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Re-Thinking Strategy After *Roe*

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Introduction

Now that the Supreme Court has overturned *Roe v. Wade* and *Planned Parenthood v. Casey*, the movement for abortion rights and access finds itself in uncharted territory.[1] For almost fifty years, abortion rights supporters have been largely on the defensive, trying to prevent backsliding and whittling away of the right to terminate a pre-viable pregnancy. Abortion opponents, on the other hand, have been on the offensive, using creative strategies in all three branches of government across federal, state, and local levels to try to achieve their goal of ending abortion nationwide. It took almost half a century, but with *Dobbs v. Jackson Women's Health Organization*, *Roe*'s attackers have taken a decisive step toward their goal.

For abortion rights defenders, this new, post-*Roe* playing field means adapting their strategy and mindset to confront a new environment without a tether to federal constitutional protection. The stakes could not be higher. No one knows the trajectory of this new battle to restore abortion rights, but it will be longer and harder than it needs to be if abortion rights defenders cannot rethink basic strategy assumptions. And the longer the battle, the more dire the effects of forced pregnancy: greater risks to pregnant people's physical and mental health, deeper economic gender

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1. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

inequity, higher maternal mortality, and higher child poverty, just to name a few exceedingly likely public health consequences.[2]

This Essay, published in the immediate aftermath of *Dobbs*, offers some initial thoughts about what the changed legal landscape means for abortion rights legal advocacy. Our focus in recent writings has been to identify concrete measures that federal and state actors can take to secure abortion access after *Dobbs*.[3] Here, we explore what we believe to be an immediate overarching concern: What strategies should govern the abortion rights movement going forward? To that end, we identify three themes: (1) trying creative, sometimes novel, approaches to put the antiabortion movement into a defensive posture, (2) expecting and embracing disagreement among abortion rights supporters, and (3) playing the long game. This will require a paradigm shift in movement strategy—one that is in some ways modeled after the now-successful movement to overturn *Roe*. Such a paradigm shift takes time, will, and responsiveness to change.

An important note before proceeding: The three of us, in our own ways, have collectively served as lawyers, teachers, and scholars of abortion rights for decades. This Essay's intent is not to critique previous movement strategies. However, to the extent that any of the following can be read as criticism, it is as much a criticism of our past work as it is of anyone else's.

I. Creative Rather Than Defensive Strategies

Ever since the Supreme Court held that the Constitution protects the right to a pre-viability abortion as a privacy right, that right needed to be defended against an onslaught of antiabortion attacks. Having been given

2. DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION 99-129, 141-52, 163-86, 199-215, 225-39 (2020) (reporting the results of the Turnaway Study, a comprehensive series of studies that explain the harms incurred by people who carry pregnancies to term after being unable to obtain a wanted abortion).

3. *See generally* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023) [hereinafter Cohen, Donley & Rebouché, *Battleground*], https://perma.cc/VF3P-7E8B (reviewing several actions that states and the federal government can take in the wake of *Dobbs*); Greer Donley, Rachel Rebouché & David S. Cohen, Opinion, *Abortion Pills Will Change a Post-Roe World*, N.Y. TIMES (June 23, 2022), https://perma.cc/H33E-A86J (examining how to protect abortion pill access in a post-*Roe* America); David S. Cohen, Greer Donley & Rachel Rebouché, Opinion, *States Want to Ban Abortions Beyond Their Borders. Here's What Pro-Choice States Can Do.*, N.Y. TIMES (Mar. 13, 2022), https://perma.cc/TW4B-ZQ6W (exploring what progressive states can do to protect abortion access); David S. Cohen, Greer Donley & Rachel Rebouché, Opinion, *Joe Biden Can't Save Roe v. Wade Alone. But He Can Do This.*, N.Y. TIMES (Dec. 30, 2021), https://perma.cc/G2VK-LARD [hereinafter Cohen, Donley & Rebouché, *Joe Biden*] (highlighting what a progressive presidential administration can do to protect abortion access).

the imperfect foundation of *Roe* and *Casey*, the legal arm of the abortion rights movement used that privacy right—grounded in the Fourteenth Amendment's Due Process Clause—as the main tool in its arsenal.[4] As much as commentators have criticized *Roe*'s and *Casey*'s limitations and urged other constitutional bases for the right to terminate a pregnancy, such as the Equal Protection Clause or the Thirteenth Amendment,[5] those theories have had limited impact in the federal courts as of yet.[6] Other arguments, such as those based on the First Amendment, have had limited factual application and success.[7] State court litigation has seen more variety in legal theories, though most state decisions protecting abortion rights still rely on

4. Before *Planned Parenthood v. Casey*, laws impermissibly restricting abortion were framed as a violation of a fundamental right and subject to strict scrutiny, the standard utilized in *Roe v. Wade*. *See Casey*, 505 U.S. at 871 (plurality opinion). After *Casey*, the standard shifted from strict scrutiny to undue burden. *See id.* at 877. Regardless, the claim was the same—the laws violated the Fourteenth Amendment's Due Process Clause. *Id.* at 874.

5. Before joining the Supreme Court, Ruth Bader Ginsburg urged the Court to recognize abortion as a form of sex discrimination as it concerned women's ability to participate in public life on equal footing with men, making it a matter of equal protection. Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. REP. 143, 143-44 (1978). Andrew Koppelman argued that the Thirteenth Amendment provides a constitutional abortion right because denying a person the right to an abortion subjects them to "involuntary servitude" in service of the fetus, the precise sort of forced labor that the Amendment prohibits. Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 483-84 (1990); *see also* Michele Goodwin, Opinion, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), https://perma.cc/E2QX-GH6W ("This Supreme Court . . . ignores the intent of the 13th and 14th Amendments, . . . which extended . . . to shielding [Black women] from rape and forced reproduction."). Though these theories have not yet been successful, as we argue below, we think there is increased urgency to try them again.

6. Before *Dobbs*, Supreme Court opinions had increasingly referenced the connection between abortion rights and sex equality, but Justice Alito's majority opinion rejected this argument in dicta. *Dobbs*, 142 S. Ct. at 2245-46 ("Neither *Roe* nor *Casey* saw fit to invoke this theory [the Fourteenth Amendment's Equal Protection Clause as a basis for abortion rights], and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'" (quoting Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974))).

7. *Compare* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 580 (5th Cir. 2012) (finding that a state's forced ultrasound requirement does not violate the First Amendment), *with* Stuart v. Camnitz, 774 F.3d 238, 242 (4th Cir. 2014) (finding that a state's forced ultrasound requirement violates the First Amendment). *See also* Doe v. Parson, 960 F.3d 1115, 1116 (8th Cir. 2020) (rejecting a Satanic Temple member's First Amendment challenge to a state abortion law).

theories very similar to *Roe*.[8] Legislative and administrative strategies have been more varied in the states (rarely at the federal level), but they have, for the most part, been defensive in nature, aimed at removing or preventing new restrictions that make it difficult for someone to obtain an abortion.[9]

As the reproductive justice framework, and its focus on race and class, has become more central to the abortion rights movement, proactive advocacy has become more common.[10] For instance, some state and local governments have expanded state Medicaid funding for abortion, sent public money to private abortion funds, issued reparations for involuntary sterilization, decriminalized adverse pregnancy outcomes, and extended the rights of pregnant people and parents beyond abortion by bolstering support for workplace accommodations, government health plans, and other welfare benefits.[11] But these are relatively new developments that, by necessity, existed alongside defensive legal maneuvers.

After *Roe* made abortion legal in every state, the antiabortion movement's strategy was to overturn *Roe* and end legal abortion. The movement attacked government funding of abortion and won passage of the Hyde Amendment, which bans federal funding for abortions except to

8. *See* Linda J. Wharton, Roe *at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 499 (2009). There have been some state court decisions grounding abortion rights in equality principles, whether through a general equality provision or a state equal rights amendment, but those are not common. *See id.* at 498-526, 529-30 (reviewing state law approaches to protecting abortion rights).

9. In this paragraph, as well as throughout this Essay, we speak at a high level of generality when recapping movement history and strategy. There are, of course, outliers with everything we cover and vital sources that, because of space limitations, we do not include here.

10. *See* Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 343 (2013) (describing the reproductive justice framework); Kimala Price, *What Is Reproductive Justice? How Women of Color Activists Are Redefining the Pro-Choice Paradigm*, MERIDIANS, 2010, at 42, 46-47 (discussing the international and inclusive origins of the reproductive justice movement); JAEL SILLIMAN, MARLENE GERBER FRIED, LORETTA ROSS & ELENA GUTIÉRREZ, UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE 1-4, 7-8 (2d ed. 2016).

11. DAVID S. COHEN & CAROLE JOFFE, OBSTACLE COURSE: THE EVERYDAY STRUGGLE TO GET AN ABORTION IN AMERICA 94, 97-98, 232-33 (2020); *see, e.g.*, Daniel Trotta, *California to Compensate People Forcibly Sterilized Under Eugenics*, REUTERS (July 13, 2021, 6:48 PM PDT), https://perma.cc/8X7E-C9VV; *2021 Report, Gaining Ground: Proactive Reproductive Health, Rights and Justice Legislation in the States*, NAT'L INST. FOR REPROD. HEALTH (Dec. 14, 2021), https://perma.cc/BTP4-U366; Press Release, Rob Bonta, Att'y Gen., State of California, California Law Does Not Criminalize Pregnancy Loss (Jan. 6, 2022), https://perma.cc/U2XL-AB7B.

preserve the pregnant person's life or in cases of rape and incest.[12] Once the Supreme Court upheld the Hyde Amendment,[13] the antiabortion movement developed a series of restrictions designed to increase the difficulty of obtaining an abortion: waiting periods, parental consent requirements, and burdensome and shame-inducing informed consent processes.[14] After the Supreme Court approved these types of restrictions in *Casey*,[15] the movement pushed further. It not only expanded previous restrictions (waiting periods, for instance, were vastly increased in many states),[16] but also targeted particular types of abortion procedures, leading to a federal prohibition of a relatively rare second-trimester abortion procedure; state abortion bans at different gestational ages, frequently below the constitutional minimum; and state requirements for patients to undergo and listen to ultrasounds in the purported pursuit of informed consent.[17]

From there, another strategy emerged: targeted regulation of abortion providers (TRAP laws). TRAP laws regulated abortion facilities without any medical justification and more thoroughly than any other type of outpatient medical office. This tactic threatened to shutter almost all abortion clinics in certain states. Though the Supreme Court struck down some of these laws in 2016 and again in 2020,[18] the antiabortion movement was

12. The Hyde Amendment has been particularly devastating for poor women and women of color who rely on Medicaid for health insurance. Jill E. Adams & Jessica Arons, *A Travesty of Justice: Revisiting* Harris v. McRae, 21 WM. & MARY J. WOMEN & L. 5, 50-51 (2014).

13. *See* Harris v. McRae, 448 U.S. 297, 326 (1980).

14. *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 58 (1976) (describing a Missouri abortion statute that required informed consent of pregnant persons, spousal consent, and parental consent for minors); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 422-24 (1983) (describing a city abortion ordinance that required parental notification and consent, the pregnant person's informed consent, and a 24-hour waiting period between informed consent and the time the abortion is performed), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 759-61 (1985) (describing a Pennsylvania abortion statute that required informed consent and providing the pregnant person with printed information), *overruled by Casey*, 505 U.S. 833; Hodgson v. Minnesota, 497 U.S. 417, 424 (1990) (describing a Minnesota abortion statute that required a waiting period and parental notice for minors).

15. *Casey*, 505 U.S. at 886-87, 899 (plurality opinion).

16. Jennifer Ludden, *In Several States, Abortion Waiting Periods Grow Longer*, NPR (June 2, 2015, 4:33 PM ET), https://perma.cc/N6XA-8XKX.

17. COHEN & JOFFE, *supra* note 11, at 159-62, 177, 199-201, 203-05.

18. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112-13 (2020), *abrogated by Dobbs*, 142 S. Ct. 2228.

undeterred. In the past two years, towns and cities have passed local ordinances declaring themselves "sanctuary cities for the unborn."[19] And, most recently, antiabortion activists developed the framework for civil bounty enforcement of abortion laws, paving the way for pre-*Dobbs* abortion bans that federal courts, including the Supreme Court, have refused to enjoin.[20] In Texas, Senate Bill 8 (S.B. 8) ended in-state legal abortion after roughly six weeks of pregnancy, ten months before the Court overturned *Roe*.[21]

The legal theories supporting these restrictions and bans evolved as well. Since before *Roe*, and continuing after the decision, the antiabortion movement's main focus had been on protecting fetal life. However, once the Supreme Court reiterated in *Casey* that this interest was not enough to allow for a ban on abortion,[22] the movement pivoted its underlying theoretical position. In addition to protecting fetal life, it began to emphasize arguments that abortion restrictions further the life and wellbeing of the pregnant person and protect the integrity of the medical profession.[23] The Supreme Court supported these theories in 2007, noting that abortion restrictions may protect against maternal regret.[24] Some Justices have gone further, citing the need to protect patients from certain abortion procedures, fetal disability-based abortion, and race-based eugenics.[25]

With *Dobbs* eviscerating the federal right to a pre-viability abortion, the strategies of the two movements will be shuffled. The antiabortion

19. *See* Jessica Glenza, *The Tiny American Towns Passing Anti-Abortion Rules*, GUARDIAN (Apr. 27, 2021, 2:00 AM EDT), https://perma.cc/6A23-YGX4.

20. *See* Texas Heartbeat Act, S. 8, 87th Leg., Reg. Sess. § 3 (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2022)) (first civil bounty enforcement law); Whole Woman's Health v. Jackson, 142 S. Ct. 522, 534-35 (2021) (refusing to enjoin the law).

21. *See* Tex. S. 8 § 3 (codified at HEALTH & SAFETY § 171.204).

22. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

23. *See generally* Reva B. Siegel, Brainerd Currie Lecture, *The Right's Reasons: Constitutional Conflict and the Spread of the Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) (describing the rise of the woman-protective antiabortion argument).

24. Gonzalez v. Carhart, 550 U.S. 124, 159 (2007) ("[S]ome women come to regret their choice to abort [] infant life . . . . The State has an interest in ensuring so grave a choice is well informed.").

25. *See* Jill Wieber Lens & Greer Donley, *Second-Trimester Abortion Dangertalk*, 62 B.C. L. REV. 2145, 2160-67 (2021) (discussing disability-based abortion bans and dilation and evacuation bans); Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV 1599, 1604-05 (2022) (discussing the eugenics argument against abortion).

movement will continue to push the envelope as it strives for a nationwide abortion ban,[26] but it will also be forced into a position of defending *Dobbs* and every state's abortion ban when challenged in state courts. Just as *Roe* created the boundaries that the abortion rights movement had to defend and the framework for the defense—which consumed limited resources and upheld a precedent that many considered flawed—the antiabortion movement will need to defend *Dobbs* and state bans as part of the new legal framework. In this way, the antiabortion movement will occupy a defensive posture that the abortion rights movement has held since *Roe*.

And, by contrast, without *Roe*, the abortion rights movement can both refashion old strategies and imagine entirely new approaches. Arguments sounding in fundamental rights and liberty should not be jettisoned,[27] but they can be supplemented with additional theories. The arguments already discussed above—equality, forced labor, and free speech—need renewed attention from scholars and need to be tested before courts and in the court of public opinion.[28] Other arguments supporting abortion rights and access need to be developed as well, such as those related to privileges and immunities, the right to travel, religious liberty, federal preemption, the dormant commerce clause, uncompensated takings, procedural due process, federal jurisdiction, health justice, and vagueness, to name a few.[29] And any legal argument should reflect the evolving nature of abortion services. Abortion rights historically were tethered to the physician-patient relationship, but that is changing as more and more people receive care from healthcare providers who are not doctors and end pregnancies with pills, often without the direct help of any provider.[30]

The conservative legal movement has moved novel, even outlandish, legal theories from laughable to legitimate by talking and writing about them as part of an unrelenting campaign.[31] Abortion rights scholars and advocates also can move creative ideas into the mainstream until courts

26. Caroline Kitchener, *Roe's Gone. Now Antiabortion Lawmakers Want More.*, WASH. POST (June 25, 2022, 7:52 PM EDT), https://perma.cc/4EAD-H2X2.

27. Just because *Dobbs* rejected those theories does not mean a future Court might not build a new foundation of abortion rights. *See* Rachel Rebouché & Linda C. McClain, Opinion, *A New Supreme Court Justice's Dissent on Abortion Could Be Game-Changing*, HILL (Feb. 11, 2022, 9:31 AM ET), https://perma.cc/B25K-L3JX.

28. *See, e.g.*, Meghan Boone, *Reproductive Due Process*, 88 GEO. WASH. L. REV. 511, 558-59 nn.262-67 (2020).

29. *See, e.g.*, Cohen, Donley & Rebouché, *Battleground*, *supra* note 3, at 4-5, 27-29, 39 (discussing many of these arguments).

30. *See generally* Yvonne Lindgren, *When Patients Are Their Own Doctors:* Roe v. Wade *in an Era of Self-Managed Care*, 107 CORNELL L. REV 151 (2021) (framing the right to abortion as one independent of the provider-patient relationship).

31. *See* Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), https://perma.cc/6ZGC-SU79.

eventually take notice. And victories can come at surprising moments. Surely many in the antiabortion movement thought S.B. 8 was blatantly unconstitutional and a waste of time and resources—yet the Fifth Circuit and Supreme Court allowed it to remain in force. Pressing creative arguments in a variety of jurisdictions will produce unpredictable, possibly surprising results.

The same is true for legislative and administrative reform. Abortion rights advocates should continue their recent efforts to persuade legislators and administrative officials to expand access where it continues to exist. We have seen the beginnings of federal, state, and city responses to *Dobbs*. The Biden Administration has issued an executive order and a variety of guidance documents attempting to mitigate some of the harms of the coming crisis,[32] although it could surely do more.[33] State and city responses have been more robust. Oregon and New York will allocate tens of millions of dollars to support abortion patients, including those traveling from out of state because their home state has banned the procedure.[34] Five states have passed laws that protect, to various extents, abortion providers who care for patients from out of state, pushing the boundaries of what states can do to shield their residents from the policies and laws of other states.[35] In that cohort of states, Massachusetts revamped its telehealth rules to allow its providers to care for abortion patients in other states by

32. *See* Press Release, The White House, Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services (July 8, 2022), https://perma.cc/M62H-STFY; Press Release, U.S. Dep't of Health & Hum. Servs., HHS Issues Guidance to the Nation's Retail Pharmacies Clarifying Their Obligations to Ensure Access to Comprehensive Reproductive Health Care Services (July 13, 2022), https://perma.cc/VUE2-JGSS.

33. *See generally* Cohen, Donley & Rebouché, *Joe Biden*, *supra* note 3 (explaining several steps the Biden Administration can take to protect abortion access).

34. Casey Parks, *States Pour Millions into Abortion Access*, WASH. POST (May 13, 2022, 12:22 PM EDT), https://perma.cc/9YWM-CTYJ.

35. *See* Veronica Stracqualursi, *Connecticut Lawmakers Pass Bill to Protect Abortion Seekers and Providers from Out-of-State Lawsuits*, CNN (updated Apr. 30, 2022, 2:49 PM ET), https://perma.cc/K96V-FW7K; Press Release, Kathy Hochul, Governor, New York State, Governor Hochul Signs Nation-Leading Legislative Package to Protect Abortion and Reproductive Rights for All (June 13, 2022), https://perma.cc/W9D8-E3GQ; Amy Simonson, *Delaware Governor Signs Bill Expanding Abortion Access and Provider Protection*, CNN (updated June 29, 2022, 9:02 PM ET), https://perma.cc/RS3Q-NBAD; Press Release, Phil Murphy, Governor, State of New Jersey, Governor Murphy Signs Legislation to Protect Reproductive Health Care Providers and Out-of-State Residents Seeking Reproductive Services in New Jersey (July 1, 2022), https://perma.cc/8Q8A-NU6D; Press Release, Charlie Baker, Governor, Commonwealth of Massachusetts, Governor Baker Signs Legislation Further Protecting Access to Reproductive Health Care Services (July 29, 2022), https://perma.cc/Y7CL-58HL.

telehealth.[36] And several jurisdictions have passed or are considering creating a new cause of action allowing people to sue anyone who interferes with reproductive rights and access, including by bringing a lawsuit against them.[37] Cities within states with abortion bans have deprioritized any enforcement of abortion crimes, regulated deceptive advertising of fake abortion clinics, and passed other regulations to protect their providers.[38]

These reforms are the tip of the iceberg now that *Dobbs* has been decided. New ideas should be aired, considered, and—if there is a plausible argument to support them—tested in some form or other. It is impossible to predict with certainty which strategies will be effective, but there is strategic importance in overwhelming the antiabortion movement with legal arguments it must defend. In short, this current moment calls for creativity and boldness in litigation and advocacy.

II. Expect and Embrace Disagreement

Conflict and disagreement within social and legal movements are common. Over the past half-century, there has been internal disagreement within the abortion rights movement over the movement's scope and focus, especially pertaining to the minimization and exclusion of racial justice. This tension led to the development of the reproductive justice framework, focusing the movement on racial justice, which for too long did not receive the attention it deserved.[39] More recently, there has been a push to use gender-inclusive language within the movement, a change that is not without its detractors.[40]

Despite these conceptual critiques, broadly speaking, since *Roe*, there has been little disagreement about the abortion rights movement's broader

36. Act of July 29, 2022, 2022 Mass. Acts ch. 127, §§ 1, 4.

37. *See, e.g.*, *id.* § 4; N.Y. CIV. RIGHTS LAW § 70-b (McKinney 2022).

38. *See* Nicole Narea, *How Blue Cities in Red States Are Resisting Abortion Bans*, VOX (June 29, 2022, 5:10 PM EDT), https://perma.cc/KWS6-LQDA; Morgan Severson, *Austin City Council Passes GRACE Act to Decriminalize Abortion Despite Statewide Ban*, DAILY TEXAN (July 25, 2022), https://perma.cc/LS5T-JSSP; Chris Potter, *Pittsburgh City Council Passes Bills Affirming Abortion Rights in City Limits*, WESA (July 19, 2022, 5:53 PM EDT), https://perma.cc/6MRY-9KLT.

39. *See generally* LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION (2017) (exploring the evolution of the reproductive justice movement); ASIAN COMTYS. FOR REPROD. JUST., A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE (2005), https://perma.cc/JF68-QFY5 (setting forth the contours of the reproductive justice framework compared to the reproductive rights and reproductive health frameworks).

40. *See* Irin Carmon, *You Can Still Say 'Woman' but You Shouldn't Stop There*, N.Y. MAG. (Oct.
28, 2021), https://perma.cc/2LVJ-DKPP.

legal strategy. This is in part due to a strong group of national organizations and in part because of the point made in Part I: *Roe* created a tool to fight against abortion restrictions, and even those critical of *Roe* agreed it must be a focal point in litigation.

That is not to say there has been consensus over strategy regarding how best to wield *Roe* as a defense. For instance, part of the package of Texas laws ultimately struck down by the Supreme Court in *Whole Woman's Health v. Hellerstedt*[41] was a ban on abortion at 20 weeks.[42] Unlike the ambulatory surgical center and admitting privileges requirements that advocates challenged and the Supreme Court found unconstitutional,[43] the 20-week ban was never challenged because of a fear that the Supreme Court would uphold it, risking a detrimental decision with a nationwide effect.[44] The decision to let that part of the law take effect was a difficult question upon which reasonable minds have disagreed.

Consider the deep dissension that could have derailed antiabortion legal strategies but ultimately did not. To give just a few examples, there have been many different possible avenues to attack *Roe* and its progeny. Should state legislation restricting abortion have exceptions for rape, incest, and the health of the pregnant person, or should they be more absolutist, with only an exception for the person's life? Should state gestational bans start with later abortions so there is a more palatable incremental chipping away, or should they go straight to earlier abortion bans, such as at six weeks or even conception? Should the movement try novel approaches such as civil bounty enforcement, or should it stick to criminal and licensure-based enforcement mechanisms? The antiabortion movement has faced these and many other questions that no doubt caused debate and internal conflict—conflict that will no doubt continue after *Dobbs*.[45]

The abortion rights movement needs to expect similar tumult over strategy as it shifts from a defensive to an offensive posture. Without the analytical framework from *Roe* and *Casey* being the starting point for legal

41. 136 S. Ct. 2292 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

42. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.044 (West 2021) (outlining the 20-week ban provision).

43. *Hellerstedt*, 136 S. Ct. at 2300.

44. The Authors have had discussions with lawyers and providers in Texas who explained the basis for not challenging the 20-week ban.

45. *See generally* MARY ZIEGLER, DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT (2022) (tracing the evolution of the antiabortion movement in the context of its connection to Republican party politics). For a discussion of recent conflicts within the antiabortion movement, see Rachel Roubein & Brittany Shammas, *A Triumphant Antiabortion Movement Begins to Deal With Its Divisions*, WASH. POST (July 24, 2022, 8:32 AM EDT), https://perma.cc/7WXA-HUAN.

claims, the movement will face difficult questions that will lead to inevitable disagreement. Given the reality of limited resources, should money and attention focus on people crossing state lines to obtain abortions in states where it remains legal, or on getting abortion pills in the hands of people in states that ban abortion? Should the movement devote resources to the clinics that are in states where they can no longer provide abortions, supporting them and their employees so they can develop new business models related to full-spectrum early pregnancy care, or should it direct support to clinics in the states where abortion remains legal so that they can handle the influx of abortion patients? Should the movement continue to focus on abortion and contraception, or advance reproductive justice commitments that equally foreground the right to have children and parent those children with dignity? And in light of the resounding victory for abortion rights in the Kansas referendum in August 2022,[46] can the movement pour resources into expensive statewide ballot initiatives while also engaging in other forms of organizing?

In addition to resource constraints, there will be disagreements about legal strategy and theory. Five states have passed laws that prohibit state agencies and courts from participating in any out-of-state prosecutions or lawsuits, and several others are considering them. Is this a smart preemptive move on the part of abortion-supportive states, or is this a threat to interstate cooperation, something that is important for many issues such as recognition of diverse family forms and gun regulation? The generic manufacturer of mifepristone brought a now-withdrawn lawsuit in federal court arguing that the FDA's regulation and approval of medication abortion preempts state laws that further restrict the drug.[47] Is this a powerful theory that could pave the way for abortion access in the future, or is it a threat to local control over other dangerous drugs in the name of consumer safety and corporate responsibility? Looking at the federal level, should the movement push the Biden Administration to take legally risky steps to improve abortion access via administrative agencies and other executive actions—steps that could result in lengthy court battles over executive power but that, if successful, might mean patients have improved access? Or should it focus on messaging and getting out the vote for pro-choice candidates so that someday Congress can pass a national law protecting abortion rights?

In this new landscape, people who care about the same ultimate goal of restoring abortion access will have principled, intense disagreements about

46. *See* Katie Bernard & Lisa Gutierrez, *'No' Prevails: Kansas Votes to Protect Abortion Rights in State Constitution*, KAN. CITY STAR (updated Aug. 3, 2022, 5:23 PM), https://perma.cc/2WGG-2WL2.

47. *See* Complaint at 1-3, GenBioPro, Inc. v. Dobbs, No. 20-cv-652 (S.D. Miss. Oct. 9, 2020). GenBioPro is expected to file a new lawsuit in a different jurisdiction.

all of these questions and more. Such disagreements will lead to division and tension within the movement. Understanding that this disagreement is inevitable might help make it easier for people to continue to work together despite the tension. And from a slightly more removed view, the movement may be best served by groups with different priorities working on different issues rather than the movement trying to align priorities across all stakeholders. Though resources are finite, and some strategies might have collateral consequences that will make them not worth the costs, there are benefits to taking different approaches in an effort to see which breaks through, even if otherwise allied people disagree.

III. Playing the Long Game

Finally, the abortion rights movement will need to look to the long game with its legal strategy.[48] The antiabortion movement has been playing the long game since 1973. When *Roe* was decided, banning abortion immediately was not a possibility. The movement tried a constitutional amendment, but it never had enough support. Rather than accepting *Roe*, the movement took different paths to get to where we are today, fifty years later. For one, the movement pressured the Republican party to appoint judges and Justices who would overturn *Roe*. This strategy is inherently long-term because having enough appointment opportunities takes time. Moreover, several Justices nominated by Republicans ultimately refused to overturn *Roe*.[49] In response to these disappointments, the antiabortion movement did not abandon the strategy to pack the Supreme Court; rather, it doubled down and spent the next three decades nominating and appointing judges and Justices whom they were even more certain would vote against *Roe*. This strategy paid off in *Dobbs*, as five of the six most

48. There have certainly been some strategies, like All* Above All's efforts to repeal the Hyde Amendment, that have included less immediate goals as focuses. *See About*, ALL* ABOVE ALL, https://perma.cc/SPJ8-FFS6 (archived Aug. 25, 2022).

49. Justices Stevens, O'Connor, Kennedy, and Souter all voted to uphold *Roe* in some form. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872-74 (1992) (plurality opinion), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *id.* at 912 (Stevens, J., concurring in part and dissenting in part). Only Justice Scalia was a reliable vote against *Roe*. *See, e.g.*, *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment) (arguing that *Roe* should be explicitly overruled); *Ohio v. Akron Ctr. For Reprod. Health*, 497 U.S. 502, 520 (Scalia, J., concurring) ("[T]he Constitution contains no right to abortion."); *Casey*, 505 U.S. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so."), *overruled by Dobbs*, 142 S. Ct. 2228; *Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting) (deriding *Casey*'s "undue burden" test and arguing that it should be overruled).

recent Republican appointees joined the majority, with the sixth voting to substantially reduce the right.

Meanwhile, another key part of the long-term antiabortion legal strategy played out in state legislatures throughout the country. There, the movement enacted the various approaches to restricting and even banning abortion mentioned in Part I of this Essay. These laws were passed knowing that many would be found unconstitutional. But in some sense, the movement considered it a win whether the law was invalidated or not. If the law was upheld, it would chip away at abortion accessibility on the ground and precedent in the courts. But if it was enjoined, the short-term loss would produce judicial dissents that would be useful in the long term to shore up the argument against *Roe*. Those dissents, along with a concerted effort by academics and commentators to undermine the rationale of *Roe*, are the foundation of the *Dobbs* majority opinion.[50] As *Dobbs* proves, short-term losses can be valuable in the future for pushing the envelope, changing the conversation, and building momentum toward the movement's ultimate goal.

Similarly, creative strategies to promote abortion rights and access discussed in the beginning of this Essay will either be successful, even if incrementally,[51] or create the building blocks for future challenges with powerful dissenting opinions or new narratives. For instance, religious liberty challenges to state abortion bans, regardless of their present success in the courts, could redefine the conversation around abortion's religious and moral value. Focusing on the Thirteenth Amendment could highlight racial injustice and racial disparities in accessing reproductive healthcare, rebutting the recent antiabortion narrative that abortion bans promote racial equality.[52] Strategies promoting medication abortion could highlight how most abortions mimic the natural experience of miscarriage, upending the antiabortion movement's narrative on "gruesome" procedures. And new strategies, like using missed period pills—which dispense medication abortion to induce a period without a pregnancy test—have interesting

50. The majority opinion in *Dobbs* cites past dissenting opinions forty-nine times. *See generally Dobbs*, 142 S. Ct. 2228.

51. We recognize that risks are different in some cases: For the abortion rights movement, some cases might risk someone being sent to jail, whereas ruling against the antiabortion movement usually just meant striking down legislation and mandating that the state pay attorney's fees.

52. *See generally* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025 (2021) (exploring the racialized history of reproductive healthcare in the United States and challenging the current conservative claim that abortion furthers race-based eugenics).

historical analogs that could confound "originalist" judges.[53] Looking to the long game while also keeping an eye on the short term is essential at this moment. A strategy that might have been taken for granted as too risky needs reevaluation and support from a varied set of researchers, litigators, and advocates.

Accepting, even expecting, defeat in the short term has another benefit. As the past decade has demonstrated, unexpected departures from the Supreme Court happen and could quickly change the outlook for abortion rights. If that were to occur, cases need to be in the pipeline. But even in the much more likely scenario that the Court's composition remains stable for a while, pressing forward with a long-term strategy that accepts the risk of short-term defeat could be effective in changing the narrative and winning hearts and minds.

Conclusion

There is no understating the catastrophe that *Dobbs* is for the abortion rights and access movement. Its impact will be staggering, probably worse than most people are imagining. But, in the midst of navigating legal complexity and uncertainty, this moment presents an opportunity for a reassessment of strategy and focus. By thinking creatively, pushing past predictable disagreement and division, and thinking of inevitable losses as part of a long-game strategy, the movement can harness some of the antiabortion movement's most successful approaches for its own purposes.[54]

Rethinking strategy like this will be difficult. The abortion rights movement has many different players, from powerful national organizations that have been at the forefront of legal advocacy to nimble local organizations that have been on the cutting edge of providing access on the ground. A model suited for 2022 and beyond will require a big tent that capitalizes on novel yet varied approaches from all of the existing organizations and welcomes newcomers into the fold, even if they disagree and even if there is no guarantee of success.

Rebuilding the right to abortion, whether through a national statute or a renewed constitutional right to abortion, will require rethinking the movement's strategic orientation. The stakes could not be higher, as every

53. *See* Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. (forthcoming 2022) (manuscript at 36-38), https://perma.cc/WUP7-JVZ8.

54. None of what we argue here should be interpreted as approval of antiabortion tactics, especially those relying on violence, harassment, and lies, or as an argument for copying antiabortion strategies without close attention to costs and repurposing messages for reproductive justice ends.

day that passes without nationwide abortion rights leaves countless people in dangerous medical situations and out of control of their lives and bodies. But with new ideas and relentless offensives, we might end up with a right that is less precarious than *Roe* was.