade, 410 U.S. 113, 173 (1973).

[55] *See* sources cited *supra* notes 52-53.

toward women and others capable of pregnancy—suggesting such people merit little concern and have no value apart from their baby-making capacity.[56]

Under heightened scrutiny, these laws fare even worse. Heightened scrutiny requires the state to justify its decision to regulate by discriminatory means, and to show why the state could not have adopted less restrictive means to accomplish its aims.[57] States enacting criminal bans classify by sex,[58] singling out pregnant women, without endeavoring to achieve the compelling end of protecting life and health by more inclusive, less coercive means.

States claim that their aim is to nurture and protect potential life. But there are many ways for states to nurture potential life and reduce the incidence of abortion that are not punitive and do not strip women and other pregnant people of agency. Evidence-based sex education can help to reduce unplanned pregnancies, which are far more likely than planned pregnancies to result in abortion. Making contraception widely available and mandating its coverage in health insurance plans can also reduce the incidence of unplanned pregnancies.[59] States can expand Medicaid, to ensure people receive essential pre- and post-natal care; they can provide pregnant people with nutrition and housing support and access to drug and alcohol treatment programs; they can guarantee high-quality childcare and paid parental leave; they can pass laws protecting pregnant workers, to help people—women in particular—surmount the many obstacles to combining work and parenting in an at-will employment context with few social supports for poor and low-income parents. [60]

These are just a few of the less restrictive alternatives to criminalization states that purport to prioritize protecting unborn life could adopt. In fact, many of the states enacting

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[56] *See* Zernike, *supra* note 51 (reporting on efforts by anti-abortion lawmakers and advocates to redefine "abortion" so that it excludes pregnancy terminations in situations where even they believe terminations are warranted, including cases involving ectopic pregnancies, miscarriages, fetal abnormalities, and pregnant ten-year-olds).

[57] Under the intermediate scrutiny standard set forth in *Virginia*, a state must show that its decision to regulate health and life by sex-discriminatory means is substantially related to the achievement of an important governmental end. *Virginia* requires the state to offer an "exceedingly persuasive justification" for its use of any sex-based classification; that is, *Virginia* requires the government to justify its use of sex-based (and coercive) means without relying on "overbroad generalizations about the different talents, capacities, or preferences of males and females. Sex classifications may be used to promote equal opportunity, but sex "classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women." United States v. Virginia, 518 U.S. 515, 533-34 (1996).

[58] Mississippi's abortion ban explicitly classifies by sex, prohibiting physicians from performing an abortion on "a maternal patient" after fifteen weeks. H.B. 1510 § 1(4), 2018 Leg., Reg. Sess. (Miss. 2018). Kentucky's fifteen-week ban refers to the "maternal patient" and "pregnant woman" throughout. H.B. 3, 2022 Leg., Reg. Sess. (Ky. 2022). Oklahoma's ban repeatedly refers to the "pregnant woman." 2022 Okla. Sess. Law Serv. Ch. 11 (S.B. 612) (West).

[59] *See* L.B. Finer & M.R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008-11*, 374 NEW ENG. J. MED. 843 (2016); Joerg Dreweke, *New Clarity for the U.S. Abortion Debate: A Steep Drop in Unintended Pregnancy is Driving Recent Abortion Declines*, GUTTMACHER POL'Y REV. (Mar. 18, 2016), https://www.guttmacher.org/gpr/2016/03/new-clarity-us-abortion-debate-steep-drop-unintended-pregnancy-drivingrecent-abortion.

[60] For an illustration of this analysis, *see* Siegel, Mayeri & Murray, *supra* note 40.

criminal abortion bans are openly hostile to offering social supports for pregnant people that other states routinely provide.

Take Mississippi, the state whose fifteen-week abortion ban was at issue in *Dobbs*. The anti-abortion legislators who control the Mississippi legislature frequently proclaim their commitment to protecting potential life. But their policy choices help place Mississippi last, or near the bottom, on nearly every measure related to fetal and maternal health. Infants in Mississippi are likelier to die before their first birthday than infants in any other state, and Black babies are twice as likely to die as their white counterparts.[61] In part, this is because Mississippi has the country's highest rate of premature birth—a leading cause of infant death that is linked to chronic conditions such as high blood pressure and diabetes among mothers.[62] Increasing access to pre- and post-natal care could address many of these problems, but Mississippi is one of twelve states that have not expanded Medicaid coverage under the Affordable Care Act—leaving approximately 25% of Black women in Mississippi without health insurance.[63] The state has repeatedly refused to provide a full year of Medicaid coverage to people who have given birth, despite evidence showing that extending this postpartum benefit to the Medicaid eligible would make a critical difference in protecting maternal life and health.[64] (Even though the decision to extend postpartum benefits from two months to a year would not increase the number of people eligible for Medicaid, the Mississippi Speaker of the House explained the state's refusal by asserting: "We need to look for ways to keep people off [Medicaid], not put them on." He also claimed he had seen no evidence proving the benefit would save the state money, and when asked whether it could save lives, responded, "That has not been a part of the discussions that I've heard."[65]) Nor is the state taking steps proven to reduce the number of unplanned pregnancies: the widespread lack of health insurance reduces access to contraception and the state refuses to provide comprehensive evidence-based sex education. Unsurprisingly, the 2019

[61] Isabelle Taft, *Mississippi Remains Deadliest State for Babies, CDC Data Shows*, MISS. TODAY (Sept. 29, 2022), https://mississippitoday.org/2022/09/29/mississippi-remains-deadliest-state-for-babies.
[62] *Id*.
[63] Asha DuMonthier, Chandra Childers, Ph.D & Jessica Milli Ph.D., *The Status of Black Women in the United States*, INST. FOR WOMEN'S POL'Y RSCH. 66 (June 26, 2017), https://iwpr.org/wp-content/uploads/2020/08/The-Status-of-Black-Women-6.26.17.pdf.
[64] *See* Angela Grayson, *Op-Ed: Extending Postpartum Medicaid Coverage Is Important to Addressing the Black Maternal Health Crisis*, G93 WPMZ (Oct. 1, 2022, 1:55 PM), https://g93wmpz.com/2022/10/01/op-ed-extending-postpartum-medicaid-coverage-is-important-to-addressing-the-black-maternal-health-crisis.
[65] *See* Emily Wagster Pettus, *Mississippi House Leaders Kill Postpartum Medicaid Extension*, AP NEWS (Mar. 9, 2022), https://apnews.com/article/health-mississippi-medicaid-c49dcbdc7b356f593485853aee5458c1; Sarah Fowler, *Mississippi Banned Most Abortions to Be the 'Safest State' for the Unborn. Meanwhile, One in Three Mississippi Kids Lives in Poverty*, BUS. INSIDER (Nov. 26, 2021, 9:23 AM), https://www.businessinsider.com/mississippi-defends-abortion-ban-one-in-three-kids-in-poverty-2021-11.

*Health of Women and Children Report* ranked Mississippi fiftieth among the states on a range of metrics related to the health of women, infants, and children.[66]

Just about the only thing Mississippi does to vindicate its purported interest in protecting potential life is criminalize abortion.[67] In this, it is not an outlier. States enacting criminal abortion bans post-*Dobbs* generally share Mississippi's antipathy to expanding health insurance, to enacting any kind of social support for poor and low-income people, and to educating students about safe sex and contraception.[68] As a result, Mississippi is joined at the bottom of the charts regarding fetal, infant, and maternal health and morbidity by all of the most zealous anti-abortion states.[69] Their policy is not only to employ criminal law means to protect unborn life but to do so while denying the people coerced into giving birth forms of social provision commonly offered in other jurisdictions. The states that have rushed to criminalize abortion in the wake of *Dobbs* are the states *least likely* to have pursued any of these other means of protecting potential life.[70]

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[66] AMERICA'S HEALTH RANKINGS, 2019 HEALTH OF WOMEN AND CHILDREN REPORT 4–7, https://www.americashealthrankings.org/learn/reports/2019-health-of-women-and-children-report; *see also* UNITED HEALTH FOUND., HEALTH OF WOMEN AND CHILDREN REPORT 8 (2019), https://assets.americashealthrankings.org/app/uploads/executive-highlights-ahr-health-of-women-and-children.pdf (ranking Mississippi fiftieth in women's and children's health).

[67] The Gestational Age Act at issue in *Dobbs* prohibited the performance of abortion past fifteen weeks, "[e]xcept in a medical emergency or in the case of a severe fetal abnormality . . . ." MISS. CODE ANN. § 41-41-191 (2018). *Dobbs* sent Mississippi's trigger ban into effect—the state now bans all abortions, except "where necessary for the preservation of the mother's life or where the pregnancy was caused by rape." MISS. CODE ANN. § 41-41-45(2) (2022).

[68] For an illustration of this dynamic in Texas, see Cary Franklin, Whole Woman's Health v. Hellerstedt *and What It Means to Protect Women*, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 223 (Melissa Murray, Kate Shaw & Reva B. Siegel eds., 2019); for Louisiana, see Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on* June Medical, 2020 SUP. CT. REV. 277, 321-27. *See generally* sources cited *supra* note 70 (demonstrating that states with the most restrictive abortion laws tend to rank lowest in social provision and safety-net policies). Some studies suggest that the provision of contraception may be the most effective of these policies. *See, e.g.*, Oberman, *infra* note 71, at 6 ("The single most effective way to help people avoid unwanted pregnancies, thereby deterring abortion, is by increasing contraception rates.").

[69] *See* AMERICA'S HEALTH RANKINGS, *supra* note 66, at 5.

[70] For sources examining the safety-net policies of so-called pro-life jurisdictions in comparison to other states, see Emily Badger, Margot Sanger-Katz & Claire Cain Miller, *States with Abortion Bans Are Among Least Supportive for Mothers and Children*, N.Y. TIMES (July 28, 2022), https://www.nytimes.com/2022/07/28/upshot/abortion-bans-states-social-services.html; Dylan Scott, *The End of* Roe *Will Mean More Children Living in Poverty*, VOX (June 24, 2022, 10:53 AM EDT), https://www.vox.com/policy-and-politics/23057032/supreme-court-abortion-rights-roe-v-wade-state-aid; Chris J. Stein, *After* Roe*, Are Republicans Willing to Expand the Social Safety Net?*, GUARDIAN (July 5, 2022, 2:00 PM EDT), https://www.theguardian.com/us-news/2022/jul/05/roe-v-wade-abortion-republicans-social-safety-net; Lauren Camera, *States Where Abortion Is Illegal Also Have the Worst Support Systems for Mothers*, U.S. NEWS & WORLD REP. (Aug. 8., 2022), https://www.usnews.com/news/national-news/articles/2022-08-08/states-where-abortion-is-illegal-also-have-the-worst-support-systems-for-mothers; and Rachel Treisman, *States With the Toughest Abortion Laws Have the Weakest Maternal Supports, Data Shows*, NPR (Aug. 18, 2022, 6:00 AM ET), https://www.npr.org/2022/08/18/1111344810/abortion-ban-states-social-safety-net-health-outcomes. *See also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2340 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("[A] state-by-state analysis by public health professionals shows that States with the most restrictive abortion policies also continue to invest the least in women's and children's health."). For a report on a study of lives saved and lost through policy choices made by red and states, see Akilah Johnson, *Can Politics Kill You? Research Says the Answer Increasingly Is Yes.*, WASH. POST (Dec. 16, 2022, 6:00 AM EST),

Assuming Mississippi sought only to protect potential life, then, the state is wildly underinclusive in the means it employs, to the point of irrationality. It has targeted women who seek to end pregnancies and has elevated control of women's decision-making over most every other policy measure it might employ to reduce abortion or to protect life in utero, even policies known to protect maternal health and potential life.

Banning abortion and coercing resisting women to serve as mothers over their objections might sound rational to some, on the assumption that women are simply instruments the state can employ for gestating and nurturing potential life. But simply criminalizing abortion does not stop the practice.[71] As the image of the coat-hanger recalls, women, even poor and young women, resist abortion bans. "Nearly six months since the Supreme Court overturned *Roe v. Wade*, triggering abortion bans in more than a dozen states, many antiabortion advocates fear that the growing availability of illegal abortion pills has undercut their landmark victory."[72] Meanwhile, lack of prenatal care can be deadly for newborns—the U.S. Department of Health and Human Services found that newborns whose mothers had no early prenatal care are almost five times more likely to die.[73] Mississippi's hostility to Medicaid and social provision must be one of the reasons Mississippi has the highest infant mortality rates in the nation. And lack of a safety net plainly contributes to abortion. Seventy-five percent of women who seek abortions are poor or low-income.[74] At the same time it is clear that coercing birth without adequate social supports poses a threat to maternal health and human dignity.[75] There is no self-evident rationale for choosing most restrictive over least restrictive means for supporting healthy pregnancies and nurturing fetal life.

Under *Virginia,* equal protection law requires the government to justify its use of sex-based coercive means over less restrictive means and to provide reasons for its policy choices

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https://www.washingtonpost.com/health/2022/12/16/politics-health-relationship, which observed that "[w]ith abortion services no longer legal nationwide, university researchers have estimated that maternal deaths could increase by up to 25 to 30 percent, worsening the nation's maternal mortality and morbidity crisis. Americans . . . is the worst place among high-income countries to give birth."

[71] Michelle Oberman notes that abortion rates are lower in Europe than in Latin America despite much higher prevalence of criminalization in Latin America and observes that "single biggest predictor of abortion rates is not the legal status of abortion, but rather, the percentage of pregnancies that occur among those who were not looking to have a baby." Michelle Oberman, *What Will and Won't Happen When Abortion is Banned*, 9 J.L. & BIOSCIENCES 11 (2022), https://academic.oup.com/jlb/article/9/1/lsac011/6575467.

[72] Caroline Kitchener, *Conservatives Complain Abortion Bans Not Enforced, Want Jail Time for Pill "Trafficking,"* WASH. POST (Dec. 14, 2022, 7.30 AM EST), https://www.washingtonpost.com/politics/2022/12/14/abortion-pills-bans-dobbs-roe.

[73] *See Prenatal Care*, DEP'T HEALTH & HUM. SERVS. OFF. ON WOMEN'S HEALTH, https://www.womenshealth.gov/a-z-topics/prenatal-care (Apr. 1, 2019).

[74] Brief of Amici Curiae Economists in Support of Respondents at 23, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4341729, at 24; *see also* Richard V. Reeves & Joanna Venator, *Sex, Contraception, or Abortion? Explaining Class Gaps in Unintended Childbearing*, BROOKINGS INST. (Feb. 26, 2015), https://www.brookings.edu/research/sex-contraception-or-abortion-explaining-class-gaps-in-unintended-childbearing (finding that access to abortion reduces the disparity between affluent and low-income women by one-third and access to contraception reduces the same disparity by one-half).

[75] *See supra* notes 63-64 and accompanying text.

that do not rely on sex-role stereotyping or perpetuate traditional inequalities between the sexes.[76] Mississippi and like-minded states think it is reasonable to protect life by pushing pregnant women into motherhood against their will, without providing health care, providing social support or childcare for them and their children, or protecting them against job loss. To put the point modestly, Mississippi's method of protecting life rests on certain presuppositions about women. As Justice Blackmun observed thirty years ago in *Casey*, the "assumption—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause."[77] For these and other reasons, under *Virginia* and *Hibbs* and the body of sex discrimination case law the Supreme Court has decided in the last half century, Mississippi's exclusively carceral approach to protecting life violates equal protection.[78]

*Dobbs* rejected the claim that laws criminalizing abortion trigger equal protection scrutiny, and not only in opening dicta where Justice Alito asserted that equal protection imposes no limits on laws regulating pregnancy. The Court's due process decision depicted *Roe* and *Casey* as an illegitimate usurpation of state authority to ban abortion and represented the Court as returning the authority to ban abortion to the states: "The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."[79] *Dobbs*'s story of "return" is not only jurisdictional, but substantive, of handing power back to *Roe*'s critics.[80] It is about going back in *time* to a democratic tradition of banning abortion.

Conceding intermittently that the common law prohibited abortion at quickening—that is, midway through pregnancy only—the Court's due process opinion depicts America as a nation with a deep-rooted tradition of banning abortion. To construct this tradition, *Dobbs* expressly rejected the argument of amici who claimed that nineteenth-century abortion bans were enacted for sexist and nativist reasons and so are unfit to guide constitutional interpretation today. Acknowledging the historians' objection 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,[81] Justice Alito responded that he simply didn't believe it: "Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women? There is ample evidence that the passage of

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[76] *See* United States v. Virginia, 518 U.S. 515, 533-34 (1996); *see supra* note 57.
[77] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part); *see id.* at 928 & n.4 (Blackmun, J., concurring in part).
[78] *See* Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, *supra* note 40; Siegel, Mayeri & Murray, *supra* note 40 (expanding on these arguments).
[79] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).
[80] *Id*. at 2279 ("26 States expressly ask us to overrule *Roe* and *Casey* and to return the issue of abortion to the people and their elected representatives.").
[81] *Id*. at 2255 (discussing brief's arguments that abortion bans "were enacted for illegitimate reasons").

these laws was instead spurred by a sincere belief that abortion kills a human being."[82] By setting up a dichotomy—either nineteenth-century abortion laws were motivated by "hostility to Catholics and women" *or* by "a sincere belief that abortion kills a human being"—Justice Alito excused himself from considering how prevailing beliefs about gender shaped the campaign to ban abortion, at a time when sex role divisions were so systematically enforced by law that the Supreme Court itself authorized states to bar women from voting[83] and to deny women the right to practice law.[84]

In adopting this dichotomy—abortion bans reflect constitutionally illicit status-based judgments *or* such bans reflect constitutionally licit beliefs about the importance of protecting unborn life—the majority reasoned about the regulation of pregnancy within the logic of physiological naturalism, as *Roe* and *Geduldig* once did.[85] *Dobbs* perpetuates the naturalist claim that abortion bans may stop women from ending pregnancies but laws compelling women to continue a pregnancy reflect no judgments about women; women are simply where the embryo/fetus happens to be.

In deciding that the United States had a constitutionally cognizable tradition of banning abortion, the Court rejected the view that abortion bans, past or present, express any particular judgments or send any particular messages about women's roles and social status. As the next section shows, however, abortion regulation has never been focused exclusively on protecting fetal life. In the nineteenth century, advocates for banning abortion emphasized the laws' dual purpose of protecting the unborn and enforcing traditional norms governing sex and women's family roles.

## III. The Long History of Dualism in Abortion Regulation

In Justice Alito's telling, advocates of banning abortion had one aim in mind: protecting fetuses. But this account of our history is simply wrong. Abortion regulation has long had a dual focus. It has never been concerned exclusively with protecting fetuses. It has always, also, been about the regulation of sexuality and motherhood.

In the 1850s, Boston obstetrician Horatio Storer launched a "physicians' crusade" to criminalize abortion before quickening.[86] The physicians sought to consolidate and professionalize the practice of medicine, excluding the "irregulars," including midwives, who

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[82] *Id.* at 2256.
[83] Minor v. Happersett, 88 U.S. 162 (1874); *see also* Siegel, *supra* note 7, at 58-59.
[84] Bradwell v. Illinois, 83 U.S. 130 (1872). For an account of this portion of the *Dobbs* opinion, see Siegel, *supra* note 7, at 58-59.
[85] *See supra* text accompanying notes 21-25.
[86] JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900, at 147-170 (1978); *see also Before* Roe*: The Physician's Crusade*, NPR THROUGHLINE (May 19, 2022, 12:10 AM EDT), https://www.npr.org/2022/05/18/1099795225/before-roe-the-physicians-crusade.

often provided abortions in this era and granting male physicians monopoly control over reproductive healthcare.[87]

Many doctors came to believe that life began at conception, and that abortion was wrongful life-taking—murder, they called it. Their campaign prominently featured fetal-protective argument.[88] But to persuade Americans to abandon customary and common law views of pregnancy that permitted abortion before quickening, that is 16 to 20 weeks into a pregnancy, it was not enough to advise the public that life began at conception. Opponents of abortion added to their ethical arguments for protecting life ethical arguments for protecting the social order. Many emphasized the prevalence of abortion among married, native-born, white, Protestant women, and advocated abortion restrictions as a means of preserving the country's religious and ethnic make-up.[89] Even more pervasively, doctors argued that banning abortion was necessary to preserve the family.

A core theme of anti-abortion crusaders was that women were abandoning their wifely and maternal roles for improper pursuits and distractions. Abortion enabled women to betray their family responsibilities for pleasure and for politics. Advocates of criminalizing abortion returned to this theme constantly, arguing that childbearing was "the end for which [married women] are physiologically constituted and for which they are destined by nature."[90] If women—married women in particular—sought to evade their true destiny by ending their pregnancies, Storer and others argued, they would face devastating consequences: such infringement of nature's laws "must necessarily cause derangement, disaster, or ruin."[91]

The debate over abortion featured open debate about sex. Many advocates of criminalization argued that allowing married women to access abortion turned marriage into "legalized prostitution,"[92] in which women could trade sex—freed of reproductive consequences—for spousal support and engage all manner of activities without the obligations of motherhood.

When Storer and others argued that laws banning abortion were needed to prevent marriage from becoming "legalized prostitution," they were attacking claims for voluntary motherhood advanced by the women's movement of the era. Before and after the Civil War, women seeking the vote—and power to reform marriage law that gave a

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[87] *See* MOHR, *supra* note 86, at 33-37 (1978); LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 10-11 (1997).
[88] For examples, see Siegel, *Reasoning from the Body*, *supra* note 22, at 287-92.
[89] *See* Siegel, *supra* note 7, at 59-63 (discussing primary and secondary sources).
[90] HORATIO ROBINSON STORER, WHY NOT? A BOOK FOR EVERY WOMAN 75-76 (1866).
[91] *Id*. at 36-37.
[92] HORATIO R. STORER, ON CRIMINAL ABORTION IN AMERICA 101 (1860) ("If . . . the community were made to understand and to feel that marriage, where the parties shrink from its highest responsibilities, is nothing less than legalized prostitution, many would shrink from their present public confession of cowardly, selfish and sinful lust.") For more on physicians' use of this term, see Siegel, *Reasoning from the Body*, *supra* note 22, at 308-11.

husband rights in his wife's person, labor, and property—claimed "voluntary motherhood": the right to say no to sex in marriage. Suffragists argued that without voluntary motherhood, marriage was little better than "legalized prostitution."[93] Given the conditions of conception and childrearing, they condoned—without endorsing—women who ended a pregnancy.[94] But Storer and others who sought to ban abortion argued that it was *freeing wives from compulsory childbearing* that would turn marriage into "legalized prostitution."

In 1871, the newly-formed American Medical Association denounced women who obtained abortions, claiming that when a woman ends her pregnancy, "[s]he becomes unmindful of the course marked out for her by Providence . . . [and] overlooks the duties imposed by the marriage contract."[95] Some doctors explicitly blamed the emergence of new conceptions of women's roles for the uptick in abortion rates, arguing that "the tendency to force women into men's places" was creating insidious "new ideas of women's duties."[96]

The physicians' arguments against abortion were pronatalist. The campaign against abortion promoted birth: to protect unborn life, to enforce wives' marital roles, and to preserve the religious and ethnic character of the nation. In the 1870s, states and the federal government criminalized contraception for the first time, often enacting statutes that simultaneously banned contraceptives and abortifacients, as both interfered with the procreative ends of sex.[97]

For Storer and his allies, criminalizing abortion was the answer, and it seemed obvious that criminal penalties ought to be imposed on *everyone* involved in abortion-related crimes, including women who procured abortions. Storer argued it would make no sense to exempt

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[93] *See* Siegel, *Reasoning from the Body*, *supra* note 22, at 311-14. At common law, a wife was presumed to consent to sex with her husband when she consented to marriage. For a history of that presumption and nineteenth-century challenges to it, see Jill Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000).

[94] *See* Siegel, *Reasoning from the Body*, *supra* note 22, at 307-08; *see also* Tracy A. Thomas, *Misappropriating Women's History in the Law and Politics of Abortion*, 36 SEATTLE U.L. REV. 1, 27-30, 60-63 (2012). Of course, women in other freedom movements of the era sought and advocated for reproductive justice employing different frameworks of appeal. For examples drawn from the antislavery movement and reconstruction, see PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997).

[95] D.A. O'Donnell & W.L. Atlee, *Report on Criminal Abortion*, 22 TRANSACTIONS AM. MED. ASS'N 239, 241 (1871).

[96] MOHR, *supra* note 86, at 104 (quoting Montrose A. Pallen, *Foeticide, or Criminal Abortion*, 3 MED. ARCHIVES 193, 205 (1869)). For more on the anti-feminism of the physicians' campaign, see Siegel, *Reasoning from the Body*, *supra* note 22, at 280-314.

[97] *See* Comstock Act ch. 258, 17 Stat. 598, 599 (1873) (repealed 1909) (prohibiting any person from selling or distributing in U.S. mail articles used "for the prevention of conception, or for causing unlawful abortion" or sending information concerning these practices as "obscene"); Siegel, *Reasoning from the Body*, *supra* note 22, at 314-15 (discussing passage of Comstock Act and state analogues that banned abortifacients and contraceptives, which enabled non-natalist sex, as obscene); MOHR, *supra* note 86, at 219-21 (describing the passage of such laws in, *inter alia*, Nevada, Michigan, Kansas, Connecticut, and Massachusetts); Carol Flora Brooks, *The Early History of the Anti-Contraceptive Laws in Massachusetts and Connecticut*, 18 AM. Q. 3, 4 (1966); *cf.* JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 253 (1994) ("[T]he campaigns against abortion and contraception . . . shared important similarities in the opponents' motivations, in the imagery and symbolism of their public campaigns, and in the consequences.").

pregnant women from punishment, for "[i]f the mother does not herself induce the abortion, she seeks it, or aids it, or consents to it, and is, therefore, whether ever seeming justified or not, fully accountable as a principal."[98] In the 1850s, he developed model legislation that reflected this understanding. The legislation imposed criminal penalties not only on providers but also on women who obtained abortions.[99] The legislation allowed for increased punishment of married women,[100] as their sex-role violations were even more heinous than those of unmarried women.

The physicians' campaign was stunningly successful. Between 1860 and 1880, it "produced the most important burst of anti-abortion legislation in the nation's history."[101] States and territories enacted at least forty anti-abortion statutes and many of those statutes reflected the physicians' argument that abortion ought to be criminalized from the moment of conception.[102]

But the body of law that grew in the campaign's wake did not exert control over women through the imposition of criminal sanctions on them. Some of the criminal abortion statutes enacted in the wake of the physicians' campaign exempted women who obtained abortions from liability; other statutes imposed liability on women who obtained abortions, but prosecutors and judges refused to enforce the law against them.[103] In jurisdictions where the law explicitly criminalized obtaining an abortion, judges read in exemptions, insisting that women who did so were victims and could not be held responsible for their actions. Judges reasoned that, regardless of what statutory text said, "[t]he public policy which underlies this legislation is based largely on protection due to the woman—protection against her own weakness as well as the criminal lust and greed of others."[104] Judges insisted that a woman who obtained an abortion was "[m]isguided by her own desires, and mistaken in her belief"[105]—not thinking straight and

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[98] HORATIO R. STORER & FRANKLIN FISKE HEARD, CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE, AND ITS LAW 97 (1868).
[99] *Id*. at 98.
[100] *Id*. ("[I]f said offender be a married woman, the punishment may be increased at the discretion of the court."); *see generally* MOHR, *supra* note 86, at 225 (describing legislators in the 1870s as revoking the common law immunities of women who sought abortions); REAGAN, *supra* note 87, at 13 (noting that some mid-nineteenth-century abortion bans "included punishment for the women who had abortions"); *id.* at 60 (describing the AMA's shift from "urg[ing] the prosecution of abortionists . . . to recommending prosecution of women").
[101] MOHR, *supra* note 86, at 200; *see also id*. at 139 (observing that "so many . . . anti-abortion code revisions" in this period were "directly attributable to the influence of a regular physician with access to the lawmaking process"); *id*. at 200-45 (recounting the achievements of the physicians' campaign with respect to legislation enacted and the alteration of reproductive medicine more generally).
[102] *Id*. at 200; *see also* Aaron Tang, *After* Dobbs: *History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. (forthcoming 2023), https://ssrn.com/abstract=4205139 (showing significant errors in the ways *Dobbs* characterized and counted nineteenth-century abortion laws).
[103] Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL OF RTS. J. 735, 740-46 (2018); Clarke Forsythe, *Why States Did Not Prosecute Women for Abortion Before* Roe v. Wade*,* AMS. UNITED FOR LIFE (Apr. 23, 2010), https://aul.org/2010/04/23/why-the-states-did-not-prosecute-women-for-abortion-before-roe-v-wade (observing that regardless of statutory text, legal actors in this period almost uniformly "determined that states could *not* prosecute women under *any* theory of criminal liability"); Ashley Gorski, Note, *The Author of Her Trouble: Abortion in Nineteenth- and Early Twentieth-Century Judicial Discourses*, 32 HARV. J.L. & GENDER 431, 434 (2009).
[104] State v. Carey, 56 A. 632, 636 (Conn. 1904).
[105] State v. Pearce, 56 Minn. 226, 230 (1894).

therefore not culpable of any crime. Over time judges enforcing the bans reasoned about women who sought abortions as "the object of protection rather than of punishment" and "to be regarded as the victim of the crime rather than as a participant in it."[106]

This very prominent feature of abortion law—the general exemption from punishment of pregnant women who choose abortion—persists to this day, and it coheres with all the other natalist features of the campaign we have described—prominently including the first laws criminalizing contraception. Nineteenth-century changes in abortion law were not simply about protecting fetuses. Along with innumerable other features of social structure, abortion bans coerced and channeled women into dependent caregiving roles.[107]

Abortion bans were dualist in structure; they enforced judgments about protecting the unborn *and* sex-role judgments about women.[108] In the nineteenth century, a time when women were beginning to protest the many forms of public and private law that pushed women into dependent family roles, it "made sense" to protect unborn life by coercing motherhood.

Abortion bans offered a new and newly legitimate form of coverture, adopted at a time when suffragists were challenging old common law doctrines of marital status. With the modernization of marital status law, "a wife was gradually transformed from a juridical appendage of her husband into one who performed the physical and social work of reproducing family life."[109] Criminalization of abortion offered a new way of regulating and a "new way of reasoning about wives' obligations . . . physiologically, deriving women's duties from facts about the female body."[110] Even as legislators began to recognize wives as juridically independent of their husbands, facts about their bodies supplied reasons for laws that continued to enforce their family roles.[111] Reasoning from the body naturalized assumptions about gender, autonomy, and dependence long rooted in coverture.

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[106] Jonathan M. Purver, Annotation, *Woman Upon Whom Abortion Is Committed or Attempted as Accomplice for Purposes of Rule Requiring Corroboration of Accomplice Testimony*, 34 A.L.R. 3d 858 (1970).

[107] *See* Siegel, *The Pregnant Citizen*, *supra* note 22, at 170 ("At the founding, the law gave male heads of household authority over women and the ability to represent them in voting and the market; this understanding of women as dependent citizens, defined through family relations to men, continued to shape the law even after women's enfranchisement, despite women's efforts to democratize family structure in order to secure equal citizenship.") (citation omitted).

[108] For an illustration of how these different forms of judgment coalesced, see, for example, 1867 OHIO SENATE J. APP. 233. This Ohio report is often discussed by antiabortion advocates as monist, as illustrating fetal-protective concern only, when it is plainly dualist, combining arguments about protecting unborn life with arguments for enforcing wives' roles and preserving the ethnic character of the nation. *Compare* John Finnis, *Abortion is Unconstitutional*, FIRST THINGS, April 2021, https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional *with* Siegel, *supra* note 7, at 60-63 (discussing text of report and the selective ways it is discussed by antiabortion advocates).

[109] Siegel, *Reasoning from the Body*, *supra* note 22, at 321.

[110] *Id*.

[111] *Id*. at 331 ("[T]oday, as in the past, physiological modes of reasoning about women are invoked to limit principles recognizing woman's commonality with man and equality to him. Indeed, this mode of reasoning about women seems to acquire cultural force as women's claims to equality acquire cultural force.").

It is because abortion law regulated family roles that abortion was commonly codified in the nineteenth century as a crime against the family or a sex crime—*not* as homicide.[112] For instance, David Dudley Field classified abortion law along with "Crimes Against the Person and Against Public Decency and Good Morals" in his New York Penal Code.[113] As historian David Sklansky has observed, the crimes that accompanied abortion in this category were "rapes[,] . . . child abandonment, bigamy, indecent exposure, and lotteries . . . ."[114] In the twentieth century, the Model Penal Code classified abortion under "Offenses Against the Family."[115]

In a 1959 commentary accompanying the draft Model Penal Code's section on abortion, the American Law Institute referenced the dual aims of abortion laws quite explicitly. The ALI acknowledged that as "the fetus develops to the point where it is recognizably human in form" or "manifests life," as in quickening or at viability . . . "destruction [of the fetus] comes to be regarded by many as morally equivalent to murder."[116] But, in the next sentence the ALI observed that "abortion is opposed by many on moral grounds not directly related to the homicidal aspects," and immediately began discussing condemnation of abortion as rooted in beliefs about religion and the proper ends of sex. The 1959 commentary expressed in twentieth-century idiom the heteronormative, pronatalist objections to abortion expressed in the nineteenth-century campaign:

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[112] As a Massachusetts court recognized in 1984, "[s]ince at least the fourteenth century, the common law has been that the destruction of a fetus in utero is not a homicide . . . . The rule has been accepted as the established common law in every American jurisdiction that has considered the question." Commonwealth v. Cass, 467 N.E.2d 1324, 1328 (Mass. 1984). *See also* Keeler v. Superior Ct., 2 Cal. 3d 619, 627 (1970) ("By the year 1850 [the common law rule that homicide required live birth] had long been accepted in the United States."); *see generally* Marka B. Fleming, *Feticide Laws: Contemporary Legal Applications and Constitutional Inquiries*, 29 PACE L. REV. 43, 47 (2008) ("By 1850, the 'born alive' rule was widely adopted in the United States' legal system. Moreover, '[e]very American jurisdiction to consider the issue [of fetal homicide] on the basis of common law, rather than a specific feticide statute, followed some form of the born alive rule until 1984, when the Supreme Judicial Court of Massachusetts extended its vehicular homicide statute to a viable fetus.'").

[113] DAVID DUDLEY FIELD, NEW YORK FIELD CODES 1850-1865, at 112 (1998). Field's New York Penal Code was submitted to the legislature in 1865 and enacted in 1881, remaining in effect until its replacement by the New York Penal Law of 1967. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 322 (2007).

Field's approach proved highly influential, directly and derivatively. Field's New York Penal Code was adopted by Dakota in 1865 and California in 1872, which led to its adoption by several western states that followed the California model, including Arizona, Idaho, Montana, Oregon, Utah, and Wyoming. Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098, 1137-38 (1978). For examples of state codes listing abortion under "Crimes Against Public Decency and Good Morals," see THE PENAL CODE OF CALIFORNIA: ENACTED IN 1872; AS AMENDED IN 1889, at 124-25 (Robert Desty, ed., 1889) (classifying abortion with abandonment and neglect of children, bigamy, incest, lotteries, gaming, and indecent exposure); NEV. REV. STAT. ANN. § 201.120 (1911) (classifying abortion with bigamy, incest, obscenity, and open or gross lewdness); and Oklahoma, OKLA. STAT. ANN. tit. 21, § 861 (1910) (classifying abortion with adultery, bigamy, incest, and desertion of wife or child).

[114] *See* DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 53 (2021).

[115] MODEL PENAL CODE § 230.3 (AM. L. INST. 1962).

[116] MODEL PENAL CODE § 207.11, Comments (AM. L. INST., Tentative Draft No. 9, 1959).

> For some it is a violation of the divine command to be fruitful from which has been inferred also the sinfulness of homosexuality, contraception, masturbation, and in general all sexuality which is 'unnatural' in the sense of not being procreative. Furthermore, legalizing abortion would be regarded by some as encouraging or condoning illicit intercourse . . . .[117]

The fact that criminal law codes grouped abortion alongside rape, bigamy, homosexuality, neglect/abandonment of wife and children, contraception, and masturbation as crimes against public decency and good morals, or offenses against the family,[118] instead of treating abortion as contract killing or some other form of first-degree murder underscores the degree to which abortion restrictions have been understood as regulating women's sexuality and family roles rather than simply protecting fetuses.

Today, the dual concerns of abortion law may not be as prominent as in the past. Yet, abortion law is unmistakably shaped by judgments about women as well as the unborn. When abortion is banned, pregnant women who obtain abortions are still exempt from any sort of criminal punishment. And abortion bans typically have exceptions reflecting judgments about pregnant women. "Nearly three-quarters of adults (73%) say abortion should be legal if the woman's life or health is endangered by the pregnancy, while just 11% say it should be illegal. And about seven-in-ten say abortion should be legal if the pregnancy is a result of rape, with just 15% saying it should be illegal in this case."[119] Broad-based support for health, life, and rape exemptions demonstrates that beliefs about abortion depend on judgments about women's sexuality and whether it is fair to coerce women into motherhood—not only judgments about when life begins.[120]

The application of abortion law to fertility practices demonstrates again that abortion law cannot be explained simply by beliefs about when life begins. A number of states now banning abortion expressly *permit disposal of embryos created through in vitro fertilization*, only characterizing acts that prevent the embryo's development *as abortion if the embryo is in a woman's uterus*.[121] These states seem to reason that it is permissible to destroy embryonic life in

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[117] *Id.*

[118] MODEL PENAL CODE §§ 230.1-230.5 (AM. L. INST. 1962).

[119] *America's Abortion Quandary*, PEW RSCH. CTR (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary.

[120] *See, e.g.*, Brief of Texas Right to Life as Amicus Curiae in Support of the Petitioners at 19, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4264275, at 20 ("Women can 'control their reproductive lives'; without access to abortion; they can do so by refraining from sexual intercourse.").

[121] *See, e.g.*, Opinion No. 22-12, Applicability of the Human Life Protection Act to the Disposal of Human Embryos that Have Not Been Transferred to a Woman's Uterus (Tenn. A.G. 2022), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2022/op22-12.pdf (explaining that "the disposal of a human embryo that has not been transferred to a woman's uterus [is not] punishable as 'criminal abortion' under Tennessee's Human Life Protection Act," which "only applies when a woman has a living unborn child within her body"); W. VA. CODE § 16-2R-4(a)(5) (2022) (providing that "[a]bortion does not include . . . [i]n vitro fertilization");

the quest to conceive, but not in the effort to avoid parenthood. This policy is as natalist as the bans on contraception that began during the nineteenth-century antiabortion campaign. In the wake of *Dobbs*, we can also see dualist judgments fueling efforts by anti-abortion advocates to redefine the term abortion to exclude pregnancy terminations that take place during the treatment of miscarriages, in cases involving pregnant ten-year-olds, and in other contexts in which advocates are uncomfortable forcing people to continue pregnancies.[122]

The simple desire to protect life from the moment of conception cannot explain these various exemptions and exceptions. We see, instead, that the regulation of abortion, in the nineteenth century and today, has consistently had a dual focus concerned with protecting fetuses *and* regulating women's sexuality and family roles.

In fact, for decades now the modern antiabortion movement has insisted that the case for prohibiting abortion depends on protecting *women*, as well as the unborn, as advocates argue that abortion harms women or that women have been coerced into abortions.[123] *Dobbs* and the two Supreme Court cases before it involved challenges to laws that restricted abortion purportedly to protect *women*'s health. Of course, sex-role reasoning undergirds these woman-protectionist claims. The architect of the Louisiana law at issue in *June Medical* explained her thinking, "What's good for the child is good for the mother."[124]

One of the most striking features of Justice Alito's opinion in *Dobbs* is its denial of the dual focus of abortion law and its insistence that restrictions on abortion are, and always have been, exclusively about protecting fetuses. The opinion frames its question about the nineteenth-century record in binary terms: are abortion bans focused on protecting fetuses *or* on regulating women? But Justice Alito never explained why the desire to protect fetuses and the desire to regulate women are mutually exclusive—why evidence that regulators cared about fetuses means they can't have had any particular views about women. (Just where are fetuses?) This fetal-focused account of abortion bans is all the more striking given that the Mississippi ban at issue in

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IND. CODE. § 16-34-1-0.5 (2022) (providing that Article 34, which covers "Abortion," "does not apply to in vitro fertilization"); *cf.* OKLA. STAT. tit. 63, § 63-1-730(A)(1) (2022) (defining "Abortion" as "the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to *terminate the pregnancy of a female known to be pregnant* with an intention other than to increase the probability of a live birth" (emphasis added)).

[122] *See* Zernike, *supra* note 51 and text accompanying note 56.

[123] *See* Siegel, *supra* note 68, at 296-309. For discussion of the woman's health protective laws at issue in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2202 (2016) and *June Medical Services L.L.C. v. Russo*, 140 S.Ct. 2103 (2020), see Siegel, *supra* note 68. For the law in *Dobbs*, see Miss. H.B. 1510 § 1(2)(b)(i) (finding that banning abortion protects fetal life); *id*. § 1(2)(b)(ii)-(v) (finding that banning abortion protects women); Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, *supra* note 40, 12-13. The reasoning Mississippi offers for banning abortion after 15 weeks—to protect the health of the "maternal patient," Miss. H.B. 1510 § 1(2)(b)(ii), (iii)—echoes the sex-role assumptions of the nineteenth-century antiabortion campaign: a pregnant woman's "health" will suffer if she deviates from her natural maternal role.

[124] *See* Siegel, *supra* note 68, at 215-16.

*Dobbs* asserted the legislators' claims that coerced motherhood is good for women's health in the text of the statute itself.[125]

In his concurring opinion Justice Kavanaugh also insistently denied the dual focus of abortion bans. The central theme of his opinion is that the Constitution is neutral with respect to abortion bans: it neither requires nor prohibits them. This almost shrill insistence on the Constitution's "neutrality"[126] with respect to abortion bans erases the dual focus of abortion regulation—the historical and ongoing ways in which carceral approaches to abortion implicate women's liberty and equality.

The *Dobbs* Court has authorized lawmakers opposed to abortion to revive the carceral regime their predecessors developed over a century and a half ago. In some cases, contemporary lawmakers are simply reinstating bans from the nineteenth and early twentieth century, while in others, they are dramatically increasing criminal penalties.[127]

Just as *Dobbs* has nostalgia for a national past that the Court itself is in part reviving and in part inventing, so too antiabortion advocates and lawmakers are returning to a past that they are playing a role in creating. When lawmakers today argue for protecting women, as Louisiana did in *June Medical* and Mississippi did in *Dobbs*, they revive protectionist traditions in contemporary feminist and public health idioms.[128] And when lawmakers argue for *punishing* abortion, they resume carceral conversations that reach back to the nineteenth-century, often supercharged with a quite contemporary appetite for use of the criminal law—as in a Louisiana bill that would have granted constitutional rights to "'all unborn children from the moment of fertilization'" while classifying abortion as homicide. The bill was withdrawn amidst public uproar at the plan to charge women and their doctors with murder for obtaining or providing abortion services.[129]

This escalation to classifying abortion as homicide suggests that interest in punishing abortion may rise with women's civic status. Nineteenth-century doctors may have talked about abortion as murder, but nineteenth-century legislators did not ban abortion as homicide. (Infanticide was distinct from abortion, and to prosecute infanticide at common law, courts reasoned, "a child must be born alive. It cannot be the subject of a homicide until it has an

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[125] *See supra* note 123.
[126] Justice Kavanaugh uses the words "neutral" no fewer than eight times—and "neutrality" five times—throughout his concurring opinion. *See Dobbs*, 142 S. Ct. at 2304-11 (Kavanaugh, J., concurring).
[127] *See* sources cited *supra* note 48.
[128] *See supra* notes 123-124 and accompanying text; *see also* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L. J. 1641 (2008).
[129] Sharon Bernstein, *Louisiana Lawmakers Withdraw Bill Declaring Abortion Homicide*, REUTERS, May 13, 2022 (5:22 AM EDT), https://www.reuters.com/world/us/louisiana-lawmakers-withdraw-bill-declaring-abortion-homicide-2022-05-13/.

existence independent of its mother."[130]) It wasn't until the 1980s that states began passing fetal homicide statutes (with abortion-rights carveouts) that broke with this common law tradition.[131] Today there are natural lawyers and originalists who urge *judges* to impose draconian penalties for abortion. They talk about giving unborn persons equal treatment under homicide laws,[132] asserting that "unborn children are *persons* within the original public meaning of the Fourteenth Amendment's Due Process and Equal Protection Clauses,"[133] and urging courts to apply homicide laws to abortion ("[m]ost States have laws tailormade for "feticide"; any carve-outs for elective abortion would be disregarded by courts as invalid").[134] This is living constitutionalism,[135] advancing a carceral claim rooted in the 1980s, not in the 1860s, that would enforce modern forms of coverture. Observe that as the embryo and fetus appear, women disappear. And because women disappear the question never comes into view: what forms of law for protecting unborn life are appropriate today, given women's equal civic status?

The antiabortion movement is now advancing equal protection claims for fetuses, even as the Court is denying equal protection rights for women. It is precisely because abortion bans raise questions under contemporary sex discrimination law that the Justices in *Dobbs*—and those defending their decision—are so intent on reasoning from the body and so insistent that abortion laws are exclusively motivated by concern for protecting fetal life. Denying the dual focus of

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[130] Morgan v. State, 256 S.W. 433, 434 (Tenn. 1923) ("It is usually said that the umbilical cord must have been severed, and an independent circulation established."); Keeler v. Superior Ct., 2 Cal. 3d 619, 625-26 (1970) ("[A]n infant could not be the subject of homicide at common law unless it had been born alive."); Mamta K. Shah, Note, *Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life*, 29 HOFSTRA L. REV. 931, 937 (2001); Louis Westerfield, *The Born Alive Doctrine: A Legal Anachronism*, 2 S.U. L. REV. 149, 149-151 (1975).

[131] *See State Homicide Laws That Recognize Unborn Victims*, NAT'L RIGHT TO LIFE (Apr. 2, 2018), https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx; *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT'L CONF. STATE LEGISLATURES (May 1, 2018), https://www.nrlc.org/federal/unbornvictims/statehomicidelaws092302.

[132] Josh Hammer, *The Case for the Unconstitutionality of Abortion*, NEWSWEEK, July 30, 2021 (7:30 A.M. EDT), https://www.newsweek.com/case-unconstitutionality-abortion-opinion-1614532; Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2475 (1997) ("From the pro-life point of view, any regime of law (including one whose pedigree is impeccably democratic) that deprives unborn human beings of their right to legal protection against homicide is gravely unjust.") (citation omitted); *id.* at 2489 (arguing that "like all other human beings, ["[h]uman beings in the embryonic and fetal stages"] are entitled to the (equal) protection of the laws against homicide") (citations omitted). *See also* Sherif Girgis, *Update: Why the Equal-Protection Case for Abortion Rights Rises or Falls with* Roe*'s Rationale*, 17 HARV. J. L. & PUB. POL'Y PER CURIAM 1, 6-7 (2022) (discussing equality arguments in terms of protection of homicide laws).

[133] Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 3374325 at 2.

[134] *Id*. at 32 (citations omitted).

[135] *See* Christine Rousselle, *March For Life Announces 2022 Theme of 'Equality,'* CATHOLIC NEWS AGENCY, Oct. 27, 2021 (12:18 P.M.), https://www.catholicnewsagency.com/news/249416/march-for-life-announces-2022-theme-of-equality (quoting the president of the March for Life saying, before *Dobbs*, that "'[t]here's little agreement on the definition of what "equality" is and who it applies to,'" and "'[w]e want to expand this rigorous debate about equality to unborn children'").

abortion bans, in doctrine and in history, is part of a concerted effort to shield abortion laws from the scrutiny that contemporary sex discrimination doctrine demands.

## IV. Anti-Carceral Presumption

This chapter opened by showing how the Court integrated pregnancy into the framework it developed for adjudicating sex-based equal protection cases. Well into the 1970s, the Court continued to view pregnancy through the lens of physiological naturalism. But after years of enforcing the PDA, the Court began to appreciate the centrality of laws regulating pregnancy in constructing and maintaining gender-based hierarchies and cementing women's secondary status. Justice Ginsburg's opinion in *Virginia* and Chief Justice Rehnquist's opinion in *Hibbs* superseded the Court's reasoning in *Geduldig*. Rather than assert that women are equal to the extent that they are like men, the Court announced that women are men's equals, notwithstanding their differences. Once *Virginia* and *Hibbs* applied antisubordination and antistereotyping principles to pregnancy, the government cannot appeal to pregnancy as a physical difference between men and women to justify laws that perpetuate women's second-class standing or enforce traditional family roles.

In a Court that was willing to apply equal protection doctrine faithfully, this body of law would give rise, in the context of abortion, to an anti-carceral presumption. When the government engages in sex-based state action—including when it regulates pregnancy—the government must show why less restrictive means will not serve its ends, especially here where the government is enforcing a role historically associated with restrictions on women's civic status. There are many ways the state can protect life that *support rather than coerce* those who gestate, nurture, and provide for developing dependent humans that do not "perpetuate the legal, social, and economic inferiority of women."[136]

In a gender-egalitarian society, government efforts to protect potential life should look different than in a world in which the work is performed by a disfranchised caste. Centrally, a government committed to women's equal citizenship would recognize that commitment as changing its relationship to the family and to those who do the work of raising the next generation. As we have shown, there are a multitude of ways states can protect new life that are compatible with women's equal citizenship. To reduce abortion, the state can assist those who are sexually active and wish to avoid becoming parents; to protect potential life, the state can assist those who are expecting children and would become parents if they could afford to do so.

When a state rejects this array of non-discriminatory means of nurturing potential and born life, and protects life by means that instrumentalize women and inflict on them bodily, economic, and dignitary harms, this violates modern equal protection law. It may have been acceptable, in the view of the law and of many Americans, in the nineteenth century to threaten

[136] United States v. Virginia, 518 U.S. 534 (1996).

and coerce women, to compel them to become mothers by criminalizing abortion. But that anti-abortion regime did not treat women as equal members of the polity. It exacerbated inequality, endangered pregnant women's lives and wellbeing, stripped women of agency, and subjected them to forms of coercion and control incompatible with twenty-first-century understandings of liberty and equality. When a state today eschews other means of protecting fetuses—when it refuses to employ the many egalitarian, less violent means of supporting the health and wellbeing of fetuses and pregnant people—and seeks to discipline and punish, it violates this anti-carceral presumption.

While there are members of the *Dobbs* majority who might yet rule that the Constitution imposes some limits on abortion bans—for example, to protect a pregnant woman's right to life[137]—it is of course exceedingly unlikely that the Court responsible for *Dobbs* will actually enforce an anti-carceral presumption. But this presumption does not reside only in federal judicial doctrine. It also resides in other governmental actors' and the public's understanding of the limits on state power to coerce motherhood. Even without a Supreme Court to give it uniform articulation, we can expect to see federal and state actors—many legislative—giving this presumption varying expression in the coming years. Indeed, some states took action immediately after *Dobbs* to incorporate aspects of this presumption into their state constitutions. A few months after the Court's decision, Michigan and Vermont amended their constitutions to include explicit protections for reproductive freedom that subject abortion regulations to strict scrutiny, requiring the state to show that it has a compelling interest and is employing "the least restrictive means" to effectuate that interest.[138] California also amended its constitution to protect reproductive rights; like Vermont, its amendment explicitly references equal protection, making clear that abortion rights vindicate both liberty and equality values.[139]

Public opposition to the recent carceral turn in abortion regulation was also evident in the aftermath of *Dobbs* in red states such as Kansas and Kentucky, where voters rejected proposed constitutional amendments that would have outlawed abortion.[140] Like the Louisiana law referenced above, which would have treated abortion as homicide and had to be withdrawn after public outcry,[141] these extreme carceral measures induce discomfort even among many conservatives. They are too harshly punitive and too obviously disrespectful of women's wellbeing and social standing to move through legislatures and succeed at the ballot box even in some very conservative, anti-abortion states.

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[137] *See supra* notes 51-56 and accompanying text.
[138] MICH. CONST. art. I, § 28; VT. CONST. chap. 1, art. 22.
[139] 10. S.C.A. 10, 2021 S., Reg. Sess. (Cal. 2021).
[140] Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protections in its Constitution*, N.Y. TIMES (Aug. 2, 2022), https://www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html; Bruce Schreiner & Beth Campbell, *Kentucky Voters Reject Constitutional Amendment on Abortion*, PBS NEWSHOUR (Nov. 9, 2022), https://www.pbs.org/newshour/politics/kentucky-voters-reject-constitutional-amendment-on-abortion.
[141] *See supra* note 129 and accompanying text.

Indeed, we can read electoral backlash to the Court's decision in *Dobbs* as expressing skepticism of its account of public values. In the 2022 midterm elections, voters—especially young voters and women—turned out in great numbers to repudiate the Court's decision in *Dobbs*.[142] The public does not appear to credit the claim made by *Dobbs* and its advocates that abortion bans contain no judgments about women, that bans are simply the most effective way of communicating the state's profound concern for fetal life.[143]

Does declaring that abortion bans communicate only fetal-focused messages make it so? Did declaring separate was equal make it so? As Elizabeth Anderson and Richard Pildes have observed, "[e]xpressive meanings are socially constructed"; they are "a result of the ways in which actions fit with (or fail to fit with) other meaningful norms and practices in the community."[144] For this reason, "a proposed interpretation must make sense in light of the community's other practices, its history, and shared meanings."[145] The expressive meaning of a governmental act emerges only when analyzed "in the full context in which it is adopted and implemented."[146]

If we situate abortion bans in the historical and social contexts in which they arose and continue to operate, the depiction of these bans as gender-neutral, incorporating no suspect judgments about women and simply expressing concern for fetal life, is not plausible. Abortion bans were enacted in the nineteenth century—by an electorate from which women were excluded—for purposes including enforcing women's marital and maternal roles, at a time when law was first enlisted to criminalize the means of contraception and to direct sex to natalist ends.[147]

To suggest that reviving this regime—a hybrid of ancient and modern status laws—reflects only judgments about embryos and fetuses and has nothing to do with women's equality is ridiculous. We have examined the gender stereotypes and judgments that fueled abortion bans

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[142] 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.

[143] *See supra* text at note 82. Professor Sherif Girgis argues that imposing abortion bans does not discriminate on the basis of sex. Following Justice Alito, he appeals to physiological naturalism: "The costs of pregnancy . . . cannot be transferred" and "we would have to find something similarly morally egregious that prolife states would tolerate to benefit men, if we're to establish a double standard." Girgis, *supra* note 132, at 6. The failure of antiabortion states to provide support for those whom they would coerce into carrying pregnancies evinces no sex role stereotyping, he argues. To demonstrate sex-role stereotyping in an abortion ban, opponents would have "to identify situations where prolife states not only fail to effectively promote life but do something as callous toward life as withdrawing the protection of homicide laws from a class of innocents." *Id.* at 7 (emphasis omitted); *see also* Girgis, *supra* note 132 at 8 (arguing that "[t]he fact that prolife or antiabortion views are barely more common among men than women, and are quite common among women, is a serious point against suspect-judgment arguments").

[144] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1525 (2000).

[145] *Id.*

[146] *Id.*

[147] *See supra* note 120.

historically and the way the revival—and the shocking intensification—of these bans perpetuates women's secondary status. But history is only one lens for looking at these bans; there are all sorts of indicia of sexism surrounding the new wave of anti-abortion lawmaking post-*Dobbs*. Polling in the aftermath of *Dobbs* shows that "[s]exist beliefs are highly correlated with and predictive of views toward abortion" and that false stereotypes about women and women who have had abortions are very strong predictors of opposition to abortion—stronger than party identification, gender, or religiosity.[148] For example, a majority of anti-abortion adults in a recent poll agreed with the statement that "feminism has done more harm than good." Just 20% of anti-abortion adults agreed "the country would be better off with more women in political office," compared to 64% of adults who support legal abortion.[149] There is no independent, or fetal-focused, reason why support for abortion bans would be so strongly correlated with a dislike of women holding political office: traditional gender ideology is clearly the driver of and the link between these views.

Or, we could shift from polling to consider the people most affected by the new abortion bans. As we have noted, the vast majority of women who obtain abortions are poor, and they are disproportionately Black and brown. The overrepresentation of Black women among those who seek abortions is particularly pronounced in Mississippi, where *Dobbs* arose. Anti-abortion advocates in Mississippi have long insisted that their primary motivation in pursuing abortion bans is to protect new life. But Black women in Mississippi have been lobbying state legislators to protect new life and those who nurture it for years, to no avail.

Shortly after *Dobbs* came down, organizations devoted to Black women's health in Mississippi held a press conference called "We Are the Data" to dramatize the crisis in Black maternal and infant mortality[150] and to persuade the state legislature to implement measures proven to improve health outcomes, such as extending Medicaid coverage for post-natal care by a few months.[151] One of the organizers emphasized that "[w]hat we're asking for here is just a right to life," some basic measures to curb the unnecessary suffering and death experienced by so many Black mothers and babies. The majority-white legislature rebuffed their demands. The only thing the Mississippi legislature appears willing to do to address this crisis is to pass

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[148] Perry Undem, *Assessing the State of Public Opinion Toward Women, Gender, Equality—and Abortion: Analysis From National PerryUndem Survey* 10 (Nov. 2022), https://perryundem.com/wp-content/uploads/2022/12/PerryUndem-Landscape-of-Views-toward-Women-Gender-and-Abortion-F.pdf. Anti-abortion advocates often cite the fact that substantial numbers of women support abortion bans as evidence that these bans do not enforce gender-based stereotypes or judgments. *See, e.g.*, *supra* note 143. But this polling shows why that's a weak argument: the greatest predictor of anti-abortion sentiment is belief in traditional sex stereotypes, and anti-abortion women hold these beliefs in high numbers. *See id*. at 9, 60.

[149] *Id*. at 51. For a recent study analyzing the role of gender attitudes in antiabortion activism, see Eric Swank, *The Gender Conservatism of Pro-life Activists*, 42 J. WOMEN, POL & POL'Y 124 (2021).

[150] For a discussion of this crisis, see Khiara M. Bridges, *The Supreme Court, 2021 Term – Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 46, 48-49 n.127 (2022).

[151] *See* Geoff Pender, *'We're 50th by a Mile.' Experts Tell Lawmakers Where Mississippi Stands with Health of Mothers, Children*, MISS. TODAY (Sept. 27, 2022), https://mississippitoday.org/2022/09/27/where-mississippi-stands-with-health-of-mothers-children.

abortion bans that close clinics that predominantly served Black and poor women. This regulatory approach imposes on these women conditions the majority of Mississippi legislators would not impose on their own families. It treats vulnerable women with contempt, it disregards their health and wellbeing, and it subjects them to forms of coercion and control all too familiar to Black women living in the former Confederacy.

As Professor Charles Black once said of *Plessy*'s claim that separate was equal: "[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated 'equally,' I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter."[152]

The Court has the power to control the narrative it constructs about abortion within the four corners of its opinions. It can assert that punitive abortion laws convey no judgments about women's social status—just as the Court in 1896 asserted that the segregation of railcars conveyed nothing about Black people's social status. But there are limits to the Court's power, even in the context of imperious landmark decisions such as *Plessy* and *Dobbs*. Simply announcing that nineteenth-century status regimes are compatible with egalitarian ideals and constitutional protections does not make it so. And defending and maintaining such a regime today ought to be even more of a challenge than it was at the time of *Plessy*, because despite what the Court suggests, we now have a robust body of equal protection law that requires the state to respect women as equal citizens. We are beyond the day when the state can simply dominate and control women, using punitive measures to coerce them to continue pregnancies and become mothers against their will. The majority in *Dobbs* seems determined to kill this body of law, and although it didn't succeed this time, it is likely to keep trying.

But equal protection doctrine and equality principles have taken root in too many places, have been embraced by too many actors across too many levels of government, and by too high a percentage of the American people, for the Court to eradicate them everywhere. The goal now is to figure out how best to nurture and protect these commitments, not by debating women's rights vs. fetal rights, but by talking about the kind of support families need to meet the real challenges families face, and to enable new understandings of women's citizenship to flourish.

[152] Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1959-1960).