

**TESTIMONY OF LEAH M. LITMAN**  
**ASSISTANT PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN LAW SCHOOL**

**BEFORE THE COMMITTEE ON ENERGY AND COMMERCE**  
**SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS**  
**UNITED STATES HOUSE OF REPRESENTATIVES**  
**JULY 19, 2022**

Chair DeGette, Ranking Member Griffith, and Members of the House Committee on Energy & Commerce, Subcommittee on Oversight and Investigations, thank you for the opportunity to appear before you. My name is Leah Litman. I am an Assistant Professor of Law at the University of Michigan Law School, where I teach constitutional law, federal courts, habeas corpus, reproductive rights and justice, current issues in public law litigation, and classes on the Supreme Court. Prior to my appointment at the University of Michigan, I was an Assistant Professor of Law at the University of California, Irvine School of Law, a Visiting Assistant Clinical Professor of Law at Stanford Law School, where I taught in the Supreme Court Litigation clinic, and a Climenko Fellow and Lecturer in Law at Harvard Law School. I also clerked for two different federal judges, including one on the U.S. Supreme Court.

The Supreme Court’s decision overruling *Roe v. Wade*<sup>1</sup> will have, and is already having, dramatic consequences on Americans’ lives. Immediately after the decision, some states put into effect “trigger laws” (laws that would prohibit abortion in the event that *Roe* was overruled), while other states sought to bring back into effect restrictive abortion laws (including laws that prohibited abortion more than six weeks after a person’s last period) that federal courts had previously invalidated by relying on *Roe*.<sup>2</sup>

Taking away peoples’ ability to make decisions about their bodily autonomy is a profound loss of peoples’ right to self-determination. As states quickly move to restrict or prohibit abortion, some people will be forced to shoulder the additional burden of travelling long distances away from their communities in order to obtain abortion care, while some people will not have that luxury and will be forced to carry pregnancies to term against their will. People everywhere are unsure about what their rights are on any given day. Imposing these burdens on people who are just trying to make decisions about their bodily autonomy is harmful to peoples’ lives.<sup>3</sup> And denying, burdening, or destabilizing

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, The Guttmacher Institute (June 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned>; Devan Cole & Tierney Sneed, *Where abortion ‘trigger laws’ and other restrictions stand after the Supreme Court overturned Roe v. Wade*, CNN (July 4, 2022), <https://www.cnn.com/2022/06/27/politics/states-abortion-trigger-laws-roe-v-wade-supreme-court/index.html>.

<sup>3</sup> Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 216 (2012) (U.S. mortality rate associated with live births from 1998 to 2005 was 8.8 deaths per 100,000 live births); Marian F. MacDorman et al, *Recent Increases in the U.S. Maternal Mortality Rate: Disentangling Trends from Measurement Issues*, 128 OBSTETRICS & GYNECOLOGY 447 (2016) (finding a 26.6% increase in maternal mortality rates between 2000 and 2014). Women are fourteen times more likely to die by carrying a pregnancy to term than by having an abortion. See Raymond & Grimes, *supra*, at 216. In Mississippi, a woman is 118 times more likely to die by carrying a pregnancy to term than by

their access to abortion care will not only impact their lives; it will jeopardize their health, their economic stability, their ability to care for their families, and more.<sup>4</sup>

The impact of *Dobbs v. Jackson Women’s Health Organization*<sup>5</sup> is already being felt in many places around the country.<sup>6</sup> The harm and chaos that *Dobbs* is producing is only likely to get worse over time, at least until there is meaningful action to restore the right to abortion and to support people who are seeking access to abortion care. While the loss of the right to an abortion will likely impact everyone in some way, the Court’s decision will fall hardest on historically disadvantaged and excluded communities who are already vulnerable—Black communities, as well as other communities of color, young people, people with more limited economic resources, the LGBTQ+ community, and others too.<sup>7</sup>

Finally, the decision overruling *Roe* represents a challenge to the rule of law as well as our broader constitutional order because of the brand of judicial decisionmaking it reflects. The Court’s decision not only undermines a foundational line of precedents ensuring the liberty and equality of all persons; it is also part of an alarming trend in Supreme Court decisionmaking that makes it difficult for anyone, including lawyers, to rely on seemingly established law and conventional forms of legal reasoning. The uncertainty generated by the Court’s approach to decisionmaking chills people’s ability to exercise their constitutional rights and undermines the ability of private and public institutions to work to secure those rights. I thank the Committee for their attention to these pressing issues.

## I. The Framework and Legal Reasoning in *Dobbs* Reflect A Political Campaign to Undo the Abortion Right and Other Reproductive Rights

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having an abortion. See Miss. State Dep’t of Health, Miss. Maternal Mortality Report 2013-2016 (Apr. 2019), [https://msdh.ms.gov/msdhsite/\\_static/resources/8127.pdf](https://msdh.ms.gov/msdhsite/_static/resources/8127.pdf); Katherine Kortzmit et al., Abortion Surveillance—United States, 2018, 69 MMWR Surveillance Summaries 1 (Nov. 2020), <https://www.cdc.gov/mmwr/volumes/69/ss/pdfs/ss6907a1-H.pdf>.

<sup>4</sup> Diana G. Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108(2) AM. J. PUB. HEALTH 407, 410–12 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5803812/pdf/AJ.PH.2017.304247.pdf>

<sup>5</sup> 142 S. Ct. 2228 (2022); Diana Greene Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty among Children Born after Denial of Abortion vs after Pregnancies Subsequent to an Abortion*, 172 J. AM. MED. ASS’N. PEDIATRICS (2018), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2698454>; Bixby Ctr For Glob Reproductive Health, *Advancing New Standards in Reproductive Health, Turnaway Study*, [www.ansirh.org/sites/default/files/publications/files/tur\\_naway\\_study\\_brief\\_web.pdf](http://www.ansirh.org/sites/default/files/publications/files/tur_naway_study_brief_web.pdf).

<sup>6</sup> See, e.g., Devan Cole & Tierney Sneed, *Here’s where abortion ‘trigger laws’ stand after the overturn of Roe v. Wade*, CNN (July 1, 2022), <https://www.kcra.com/article/heres-where-abortion-trigger-laws-stand-after-the-overturn-of-roe-v-wade/40486700#>.

<sup>7</sup> See, e.g., Pregnancy Mortality Surveillance System, Ctrs for Disease Control & Prevention (Nov 25, 2020), <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortalitysurveillance-system.htm> (for every 100,000 live births from 2014–2017, 13.4 non-Hispanic white women died of pregnancy-related causes compared to 41.7 non-Hispanic black women). Black women are 3.5 times more likely to die of maternal mortality than white women. See News Release, Nat’l Insts. of Health, NIH-funded study highlights stark racial disparities in maternal deaths (Aug. 12, 2021), <https://www.nih.gov/news-events/news-releases/nih-funded-study-highlights-stark-racialdisparities-maternal-deaths>.

### A. The *Dobbs* Litigation Capitalized on a Political Campaign to Take Over the Courts

The litigation in *Dobbs* illustrates how politicians have used Supreme Court appointments to advance a political agenda to take away reproductive rights. The litigation also underscores how politicians believe that the recently altered composition of the Supreme Court provides a greenlight to make significant changes to constitutional law as we know it.

In spring 2017, there were rumors that Justice Anthony Kennedy planned to announce his retirement.<sup>8</sup> During his tenure at the Supreme Court, Justice Kennedy reaffirmed *Roe v. Wade* and *Planned Parenthood v. Casey*, the decisions protecting the right to decide to have an abortion.<sup>9</sup> President Trump promised to appoint a pro-life Justice to replace Justice Kennedy, and several Senators spoke openly about confirming pro-life Justices.<sup>10</sup>

Against that backdrop, in spring 2018, Mississippi enacted the Gestational Age Act, the law at issue in *Dobbs*.<sup>11</sup> Mississippi conceded that the law was unconstitutional under existing precedent because the law completely prohibited people from making the decision to have an abortion at some points before viability, placing the law in direct conflict with *Roe* and *Casey*.<sup>12</sup> But Mississippi began pressing the argument that courts should change the law.

A few months later, and as predicted, Justice Kennedy announced his retirement from the U.S. Supreme Court.<sup>13</sup> President Trump announced that he would nominate then Judge Brett Kavanaugh

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<sup>8</sup> See Ariane de Vogue, *Anthony Kennedy retirement watch at a fever pitch*, CNN (June 26, 2017), <https://www.cnn.com/2017/06/24/politics/anthony-kennedy-retirement-rumors/index.html>.

<sup>9</sup> See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992) (plurality op.) (reaffirming *Roe*); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016) (reaffirming *Casey*).

<sup>10</sup> See Josh Hawley (@HawleyMO), Twitter (June 24, 2022), <https://twitter.com/HawleyMO/status/1540345816019238912> (“For those who wondered why I said, two years ago, I would vote to confirm ONLY Supreme Court Justices who acknowledged *Roe* was wrong, this is why. Amy Barrett was the first openly pro-life nominee of my lifetime. And she was the deciding vote.”); Jemima McEvoy, Lindsey Graham Praises Amy Coney Barrett For Being ‘Unashamedly Pro-Life’, *Forbes* (Oct. 14, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/10/14/lindsey-graham-praises-amy-coney-barrett-for-being-unashamedly-pro-life/?sh=73ec9c99296c>; Senator Tom Cotton, Address to the National Right to Life Committee (June 30, 2021), <https://www.cotton.senate.gov/news/speeches/cotton-defends-the-right-to-life> (“And yes, in Washington, yes, we’ve moved heaven and Earth to confirm hundreds of pro-life judges and three Supreme Court justices who may hope may soon one day call *Roe v. Wade* what it was and what it remains: a moral and constitutional travesty.”).

<sup>11</sup> Miss. Code Ann. § 41–41–191(4)(b) (2018).

<sup>12</sup> See *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 279 (5<sup>th</sup> Cir. 2019) (Ho, J., concurring) (“Mississippi concedes that HB 1510 would be held unconstitutional in every circuit that has addressed such issues to date.”).

<sup>13</sup> Robert Barnes, *Justice Kennedy, the pivotal swing vote on the Supreme Court, announces his retirement*, *Washington Post* (June 27, 2018), [https://www.washingtonpost.com/politics/courts\\_law/justice-kennedy-the-pivotal-swing-vote-on-the-supreme-court-announces-retirement/2018/06/27/a40a8c64-5932-11e7-a204-ad706461fa4f\\_story.html](https://www.washingtonpost.com/politics/courts_law/justice-kennedy-the-pivotal-swing-vote-on-the-supreme-court-announces-retirement/2018/06/27/a40a8c64-5932-11e7-a204-ad706461fa4f_story.html).

to replace him.<sup>14</sup> As a judge on the U.S. Court of Appeals for the D.C. Circuit, Judge Kavanaugh authored a dissent in which he would have ruled for the Trump administration when they refused to allow undocumented minor women in their custody to obtain abortions.<sup>15</sup> The Senate confirmed Justice Kavanaugh to the Supreme Court.<sup>16</sup>

The *Dobbs* litigation proceeded, and a federal trial court and appeals court concluded that Mississippi's law violated established Supreme Court precedent.<sup>17</sup> The district judge (the federal trial court) wrote that Mississippi's "professed interest in 'women's health' is pure gaslighting," and that the legislation is "closer to the old Mississippi—the Mississippi bent on controlling women and minorities."<sup>18</sup> Mississippi then asked the Supreme Court to review the decision invalidating the law.

Mississippi's petition for certiorari was filed on June 15, 2020 when Justice Ruth Bader Ginsburg was still on the Supreme Court and the Court had five, not six, Justices who were appointed by Republican Presidents.<sup>19</sup> In requesting the Supreme Court hear the case, Mississippi argued that "the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*."<sup>20</sup> Instead, Mississippi argued, the case was "an ideal vehicle" to "reconsider the bright-line viability rule" that states may not prohibit abortions before viability.<sup>21</sup>

Justice Ruth Bader Ginsburg passed away in early September 2020, and the Senate confirmed Justice Amy Coney Barrett to replace her the following month as the election was underway.<sup>22</sup> Mississippi's petition for certiorari was initially distributed at the Supreme Court (for discussion on whether to hear the case) after Justice Ginsburg passed away, but before Justice Barrett was confirmed,

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<sup>14</sup> Nina Totenberg, *Trump Picks Kavanaugh To Replace Retiring Justice Kennedy*, NPR (July 10, 2018), <https://www.npr.org/2018/07/10/627588065/trump-picks-brett-kavanaugh-to-replace-retiring-justice-kennedy>.

<sup>15</sup> *Garza v. Hargan*, No. 17-5236, 2017 WL 4707112 (D.C. Cir. Oct. 19, 2017), vacated by 874 F.3d 735 (D.C. Cir. 2017), vacated sub nom *Azar v. Garza*, 138 S. Ct. 1790 (2018); see *Garza v. Hargan*, 874 F.3d 735, 752 (D.C. Cir. 2017) (mem.) (Kavanaugh, J., dissenting). After authoring this opinion, Justice Kavanaugh was added to President Trump's list of potential nominees to the Supreme Court.

<sup>16</sup> Seung Min Kim & John Wagner, *Kavanaugh sworn in as Supreme Court justice after divided Senate votes for confirmation*, Washington Post (Oct. 6, 2018), [https://www.washingtonpost.com/politics/kavanaugh-vote-divided-senate-poised-to-confirm-trumps-nominee/2018/10/06/64bf69fa-c969-11e8-b2b5-79270f9cce17\\_story.html](https://www.washingtonpost.com/politics/kavanaugh-vote-divided-senate-poised-to-confirm-trumps-nominee/2018/10/06/64bf69fa-c969-11e8-b2b5-79270f9cce17_story.html).

<sup>17</sup> One of the court of appeals judges who heard the case was nominated by President Trump; that judge wrote a separate opinion urging the Supreme Court to revisit *Roe v. Wade* and *Planned Parenthood v. Casey*. *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 277 (5<sup>th</sup> Cir. 2019) (Ho, J., concurring).

<sup>18</sup> *Jackson Women's Health Org. v. Carrier*, 349 F. Supp. 3d 536, 540 n.22 (S.D. Miss. 2018).

<sup>19</sup> See Dkt. No. 19-1392 (U.S. June 15, 2020), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1392.html>.

<sup>20</sup> Pet. for Certiorari at 5, *Dobbs*, 142 S. Ct. 2228.

<sup>21</sup> *Id.*

<sup>22</sup> Brief of Petitioners Thomas Dobbs, et al. at 1, *Dobbs*, 142 S. Ct. 2228.

at the Court’s September 29, 2020 conference.<sup>23</sup> The Court held onto Mississippi’s petition, and did not decide whether to grant it, for almost a full year until May 17, 2021, when the Court agreed to hear the case during the OT 2021 term.<sup>24</sup>

Once the newly constituted Supreme Court granted the petition, Mississippi shifted gears.<sup>25</sup> Instead of arguing that “the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*,”<sup>26</sup> the first page of Mississippi’s opening brief stated that “the question [in this case] becomes whether this Court should overrule” *Roe* and *Casey*.<sup>27</sup>

B. The *Dobbs* Decision Minimizes the Profound Harms It Unleashes and Enables States to Take Away Constitutional Rights from Historically Excluded Groups

On June 24, the Supreme Court issued its decision overruling *Roe* and *Casey*. The opinion in the case conveys little awareness, much less concern, for the profound consequences on peoples’ lives that will result from the Court withdrawing the right to abortion. The Court’s reasoning also provides a blueprint for states to deny constitutional protections to historically marginalized and excluded groups. The Court declared that the Constitution offers no protection for peoples’ liberty to decide not to carry a pregnancy to term because state laws and federal courts did not recognize any such right in the 1860s—a time when women were thought to lack full legal personhood, were not entitled to vote, and could not serve in the state legislatures and federal courts deciding these issues. This reasoning jeopardizes constitutional protections for historically excluded groups because the unfortunate reality is that many differently groups have been historically denied constitutional protections; the fact that that happened doesn’t make it right, and it certainly doesn’t make it legal. Yet the Court’s approach to constitutional law makes it easier for states to deny constitutional protections to historically excluded groups on the ground that states have denied them protections and rights in the past.

Justice Alito’s majority opinion first explained why a majority of the Court believes that *Roe* and *Casey* were wrongly decided. The opinion began by stating that “[t]he underlying theory . . . that the Fourteenth Amendment’s Due Process Clause provides substantive, as well as procedural, protection for ‘liberty’ [] has long been controversial.”<sup>28</sup> But, the Court continued, the Court’s cases have acknowledged that the Constitution does protect “a select list of fundamental rights that are not

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<sup>23</sup> See Dkt. No. 19-1392 (U.S. Sept. 2, 2020), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1392.html>.

<sup>24</sup> See Dkt. No. 19-1392 (U.S. May 17, 2021), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1392.html>.

<sup>25</sup> See *Egbert v. Boule*, 142 S. Ct. 1793, 1818 (2022) (Sotomayor, J., dissenting) (describing the Court as “restless and newly constituted”).

<sup>26</sup> Pet. for Certiorari at 5, *Dobbs*, 142 S. Ct. 2228.

<sup>27</sup> Brief of Petitioners Thomas Dobbs, et al. at 1, *Dobbs*, 142 S. Ct. 2228.

<sup>28</sup> 142 S. Ct. at 2246.

mentioned anywhere in the Constitution,” namely those rights that are “‘deeply rooted in our history and tradition’ and . . . essential to our Nation’s ‘scheme of ordered liberty.’”<sup>29</sup>

The opinion then explained why the Justices believed the decision to end a pregnancy should not be a fundamental right protected by the Constitution:

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware.<sup>30</sup>

While Justice Alito’s majority opinion seemed to treat the fact that there was “no support for such a constitutional right” until shortly before *Roe* as sufficient evidence of *Roe*’s error, the opinion also advanced the additional, more historically dubious claim that “abortion had long been a *crime* in every single State . . . criminal in at least some stages of pregnancy and . . . regarded as unlawful and could have very serious consequences at all stages.”<sup>31</sup>

Justice Alito’s majority opinion then rejected the argument “that the abortion right is an integral part of a broader entrenched right” that might be defined either as “a right to privacy” or as “the freedom to make ‘intimate and personal choices’ that are ‘central to personal dignity and autonomy.’”<sup>32</sup> The opinion rejected the argument that there was any right so defined that was protected by the Constitution: “While individuals are certainly free to think and to say what they wish about ‘existence,’ ‘meaning,’ the ‘universe,’ and ‘the mystery of human life,’ they are not always free to act in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of ‘liberty,’ but it is certainly not ‘ordered liberty.’”<sup>33</sup> The Court continued:

These attempts to justify abortion through appeals to a broader right to autonomy and to define one’s ‘concept of existence’ prove too much. *Casey*, 505 U.S. at 851, 112 S.Ct. 2791. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. See *Compassion in Dying v. Washington*,

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<sup>29</sup> *Id.*

<sup>30</sup> 142 S. Ct. at 2248.

<sup>31</sup> *Id.* But see Organization of American Historians, Joint OAH-AHA Statement on the *Dobbs v. Jackson* Decision (July 2022), <https://www.oah.org/insights/posts/2022/july/joint-oah-aha-statement-on-the-dobbs-v-jackson-decision/> (“[T]he court adopted a flawed interpretation of abortion criminalization that has been pressed by anti-abortion advocates for more than thirty years. The opinion inadequately represents the history of the common law, the significance of quickening in state law and practice in the United States, and the nineteenth-century forces that turned early abortion into a crime.”).

<sup>32</sup> 142 S. Ct. at 2257.

<sup>33</sup> *Id.*

85 F.3d 1440, 1444 (CA9 1996) (O’Scannlain, J., dissenting from denial of rehearing en banc). None of these rights has any claim to being deeply rooted in history.<sup>34</sup>

Finally, the Court rejected analogies between the abortion right recognized in *Roe* and *Casey* and rights recognized in other fundamental rights cases that are canvassed in more depth below (including decisions protecting the right to marry a person of the same sex,<sup>35</sup> the right to obtain contraceptives,<sup>36</sup> and the right to engage in private, consensual sexual acts with another adult<sup>37</sup>). The Court stated that the rights recognized in *Roe* and *Casey* “destroy[] what those decisions call ‘potential life’” and accordingly involve a “critical moral question” not at issue in other cases.<sup>38</sup>

## II. **The Decision Overruling *Roe* Exemplifies A Chaotic Approach to Law That Threatens Stability, Predictability, the Rule of Law, and Myriad Constitutional Rights.**

The *Dobbs* decision, and the overturning of *Roe v. Wade*, jeopardizes our collective ability to make decisions based on law and legal reasoning. This is a challenge for the rule of law in the United States. The *Dobbs* decision, as well as other recent Supreme Court decisions, showcase a selective attention to precedent, to history, to facts, and to analogical reasoning. This pattern of decisionmaking makes it difficult for lawyers to assess possible outcomes and advise their clients; it makes it harder for people to exercise their rights because they cannot rely on those rights being protected; and it makes it harder for institutions, including government institutions, to protect peoples’ rights because they cannot reliably predict how courts will decide cases based on conventional forms of legal reasoning.

### A. *Dobbs* Jeopardizes Other Fundamental Rights

The potential impact of the *Dobbs* decision for other fundamental rights illustrates the unpredictability of the current Court’s jurisprudence. The Fourteenth Amendment has historically guaranteed liberty to all persons.<sup>39</sup> That liberty includes the right to make certain personal decisions about intimacy, marriage, and procreation—decisions “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the 14th Amendment.”<sup>40</sup>

These rights are liberties implicitly protected by the Constitution because they are so personal and central to individuals’ lives and to their autonomy. Based on the idea that the Constitution safeguards such rights, the Court has held that the Constitution protects the right to contraception,<sup>41</sup>

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<sup>34</sup> *Id.* at 2258.

<sup>35</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>36</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>37</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>38</sup> 142 S. Ct. at 2258.

<sup>39</sup> U.S. Const. amend. XIV.

<sup>40</sup> *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851 (plurality op.)).

<sup>41</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

the right to procreation,<sup>42</sup> the right to marry,<sup>43</sup> including the right to marry a person of the same sex,<sup>44</sup> parental rights concerning the upbringing of children,<sup>45</sup> the right to consensual sexual intimacy with another adult,<sup>46</sup> and the right to live with extended family members.<sup>47</sup> The Constitution implicitly protects these rights because “We are not an assimilative, homogeneous society, but a facilitative, pluralistic one in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies.”<sup>48</sup>

*Dobbs* represents a challenge to this body of law. One of two things is true: Either the Court’s decision in *Dobbs* jeopardizes the legal basis for other foundational rights in our constitutional system, or the Court reached the result in *Dobbs* for some number of unstated reasons that provide no clues and no reassurances about what the Court might do next.

Take the Court’s reasoning on its own terms. *Dobbs*’ conclusion that *Roe* and *Casey* were wrong rested on the premise that the notion that the Constitution protects rights not explicitly listed in the constitutional text is “controversial,” and that *Roe* and *Casey* were not among the rights protected by the Constitution because “[u]ntil the latter part of the 20<sup>th</sup> century, . . . [n]o state constitutional provision had recognized such a right,” and “[u]ntil a few years before *Roe* was handed down, no federal or state court had recognized such a right.”<sup>49</sup>

The same thing could be said—and indeed, the same thing has been said—about several other fundamental rights that the Supreme Court has recognized are implicitly protected by the Constitution.<sup>50</sup> Consider the right to contraception, or the right to marry a person of the same sex, or the right to consensual sexual intimacy with a person of the same sex. “Until the latter part of the 20<sup>th</sup> century,” “[n]o state constitutional provision had recognized such . . . right[s]” and “[u]ntil a few years

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<sup>42</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>43</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>44</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>45</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>46</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>47</sup> *Moore v. East Cleveland*, 431 U.S. 494 (1977).

<sup>48</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting). See also *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (“[T]here may be many ‘right’ ways” of conducting relationships and “much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.”), overruled by *Lawrence*, 539 U.S. 558.

<sup>49</sup> 142 S. Ct. at 2248.

<sup>50</sup> *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting) (“The Court’s description of ‘the state of the law’ at the time of *Bowers* only confirms that *Bowers* was right.”); *id.* at 596 (“[T]he only relevant point is that it was criminalized—which suffices to establish that homosexual sodomy is not a right ‘deeply rooted in our Nation’s history and tradition.’ The Court today agrees that homosexual sodomy was criminalized.”); *id.* at 605-06 (Thomas, J., dissenting); *Obergefell*, 576 U.S. at 686 (Roberts, C.J., dissenting) (“Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. . . [O]ur Constitution does not enact any one theory of marriage.”); *id.* at 687 (“The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent.”).



before *Roe* was handed down, no federal or state court had recognized such . . . right[s].”<sup>51</sup> If the majority in *Dobbs* meant what it said about why *Roe* and *Casey* are wrong, then the Court’s reasoning seems to apply to decisions recognizing the right to contraception, the right to marriage equality, and the right to same-sex sexual intimacy, among others.

*Dobbs* also faulted *Roe* and *Casey* for relying on the notion that the Constitution protects a “broader right to autonomy and to define one’s ‘concept of existence,’” and for framing the right implicated in those cases at “a high level of generality.”<sup>52</sup> Yet that terminology, and that high level of generality, is precisely the register in which the Court grounded the rights to contraception, to marriage equality, and to same-sex sexual intimacy. *Griswold*, the case recognizing a right to contraception, located the right to contraception within “the zone of privacy created by several fundamental constitutional guarantees.”<sup>53</sup> When *Eisenstadt v. Baird* recognized that unmarried individuals also have a right to contraception,<sup>54</sup> *Eisenstadt* rooted that conclusion in “the right of privacy” which the Court defined to mean the “right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>55</sup> When *Lawrence v. Texas* overruled *Bowers v. Hardwick* and recognized a right to consensual sexual intimacy between adults of the same sex, the Court relied on *Roe*’s recognition of “the right of a woman to make certain fundamental decisions affecting her destiny.”<sup>56</sup> Indeed, in *Lawrence*, the Court pointed to *Planned Parenthood of Southeastern Pennsylvania v. Casey* as one of “two principal cases decided after *Bowers*” that “cast [*Bower*’s] holding into . . . doubt.”<sup>57</sup> *Lawrence* defined the right at issue in the case in these general terms: the right to pursue “one element in a personal bond that is more enduring,”<sup>58</sup> and the same rights to “autonomy” and “personal liberty” that were recognized in *Casey*, the decision that *Dobbs* overruled.<sup>59</sup> Finally, when *Obergefell v. Hodges* recognized a right to marriage equality, the Court described the Fourth Amendment as protecting “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>60</sup> The decision also rejected the idea that “history and tradition . . . set [the] outer boundaries” of the liberties protected by the Constitution.<sup>61</sup> So here too, if *Dobbs* meant that *Roe* and *Casey* were wrong because the decisions appealed to a broader right to autonomy and a broader right to make personal decisions, then that reasoning seems to apply to the decisions recognizing rights to contraception, to marriage

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<sup>51</sup> 142 S. Ct. at 2248.

<sup>52</sup> *Id.* at 2258.

<sup>53</sup> 381 U.S. at 485.

<sup>54</sup> 405 U.S. 438 (1972)

<sup>55</sup> *Id.* at 453; *see also id.* (explaining that “the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup”).

<sup>56</sup> 539 U.S. 558, 565 (2003).

<sup>57</sup> *Id.* at 573.

<sup>58</sup> *Id.* at 567.

<sup>59</sup> *Id.* at 574, 578.

<sup>60</sup> 576 U.S. 644, 663 (2015).

<sup>61</sup> *Id.* at 664.

equality, and to same-sex sexual intimacy. Justice Kennedy authored both *Lawrence*, the opinion recognizing a right to same-sex sexual intimacy, and *Obergefell*, the opinion recognizing a right to marriage equality. Both decisions are considered central to his legacy—a legacy that is endangered by the current Supreme Court.<sup>62</sup>

The other statements in the *Dobbs* majority that purported to distinguish other fundamental rights from the abortion right raise more questions than they answer. The Court stated in a conclusory fashion that “nothing in this opinion [*Dobbs*] should be understood to cast doubt on precedents that do not concern abortion.”<sup>63</sup> The Court’s “expla[nation]” for “why that is so” was that other rights “are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed ‘potential life’”<sup>64</sup> and because the rights recognized in *Roe* and *Casey* involve a “critical moral question” not at issue with respect to other rights.<sup>65</sup>

But if that is the reason why the *Dobbs* majority believes that *Roe* and *Casey* were wrong, then the *Dobbs* majority’s statements about text, history, and tradition do not actually explain their assessment about why *Roe* is incorrect. Instead, their conclusion about *Roe* would seem to rest on an apparent belief that abortion involves a “critical moral question.” But nothing in the *Dobbs* majority indicates whether *other* rights—like the right to contraception, to marriage equality, or to consensual sexual intimacy—involve *other* “critical moral question[s]” or considerations that would lead the Justices in the *Dobbs* majority to think that the cases recognizing those rights are also wrong.<sup>66</sup> As the joint dissent in *Dobbs* wrote:

[O]ne of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority’s opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.<sup>67</sup>

Finally, there is some evidence that the Court will pave the way for other fundamental rights to be nullified or even formally revisited. In *Dobbs* itself, Justice Thomas wrote separately to express his view that the Court should overrule *Obergefell*, *Lawrence*, and *Griswold*.<sup>68</sup> Or consider the right to contraception specifically. *Dobbs*, together with other decisions, may embolden states to try and nullify the right to contraception by asserting states’ authority to (inaccurately) treat certain methods of contraception, which is still constitutionally protected, as “abortifacients,” which are not.

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<sup>62</sup> See Christopher Wiggins, *Conservative Texas Lawyer Targets PrEP Access After Abortion Rights*, Advocate (July 13, 2022), <https://www.advocate.com/news/2022/7/12/conservative-texas-lawyer-targets-prep-meds-after-abortion-rights> (documenting a case where lawyers are asking a court to decline to enforce the Affordable Care Act’s mandate for the preventive medications known as pre-exposure prophylaxis, or PrEP, drugs because the “drugs . . . facilitate and encourage homosexual behavior”).

<sup>63</sup> 142 S. Ct. at 2277-78.

<sup>64</sup> *Id.* at 2280.

<sup>65</sup> *Id.* at 2258.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 2319 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

<sup>68</sup> See *id.* at 2300-04 (Thomas, J., concurring).

Contraceptive methods are not abortifacients, but the Court has blurred the distinction between the two, and *Dobbs* may embolden states to try and further (falsely) equate them. For example, in *Burwell v. Hobby Lobby Stores*, five Justices concluded that an employer could view “four contraceptive methods” as “abortifacients,” and accordingly obtain a religious exemption from the United States Department of Health and Human Services’ contraceptive mandate.<sup>69</sup> Additionally, the majority opinion in *Dobbs* directed courts to give substantial latitude to states that seek to restrict abortion and specifically told courts not to second guess states’ judgments about abortion.<sup>70</sup> The states accordingly might argue that they are entitled to treat some forms of contraception as “abortifacients” and prohibit them.<sup>71</sup>

Or consider the right to marriage equality and the right to same-sex sexual intimacy, both of which have been directly challenged by Justices in the *Dobbs* majority.<sup>72</sup> Just two years before *Dobbs*, Justice Alito, the author of *Dobbs*, joined a statement respecting the denial of certiorari written by Justice Thomas; the statement seemed to invite efforts to have the Court revisit *Obergefell*, or at least efforts to substantially narrow the right to marriage equality recognized in *Obergefell*.<sup>73</sup> In 2017, Justice Gorsuch wrote the dissent, joined by Justices Thomas and Alito, from the Supreme Court’s decision invalidating an Arkansas statutory regime that established different standards for listing same-sex parents, versus different-sex parents, on a child’s birth certificate.<sup>74</sup> And during his confirmation hearings, when pressed about whether he agreed with the Court’s decision in *Griswold* and *Eisenstadt*, the decisions recognizing that unmarried individuals have a constitutional right to contraception, Justice Kavanaugh stated that the opinion he agreed with was “Justice White’s concurrence.”<sup>75</sup> But Justice White would not have extended a right to contraception to unmarried individuals.<sup>76</sup> Justice White also wrote the majority opinion in *Bowers v. Hardwick*, the decision upholding a statute criminalizing same-sex sexual intimacy between consenting adults.<sup>77</sup>

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<sup>69</sup> 573 U.S. 682, 691, 701 (2014).

<sup>70</sup> 142 S. Ct. at 2283 (“[R]ational-basis review is the appropriate standard” for courts to review “state abortion regulations.”); *id.* at 2284 (“Under that deferential standard of review” “courts cannot ‘substitute their social and economic beliefs for the judgment of legislative bodies’” and must uphold laws “if there is a rational basis on which the legislative *could have thought* that it would serve legitimate state interests.” (emphasis added)).

<sup>71</sup> *See id.* at 2284 (Among the interests the Court listed as “legitimate” were “respect for and preservation of prenatal life at all stages of development.”).

<sup>72</sup> The 2016 Republican platform promised to appoint Justices who would overrule *Obergefell v. Hodges* in addition to *Roe v. Wade*. Republican Nat’l Comm., Republican Platform 2016, at 10 (2016), [https://procdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL%5B1%5D-ben\\_1468872234.pdf](https://procdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf).

<sup>73</sup> *Davis v. Ermold*, 141 S. Ct. 3, 4 (2020) (mem.) (saying of *Obergefell*, “the Court has created a problem that only it can fix. Until then, *Obergefell* will continue to have ‘ruinous consequences for religious liberty’”).

<sup>74</sup> *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (Gorsuch, J., dissenting).

<sup>75</sup> <https://www.govinfo.gov/content/pkg/CHRG-115shrg32765/pdf/CHRG-115shrg32765.pdf> page 307-08.

<sup>76</sup> *Eisenstadt*, 405 U.S. at 463-65 (White, J., concurring); *Griswold*, 381 U.S. at 502 (White, J., concurring).

<sup>77</sup> 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting), overruled by *Lawrence*, 539 U.S. 558.

Similarly not reassuring are a few commentators' efforts to distinguish *Roe* and *Casey* from other fundamental rights that the Court has recognized are implicitly protected by the Constitution.<sup>78</sup> One purported basis for distinguishing these rights from *Roe* and *Casey* is that the number of states that are currently interested in revisiting *Roe* and *Casey* is much larger than the number of states that are interested in revisiting other fundamental rights, including the rights recognized in *Lawrence* and *Obergefell*.<sup>79</sup>

It is worth unpacking what this line of argument might mean. It might mean that the reasoning in *Dobbs* could plausibly lead the Court to overrule *Lawrence* or other cases protecting fundamental rights in the event that a state, or some number of states, actually wanted to overrule *Lawrence* (the decision protecting consensual sexual intimacy between adults of the same sex). If that is the basis for distinguishing *Roe* from *Lawrence* and other cases, then law and the Court's legal reasoning do not distinguish the rights from one another. What distinguishes them is whether states are politically interested in nullifying or overruling rights in addition to the rights recognized in *Roe* and *Casey*.<sup>80</sup>

Alternatively, this line of argument could mean that whether the Supreme Court will reaffirm a right depends on the number of states *in the present day* that want to have laws infringing a particular right (say the right to contraception recognized in *Griswold*). If that is the basis for distinguishing *Roe* from other rights, then that would mean much of the reasoning in *Dobbs* is irrelevant and does not provide the actual basis for the *Dobbs* decision. This argument seems to suggest that what really matters to the Court is not the historical and textual basis for a given right, but instead whether a right is accepted, in the present day, by some number of states.

Neither of these bases for distinguishing *Roe* and *Casey* from *Griswold* or other decisions suggest that the Court would, if the future of *Griswold* were directly presented to it, simply reaffirm *Griswold* (or another decision) and distinguish *Roe* based on what the Court had said in *Dobbs*.<sup>81</sup> These arguments either deny that such a case would ever come to the Court, or suggest the Court would say something other than what it had said in *Dobbs* and choose to reaffirm other rights rather than overrule them. Those possibilities are hardly reassuring; and they certainly provide no guarantees.

## B. *Dobbs* Creates Substantial Uncertainty Surrounding Reproductive Rights.

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<sup>78</sup> E.g., Akhil Reed Amar, *The End of Roe v. Wade*, *The Wall Street Journal* (May 14, 2022); Akhil Reed Amar, *A Liberal's Case for Brett Kavanaugh*, *New York Times* (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/brett-kavanaugh-supreme-court-trump.html>.

<sup>79</sup> Amar, *The End of Roe*, *supra*.

<sup>80</sup> See Craig Mauger, *Republican AG candidates criticize 1965 ruling against contraceptive ban*, *The Detroit News* (Feb. 21, 2022), <https://www.detroitnews.com/story/news/politics/2022/02/21/michigan-gop-ag-candidates-criticize-1965-ruling-againstcontraceptive-ban/6879175001/>; Dillon Rosenblatt, *GOP Senate candidate Blake Masters wants to allow states to ban contraception use*, *AZ Mirror* (May 6, 2022), <https://www.azmirror.com/blog/gop-senate-candidate-blake-masters-wants-to-allow-states-to-ban-contraception-use/>.

<sup>81</sup> See, e.g., Leah Litman & Steve Vladeck, *The Biggest Lie Conservative Defenders of Alito's Leaked Opinion Are Telling*, *Slate* (May 5, 2022), <https://slate.com/news-and-politics/2022/05/conservatives-lying-impact-samuel-alito-leaked-draft-opinion-roe.html>.

*Dobbs* and other recent decisions make our system of laws uncertain and unstable with respect to some issues that have become newly relevant in the reproductive rights space. The Court has created uncertainty because of its treatment of precedent, its analyses of history, and its application of analogical reasoning. The resulting uncertainty may chill people’s willingness to exercise their rights because they are unsure whether courts will protect them. It may also undermine public and private institutions’ ability to try and secure rights outside of the courts.

1. *Dobbs Raises Questions About The Right to Travel*

The reasoning in *Dobbs* and other cases has engendered uncertainty about whether individuals have the right to travel out of state to obtain an abortion and whether providers may safely offer abortion care to out-of-state patients without risking legal liability. Writing only for himself in *Dobbs*, Justice Kavanaugh posed the following question “may a State bar a resident of that State from traveling to another State to obtain an abortion?”<sup>82</sup> He answered the question as follows: “In my view, the answer is no based on the constitutional right to interstate travel.”<sup>83</sup>

The Court’s approach to both precedent and legal reasoning, however, raises reasonable questions about whether the Court would ultimately invalidate a state law that prohibits interstate travel to obtain an abortion, or a conviction that involves some interstate travel to obtain an abortion. Justice Kavanaugh spoke only for himself in that separate writing; his observations do not bind him, much less the Court, in a future case. He did not cite any case recognizing or protecting the right to travel; nor did he explain what the right to travel actually guarantees (for example: does the right to travel protect a doctor from prosecution if they provide abortion care to an out-of-state patient?).

The text of the Constitution does not mention a right to travel, just as it does not mention a right to an abortion. Recall that the *Dobbs* majority concluded that *Roe* and *Casey* were wrong in part because of its view that the very notion that the Constitution protects rights not explicitly listed in the constitutional text is “controversial.”<sup>84</sup> So if non-textually-enumerated rights are suspect, then it’s not clear why the right to travel has firmer constitutional grounding than the right to privacy, the abortion right, or the right to make personal decisions regarding family and medical care.

Perhaps one would say that the right to travel is rooted in history whereas the abortion right is not. But it is difficult to rely much on that method of differentiating the two given the questions that have been raised about the Court’s assessments of history in *Dobbs*. For example, *Dobbs* claimed that “abortion had long been a *crime* in every single state” and that “[a]bortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages.”<sup>85</sup> But as the Organization of American Historians and the American Historical Association noted in a statement released two weeks after *Dobbs*, “this flawed interpretation of abortion criminalization” “inadequately represents the history of the common law, [and] the significance of

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<sup>82</sup> *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

<sup>83</sup> *Id.*

<sup>84</sup> *Dobbs*, 142 S. Ct. at 2246.

<sup>85</sup> *Id.* at 2248.

quicken[ing] in state law and practice in the United States.”<sup>86</sup> The historians’ brief “show[ed] plentiful evidence . . . of the long legal tradition, extending from the common law to the mid-1800s (and far longer in some American states, including Mississippi), of tolerating termination of pregnancy before occurrence of ‘quicken[ing],’ the time when a woman first felt fetal movement.”<sup>87</sup> So if the Court does not reliably or accurately conduct historical analysis, then there is uncertainty about whether the Court would find any particular right sufficiently grounded in history.<sup>88</sup>

Additionally, some Justices have taken a restrictive view of the right to travel that raises uncertainty about how the Justices in the *Dobbs* majority would apply the “right to travel” in a case involving interstate travel to obtain an abortion even assuming they recognized any such right. For example, would the Justices say that a statute prohibiting interstate travel to obtain an abortion burdened the right to interstate travel, or would they say instead that the statute merely restricted travel for a particular, limited purpose? Would the Justices invalidate a conviction of a doctor who performed an abortion on an out-of-state patient, or would they affirm it while insisting that, even with the conviction, a person could still travel interstate?<sup>89</sup> These possibilities are not unrealistic. Consider that Chief Justice Rehnquist and Justice Thomas argued that the right to travel did not encompass the right to relocate to and become a citizen of another state.<sup>90</sup> In their dissent in that case, they argued that the right to travel should be limited to instances where “travel itself [is] prohibited.”<sup>91</sup> Given their narrow definition of the right to interstate travel, coupled with the fact that some Justices sometimes decline

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<sup>86</sup> Organization of American Historians, *Joint OAH-AHA Statement on the Dobbs v. Jackson Decision* (July 5, 2022), <https://www.oah.org/insights/posts/2022/july/joint-oah-aha-statement-on-the-dobbs-v-jackson-decision/>.

<sup>87</sup> *Id.* See also Brief for *Amici Curiae* American Historical Association and Organization of American Historians in Support of Respondents, *Dobbs*, 142 S. Ct. 2228; James C. Mohr, ABORTION IN AMERICA 73 (1978) (“To document fully the pervasiveness of the quickening doctrine in the United States through the 1870s would take scores, if not hundreds, of pages of references. It was simply a fact of American life.”).

<sup>88</sup> *Dobbs* is hardly an outlier with respect to the Court’s analysis of history. See, e.g., *Brown v. Davenport*, 142 S. Ct. 1510, 1531, 1535 (Kagan, J., dissenting) (describing the Court’s opinion as “law-chambers history” and “play[ing] amateur historian”).

<sup>89</sup> See, e.g., Philip Bump, *What the Ohio rape case tells us about post-Roe abortion politics*, Washington Post (July 14, 2022), <https://www.washingtonpost.com/politics/2022/07/14/what-ohio-rape-case-tells-us-about-post-ro-abortion-politics/> (explaining that the “Indiana Attorney General” expressed an interest in disciplining the doctor who provided an abortion to a 10-year old rape victim from Ohio); Caroline Kitchener and Devin Barrett, *Antiabortion lawmakers want to block patients from crossing state lines*, Washington Post (June 30, 2022), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/> (describing model legislation that would prohibit interstate travel to obtain an abortion); Letter from Texas Freedom Caucus to Texas Law Firm Sidley Austin LLP notifying firm of the “illegality and consequences of their actions under pre-Roe statutes” (July 7, 2022), <https://www.freedomfortexas.com/blog/post/letter-to-texas-law-firm-procuring-abortion> (threatening law firm with legal liability for supporting workers who travel interstate to obtain an abortion); Letter from Todd Rokita, Attorney General of Indiana, to Governor Eric Holcomb (July 13, 2022), [https://content.govdelivery.com/attachments/INAG/2022/07/14/file\\_attachments/2213030/Governor%20Eric%20Holcomb%20Bernard%20OH%20Minor%20Abortion%20Case.pdf](https://content.govdelivery.com/attachments/INAG/2022/07/14/file_attachments/2213030/Governor%20Eric%20Holcomb%20Bernard%20OH%20Minor%20Abortion%20Case.pdf) (identifying the Indiana doctor who performed an abortion on a 10-year-old rape victim and asking for permission to investigate the doctor).

<sup>90</sup> *Saenz v. Roe*, 526 U.S. 489, 513 (1999) (Rehnquist, C.J., dissenting).

<sup>91</sup> *Id.* at 514.

to reasonably apply disfavored precedents, it is not clear whether a restrictive interpretation of the right to travel would lead the *Dobbs* majority to invalidate laws that prohibited the ability to travel for certain purposes, such as obtaining abortion care.

The majority opinion in *Dobbs* also raises uncertainty about the right to travel because it is not entirely clear where or how the Constitution protects the right to travel interstate.<sup>92</sup> One possible source of the constitutional protections for the right to travel is the so-called “dormant Commerce Clause doctrine,” which restricts states’ ability to burden interstate commerce. Both Justice Gorsuch and Justice Thomas have questioned the validity of the so-called “dormant Commerce Clause’ doctrine.”<sup>93</sup> So the Justices’ selective approach to precedent raises doubts about whether they would invalidate a conviction involving some interstate travel to obtain an abortion.<sup>94</sup>

## 2. *Dobbs Raises Questions About Federal Authority to Secure Abortion Access*

Or consider the Federal Government’s authority to secure abortion access, which has also been thrown into some doubt given the Court’s erratic approach to law and legal reasoning.

Some scholars and commentators have suggested that the federal government could secure access to medication abortion if the Food and Drug Administration issued guidance expanding access to medication abortion or lifted certain restrictions on the availability of medication abortion.<sup>95</sup> This method of protecting access to abortion, as well as other possible methods of doing so, rely on a federal agency (here, the FDA) to exercise authority that has been delegated to them by congressional statutes.<sup>96</sup>

The problem, however, is that this past term, the Court solidified a judicially invented interpretive rule that says that the Court will *not* allow agencies to exercise powers that are delegated to them in clear, but broadly worded, congressional statutes if the agencies are exercising their

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<sup>92</sup> See *id.* at 498 (“The word ‘travel’ is not found in the text of the Constitution” but “is firmly embedded in our jurisprudence.”) (majority opinion); *id.* at 501 (“[W]e need not identify the source of that particular right in the text of the Constitution.”).

<sup>93</sup> *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2477 (2019) (Gorsuch, J., dissenting).

<sup>94</sup> See Sahil Kapur, Twitter (@sahilkapur), July 14, 2022 11:47 AM, <https://twitter.com/sahilkapur/status/1547608780828917762> (reporting remarks by a Republican Senator that protections for interstate travel to obtain an abortion were “radical” “abortion tourism”).

<sup>95</sup> U.S. Gov’t Accountability Off., GAO-08-751, Approval And Oversight of the Drug Mifeprex 5 (2008), <https://www.gao.gov/assets/280/279424.pdf>; Memorandum entitled NDA 20-687 Mifeprex (mifepristone) Population Council, at 1 (Sept. 28, 2000), <http://wayback.archive-it.org/7993/>; U.S. Food & Drug Administration, *Mifeprex (mifepristone) Information*, <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information>; Risk Evaluation and Mitigation Strategy (REMS) Single Shared System for Mifepristone 200MG, U.S. Food & Drug Admin., [https://www.accessdata.fda.gov/drugsatfda\\_docs/rems/Mifepristone\\_2019\\_04\\_11\\_REMS\\_Document.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/rems/Mifepristone_2019_04_11_REMS_Document.pdf). See David S. Cohen, Geer Donley & Rachel Rebouche, *The New Abortion Battleground*, 123 COLUM. L. REV. \_\_\_ (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4032931](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4032931).

<sup>96</sup> 21 U.S.C. § 301 et seq.

statutory powers to decide “major questions” of “political significance.”<sup>97</sup> In a powerful dissent from the decision formally announcing this rule, Justice Elena Kagan described how this means that the current Supreme Court “is textualist,” i.e., focuses on interpreting the words in a congressional statute, “only when it suits it.”<sup>98</sup> The Court’s rule about how to interpret congressional delegations to agencies, she described, functions as a “get-out-of-text-free card[.]”<sup>99</sup> As a result, there is reasonable uncertainty about whether the Court would uphold federal agencies’ authority to secure access to medication abortion in states that restrict or prohibit abortion. The Court might declare access to medication abortion a “major question” of “political significance,” and therefore not read clear, but broadly worded, congressional statutes delegating authority to agencies according to the terms of the statute.<sup>100</sup>

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The Court’s selective approach to law and legal reasoning generates substantial uncertainty about whether the Court will adhere to precedents protecting established rights, or to precedents allowing governments to protect established rights. That uncertainty chills the exercise of constitutional rights because people cannot rely on the Court to follow the law.

Texas’s SB8 shows that this has already happened, and that real uncertainty about whether the Court will follow the law chills peoples’ ability to exercise their constitutional rights. Texas’s SB8 authorizes private citizens to sue abortion providers, as well as people who assisted abortions, for at least \$10,000 for every abortion performed once fetal cardiac activity is detected (which occurs roughly six weeks after a person’s last period).<sup>101</sup> Once SB8 went into effect in September 2021, abortion providers in Texas stopped performing abortions that were prohibited by the law.<sup>102</sup> Were it clear that the Supreme Court would simply reaffirm *Roe* and *Casey* and adhere to precedent, that may not have been the case, at least for all abortion providers.<sup>103</sup> That is, if providers were confident that the Supreme Court would uphold *Roe* and *Casey*, and invalidate any state law that imposed legal penalties on (then) constitutionally protected pre-viability abortions, then providers could have performed abortions after SB8 went into effect because they could rely on the fact that the Court would overrule any judgment that imposed liability on a provider for performing a (then) constitutionally protected pre-viability abortion. But because this Court’s approach to decisionmaking generates reasonable

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<sup>97</sup> *West Virginia v. EPA*, \_\_ S. Ct. \_\_, 2022 WL 2347278, at \* 11 (June 30, 2022). See also Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine* (manuscript, on file with witness).

<sup>98</sup> *West Virginia*, 2022 WL 2347278, at \* 38 (Kagan, J., dissenting).

<sup>99</sup> *Id.*

<sup>100</sup> See Complaint, *Texas v. Becerra*, No. 5:22-cv-00185, Dkt No. 1 (July 14, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/07/Texas-Complaint.pdf> (complaint challenging Secretary Becerra’s post-*Dobbs* guidance on major questions grounds).

<sup>101</sup> Tex. Health & Safety Code Ann. §§ 171.204(a), 171.205(a), 171.207(a), 171.208(a)(2), (3) (West Cum. Supp. 2021).

<sup>102</sup> *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2499 & n. 1 (2021) (Sotomayor, J., dissenting).

<sup>103</sup> See Michael C. Dorf, *The Cloud Cast by SCOTUS Conservatives Over Roe Distinguishes the Texas Law From Most Procedurally Similar Ones*, Dorf on Law (Sept. 2, 2021), <http://www.dorfonlaw.org/2021/09/the-cloud-cast-by-scotus-conservatives.html#more>.



uncertainty about this Court’s willingness to adhere to precedent and other traditional forms of legal reasoning, abortion providers were chilled in their ability to provide abortions and to ensure that people had access to a constitutional right while the right formally existed.

### C. Dobbs Exemplifies A Broader Attack on The Rule of Law

The uncertainty and chaos in the wake of *Dobbs* is partially attributable to the Court’s erratic treatment of precedent and conventional forms of legal reasoning, not just in *Dobbs*, but in other cases as well. For example, in *Kennedy v. Bremerton School District*, another decision from this past term, a majority of the Court claimed that the Supreme Court had “long ago abandoned” the previous legal test that the Court had used to assess Establishment Clause claims.<sup>104</sup> No prior decision of the Supreme Court had ever overruled the Court’s previous Establishment Clause precedents (at least until now). But, the Court insisted, the Court’s prior cases had “abandoned” those precedents, and so the Court did not explain why the Court’s prior Establishment Clause precedents were wrong or why the Court should overrule them.<sup>105</sup> Rather, courts and other government officials were just supposed to know not to follow those precedents (again even though no Supreme Court decision had ever overruled them).<sup>106</sup> Previously, the Supreme Court had told lower federal courts that only the Supreme Court, and not other federal courts, should overrule Supreme Court decisions.<sup>107</sup>

Or consider this representative statement from an oral argument from another case from this past term about whether an individual could sue the police officers who failed to provide warnings that were required by *Miranda v. Arizona*.<sup>108</sup> Explaining one approach to precedent, Justice Kavanaugh said:

“In thinking about the status of *Miranda* and *Dickerson* [a decision reaffirming *Miranda*], it seems that the other side’s position is accept it, but don’t extend it, if I could boil it down. Accept it, but don’t extend it. And we’ve done that with other precedents of that era . . . , we accept it. . . . We’ve declined to extend it. . . . So why isn’t that the right way to think about that case?”<sup>109</sup>

The Court ultimately ruled for the party who urged the Court not to extend (i.e., not to apply) the Court’s previous precedent. What this statement and this decision suggest is that some of the

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<sup>104</sup> \_\_ S. Ct. \_\_, 2022 WL 2295034 (June 27, 2022).

<sup>105</sup> *Kennedy*, 2022 WL 2295034, at \*13 (June 27, 2022).

<sup>106</sup> *Id.* (“What the District and the Ninth Circuit overlooked, however, is that the ‘shortcomings’ associated with this ‘ambitiou[s],’ abstract, and ahistorical approach to the Establishment Clause became so ‘apparent’ that this Court long ago abandoned *Lemon* and its endorsement test offshoot.”).

<sup>107</sup> *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (“We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko* [an earlier Supreme Court decision]. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

<sup>108</sup> 384 U.S. 436 (1966).

<sup>109</sup> Transcript of Oral Argument in *Vega v. Tekoh*, 142 S. Ct. 2095 (2022), at p. 70 [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2021/21-499\\_f2qg.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-499_f2qg.pdf).

Justices in the *Dobbs* majority choose not to apply the reasoning from cases they do not agree with; they may also choose not to draw sensible analogies to or distinctions with cases they do not agree with. Rather, they might just ignore the import of those cases. That style of reasoning injects uncertainty and unpredictability into the law and erodes one of the foundations of the rule of law.<sup>110</sup>

Here I provide a few additional examples of this Court’s selective approach to conventional forms of legal reasoning. I do this not to pile on, but rather to underscore how the Court’s approach to decisionmaking makes it hard to advise people about what their rights are and hard to advise institutions about what they can do to protect peoples’ rights. The Court’s approach to decisionmaking undermines one important role that law and lawyers are supposed to have in our constitutional system.

First, consider the Court’s methodological approach to using history to interpret the Constitution. In *Dobbs*, the abortion case, the Court relied on historical evidence from the 13<sup>th</sup> century to interpret the meaning of the Fourteenth Amendment’s due process clause.<sup>111</sup> Yet in the Second Amendment opinion issued the day before, *Bruen*, the Court dismissed the relevance of historical evidence from the 1300s on the ground that it was too early to be probative of the meaning of the Constitution.<sup>112</sup> Additionally, in *Dobbs*, the Court relied on evidence from the 1900s, including evidence from the 1970s, to interpret the meaning of the Fourteenth Amendment’s due process clause.<sup>113</sup> Yet again, in the Second Amendment opinion issued the day before, *Bruen*, the Court dismissed evidence post-dating the ratification of the Constitution on the ground that it was too late to be especially probative of the meaning of the federal Constitution.<sup>114</sup>

Second, consider the Court’s approach to facts. In *Shinn v. Martinez Ramirez*, the Supreme Court held that a federal statute did not allow a federal court to consider evidence that the defendant received ineffective assistance of counsel at his trial if that evidence was not presented to the state courts due to the ineffectiveness of the lawyer who represented the defendant during state post-conviction proceedings.<sup>115</sup> In the course of announcing that rule, the majority opinion stated that “Respondents [the state court defendants] do not dispute, and therefore concede, that their habeas petitions fail state-court record alone.”<sup>116</sup> But the respondents made no such concession in the litigation. Because the Court’s statement contained an error, the respondents filed a motion to modify the opinion to reflect the fact that they did not concede that their habeas petitions failed based on the

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<sup>110</sup> See Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1481-87 (2017).

<sup>111</sup> See *Dobbs*, 142 S. Ct. at 2249 (citing a “13<sup>th</sup>-century treatise”).

<sup>112</sup> *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2136 (2022) (“Historical evidence that long predates [ratification] may not illuminate the scope of the right”).

<sup>113</sup> See *Dobbs*, 142 S. Ct. at 2253 (explaining that, when *Roe* was decided “30 States” still prohibited abortion).

<sup>114</sup> *Bruen*, 142 S. Ct. at 2137 (“[P]ost-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text.”).

<sup>115</sup> 142 S. Ct. 1718 (2022).

<sup>116</sup> *Id.* at 1730.

record contained in the state court.<sup>117</sup> And because the respondents had made no such concession, the opposing party, the state, consented to the respondents' request to modify the opinion to correct the Court's error.<sup>118</sup> The Court denied the motion without explanation.<sup>119</sup> In another case, Justice Kavanaugh had to correct an error in his separate writing that had explained why he thought that a federal district court was wrong to enjoin a State's deadline for receiving absentee ballots in light of the hardships created by the COVID-19 pandemic.<sup>120</sup> In that separate writing, Justice Kavanaugh had stated that "States such as Vermont, by contrast, have decided not to make changes to their ordinary election rules, including to the election-day deadline for receipt of absentee ballots."<sup>121</sup> But the Vermont Secretary of State's Office pointed out that this statement was incorrect; the State "held to an election day ballot receipt deadline because of the other changes we made – all voters had a ballot & prepaid return envelope in hand 30 DAYS before the election."<sup>122</sup> Justice Kavanaugh subsequently amended the incorrect statement.<sup>123</sup>

Third, consider the extent to which the Court does not explain its reasoning when it decides important matters that may augur substantial changes to the law. After initially enjoining New York's COVID-19 restrictions on religious liberty grounds in a per curiam opinion,<sup>124</sup> the Court vacated three district court opinions enjoining other jurisdiction's COVID measures, but without explaining why those district court opinions were wrong.<sup>125</sup> The Court then subsequently issued emergency injunctions in two cases involving some of California's revised COVID-19 restrictions, again without supplying a majority opinion to explain why the restrictions were unlawful,<sup>126</sup> and vacated another district court opinion enjoining other portions of California's COVID-19 restrictions.<sup>127</sup> All of these decisions were issued on the "shadow docket," the set of decisions the Court reaches on matters

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<sup>117</sup> Motion to Modify Opinion, No. 20-1009 (U.S. June 3, 2022), [https://www.supremecourt.gov/DocketPDF/20/20-1009/227113/20220603161426294\\_2022.06.03%20Ramirez-Jones%20-%20Motion%20to%20Modify.pdf](https://www.supremecourt.gov/DocketPDF/20/20-1009/227113/20220603161426294_2022.06.03%20Ramirez-Jones%20-%20Motion%20to%20Modify.pdf).

<sup>118</sup> Response to Motion to Modify Opinion, No. 20-1009 (U.S. June 13, 2022), [https://www.supremecourt.gov/DocketPDF/20/20-1009/227815/20220613172443222\\_20-1009%20Letter%20Response%20to%20Motion%20to%20Modify.pdf](https://www.supremecourt.gov/DocketPDF/20/20-1009/227815/20220613172443222_20-1009%20Letter%20Response%20to%20Motion%20to%20Modify.pdf).

<sup>119</sup> See Dkt No. 20-1009 (U.S. June 27, 2022), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-1009.html>.

<sup>120</sup> Maria Cramer, *Kavanaugh Fixes Error in Election Opinion After Vermont Complaint*, The New York Times (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/us/politics/kavanaugh-vermont.html>.

<sup>121</sup> *Id.*

<sup>122</sup> @VermontSOS, Twitter, Oct. 27, 2020 (2:08 PM), <https://twitter.com/vermontsos/status/1321151715056508936>.

<sup>123</sup> *Democratic Nat'l Committee v. Wisc. State Leg.*, 141 S. Ct. 28, 32 (2020) (mem.) (Kavanaugh, J., concurring)

<sup>124</sup> *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam).

<sup>125</sup> *Robinson v. Murphy*, 141 S. Ct. 972 (2020) (mem.); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (mem.); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020) (mem.).

<sup>126</sup> *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (mem.); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021) (mem.).

<sup>127</sup> *Gish v. Newsom*, 141 S. Ct. 1290 (2021) (mem.).

without oral argument or full briefing and, as in these cases, often without issuing an opinion or even an explanation.<sup>128</sup> And yet, a few months later, when the Court enjoined other portions of California’s revised COVID-19 restrictions that the district court and court of appeals had upheld, the Court faulted the courts for failing to apply its prior unexplained and unreasoned orders in COVID-19 cases.<sup>129</sup> If that were not confusing enough, later that year, in fall 2021, Justice Samuel Alito gave a speech in which he stated that “a ruling on an emergency application is not a precedent with respect to the underlying issue in the case.”<sup>130</sup> So the Court apparently (sometimes?) expects people to apply the unstated reasoning behind its unexplained orders.

The Court’s COVID-19 cases are not the only example of this phenomenon. The Court stayed, without a majority opinion, a decision invalidating Alabama’s redistricting map as a violation of the Voting Rights Act and scheduled the case for argument during the next term.<sup>131</sup> Subsequently, a federal trial court relied on the writing of a single Justice in that case in order to decline to issue an injunction invalidating Georgia’s redistricting map, which the court had concluded likely violated the Voting Rights Act: The court had no option but to apply the only reasoning the Court had provided—reasoning by a single Justice, joined by one other Justice—that may not even represent a majority of the Court’s views.<sup>132</sup> The Supreme Court subsequently stayed a decision invalidating Louisiana’s redistricting map again without explanation.<sup>133</sup>

This last body of cases about voting rights is important for another reason as well. At the same time that the Court is returning the issue of abortion care to the states, it is also undermining individuals’ access to the political process and undermining the political process’s responsiveness to the will of the voters. Almost ten years ago, the Supreme Court invalidated a key statutory provision that facilitated the Voting Rights Act’s preclearance regime, which required certain States with histories of racial discrimination in voting to obtain federal permission before modifying their voting rules or election procedures.<sup>134</sup> (Many of these States, including Mississippi, are now the ones trying to restrict

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<sup>128</sup> See Stephen I. Vladeck, *The Supreme Court, 2018 Term – Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019).

<sup>129</sup> *Tandon v. Newsom*, 141 S. Ct. 1294, 1297-98 (2021) (per curiam) (“This is the fifth time the Court has summarily rejected the Ninth Circuit’s analysis of California’s COVID restrictions on religious exercise. See *Harvest Rock Church v. Newsom*, 592 U. S. —, 141 S.Ct. 889, 208 L.Ed.2d 448 (2020); *South Bay*, 592 U. S. —, 141 S.Ct. 716, 209 L.Ed.2d 22; *Gish v. Newsom*, 592 U. S. —, 141 S.Ct. 1290, — L.Ed.2d — (2021); *Gateway City*, 592 U. S. —, — S.Ct. —.”).

<sup>130</sup> Stephen I. Vladeck, *The Most-Favored Rights: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J. OF L. & LIBERTY 699, 731 n.113 (2022).

<sup>131</sup> *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (mem.).

<sup>132</sup> *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, \_\_\_ F. Supp. 3d \_\_\_, 2022 WL 633312 (Feb. 28, 2022) (relying on *Merrill*, 142 S. Ct. at 879 (Kavanaugh, J., concurring)).

<sup>133</sup> See Order List (June 28, 2022), [https://www.supremecourt.gov/orders/courtorders/062822zr1\\_9ol1.pdf](https://www.supremecourt.gov/orders/courtorders/062822zr1_9ol1.pdf).

<sup>134</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013).

access to abortion.<sup>135</sup>) Following that decision, the Court watered down the remaining provision of the Voting Rights, Section 2, and how the provision applied to cases challenging preconditions to voting that disproportionately burden voters of color (like absentee ballot restrictions or early voting restrictions or voter ID requirements).<sup>136</sup>

This upcoming term, the Court is poised to hear a case that could further undermine the protections of Section 2 of the Voting Rights Act in vote dilution cases where states draw districts in ways that minimize the political power of voters of color.<sup>137</sup> Here too, many of the states that are engaged in vote dilution are also the ones who are restricting access to abortion. Alabama, the state involved in the case that the Court will hear, has a trigger law and a raft of other abortion restrictions.<sup>138</sup> The 3-judge district court concluded that Alabama’s districting map, which afforded Black Alabamians one majority-minority district out of seven (14% of the State’s congressional districts) violated the Voting Rights Act because it had diluted the votes of Black Alabamians, who comprise “approximately 27% of the State’s population.”<sup>139</sup> Georgia is another state that is currently trying to bring into effect a state law that criminalizes most abortions after about six weeks from a person’s last period.<sup>140</sup> A federal judge concluded that Georgia’s most recent legislative map violated the Voting Rights Act because it diluted the power of voters of color.<sup>141</sup> Wisconsin recently adopted state legislative maps that would actually reduce the number of districts in which Black Wisconsinites can elect the candidate of their choice;<sup>142</sup> the Wisconsin Supreme Court also ruled, 4-3 (with 4 Republican Justices in the majority) that ballot drop boxes were illegal.<sup>143</sup> Wisconsin also has restrictive abortion laws set to go into effect now that the Court has overruled *Roe*.<sup>144</sup>

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<sup>135</sup> Mary Kekatos, *Abortion trigger law goes into effect in Mississippi, where the case that overturned Roe v. Wade originated*, ABC (July 7, 2022), <https://abcnews.go.com/Health/abortion-trigger-law-effect-mississippi-case-overturned-roe/story?id=86366550>.

<sup>136</sup> *Brnovich v. Democratic Nat’l Committee*, 141 S. Ct. 2321 (2021).

<sup>137</sup> *Merrill v. Milligan* (U.S. No. 21-1086), <https://www.supremecourt.gov//docket/docketfiles/html/public/21-1086.html>.

<sup>138</sup> State Facts about Abortion: Alabama, Guttmacher Institute (June 2022), <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-alabama>; Sandhya Raman, *State policy changes intensity in wake of Supreme Court decision*, Roll Call (June 27, 2022), <https://rollcall.com/2022/06/27/27roe/>.

<sup>139</sup> *Singleton v. Merrill*, \_\_ F. Supp. 3d \_\_, 2022 WL 265001, at \*2 (N.D. Al. Jan 24, 2022).

<sup>140</sup> Stephen Fowler, *What does Georgia’s 2019 abortion law HB 481 do?*, GPB (June 30, 2022), <https://www.gpb.org/news/2022/06/30/what-does-georgias-2019-abortion-law-hb-481-do>.

<sup>141</sup> *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, \_\_ F. Supp. 3d \_\_, 2022 WL 633312 (Feb. 28, 2022).

<sup>142</sup> *Johnson v. Wisconsin Elections Comm’n*, No. 2021AP1450-OA (WI April 15 2022), [https://www.wpr.org/sites/default/files/21ap1450\\_opdec.pdf](https://www.wpr.org/sites/default/files/21ap1450_opdec.pdf).

<sup>143</sup> *Teigen v. Wisconsin Elections Comm’n*, No. 2022AP91 (WI July 8, 2022), <https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=542617>.

<sup>144</sup> See Phoebe Petrovic, *Wisconsin faces a ‘tangled series’ of abortion laws dating back to 1849 as it heads into a possible post-Roe future*, Wisconsin Watch (June 4, 2022), <https://wisconsinwatch.org/2022/06/wisconsin-faces-a-tangled-series-of-abortion-laws-dating-back-to-1849-as-it-heads-into-a-possible-post-ro-e-future/>.

Finally, the Court has prevented federal courts from remedying so-called partisan gerrymandering, where legislatures draw districts in ways that make it easier for the political party to stay in power and harder for voters to vote them out—even when a majority of voters vote against a party, partisan gerrymandering can allow the party to retain control of the state legislature.<sup>145</sup> This upcoming term, the Court is hearing a case about whether state courts and state constitutions may remedy partisan gerrymanders.<sup>146</sup>

All of these decisions make it harder for voters to have their voices heard in the political process that will now decide whether they have access to the fundamental right to make decisions about their healthcare and their bodily autonomy. These decisions also erect particular obstacles for the people who will bear the brunt of the *Dobbs* decision—communities of color.

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All of these patterns—the Court’s inconsistent approach to interpretive methods, the Court’s lack of attention to the facts, and the Court’s lack of explanation for its decisions—generate a kind of uncertainty that makes it difficult to advise people on what their rights are and to advise institutions on what they can do to secure those rights when courts take them away. The resulting uncertainty is already having devastating consequences, as we hear from those who are unable to travel for care, the struggles of those trying to manage their care at home, and the nightmares faced by those who do travel for care, including the 10-year-old rape victim who was forced to obtain an abortion from an out-of-state provider.<sup>147</sup> That is the world we are now living in.

The Court has allowed governments to take away peoples’ ability to make some of the most fundamental and profound personal decisions about their bodies, their families, and their lives. The *Dobbs* decision jeopardizes peoples’ lives, their families’ future, and more. People are rightfully unsure about what their rights are on any given day; politicians and advocates are claiming broader and broader authority over individuals, and broadcasting plans to restrict other rights related to autonomy, personhood, family, and home that so many people rely on. These rights should never depend on whether the government is willing to protect them.

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<sup>145</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *id.* at 2519 (Kagan, J., dissenting) (“By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.”).

<sup>146</sup> *Moore v. Harper*, No. 21-1271 (U.S.), <https://www.supremecourt.gov/docket/docketfiles/html/public/21-1271.html>.

<sup>147</sup> See Megan Messerly & Adam Wren, *National Right to Life official: 10-year-old should have had baby*, Politico (July 14, 2022), <https://www.politico.com/news/2022/07/14/anti-abortion-10-year-old-ohio-00045843> (“The 10-year-old Ohio girl who crossed state lines to receive an abortion in Indiana should have carried her pregnancy to term and would be required to do so under a model law written for state legislatures considering more restrictive abortion measures, according to the general counsel for the National Right to Life.”).