

ABORTION AT THE CROSSROADS: REPRODUCTIVE RIGHTS AND JUSTICE ON THE PRECIPICE OF ROE'S DEMISE

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ABSTRACT

Nearly fifty years after the Supreme Court recognized abortion as a constitutional right in the United States, the fate of Roe v. Wade hangs in the balance. This Article, written based on remarks delivered at the end of the Drexel Law Review's October 2021 symposium on COVID-19, reproductive rights, and the law (and thus before the Court's decision to overturn Roe), outlines the current state of abortion rights in the United States, focusing on the two cases that have tested the Court's willingness to abandon Roe: Whole Woman's Health v. Jackson and Dobbs v. Jackson Women's Health Organization. Despite the grim outlook for reproductive rights, this Article also paves a path forward and explains how lessons learned from the pandemic, activism, and state legislation can protect reproductive rights.

Necessity is the mother of invention, and this dire state of reproductive rights will hopefully push the reproductive rights and justice movement to try new strategies and promote creative, bold ideas. It should push legislators—federal, state, and local—to take meaningful action to further reproductive rights and justice. The reproductive rights movement needs to take a few pages from the anti-abortion movement's playbook. For decades, anti-abortion activists and politicians have tried almost anything imaginable to rid the country of legal abortion. Now, with the stage set for one of the most notable decisions in recent Supreme Court history, the reproductive

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rights movement must try almost anything imaginable to preserve legal abortion in the United States. The road ahead will surely be treacherous. The state of reproductive rights could soon get much worse. But dire straits create an opportunity for fighting back in new and innovative ways, and in doing so, we can navigate the current hostile environment and build a more just world that better protects reproductive health, rights, justice, and freedom.

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INTRODUCTION¹

Because neither the factual underpinnings of
Roe's central holding nor our understanding of it

1. This Article is an adaptation of remarks Professor David S. Cohen offered at the conclusion of the *Drexel Law Review's* October 2021 symposium on COVID-19, reproduction, and the law. It has been updated to reflect developments after the symposium through April 2022, though the focus is on developments leading up to the symposium.

has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.²

With these lines, the Supreme Court in *Planned Parenthood v. Casey* intended to dispel any doubt surrounding *Roe v. Wade*, the case that established a fundamental right to obtain an abortion in the United States.³ However, thirty years after *Casey* and nearly fifty years after *Roe*, the Court's principled pledge to follow precedent in 1992 seems quaint, as we are now on the precipice of *Roe's* demise.⁴

With a six-to-three conservative majority on the Supreme Court, the future of the right to abortion in the United States is bleak.⁵ This outlook can only partially be attributed to the Court moving to the right. Over the past decade, there has also been a large uptick in radical anti-abortion legislation.⁶ Since the

2. *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992).

3. *See Roe v. Wade*, 410 U.S. 113, 154 (1973).

4. *See Read Justice Alito's Initial Draft Abortion Opinion Which Would Overturn Roe v. Wade*, POLITICO (May 2, 2022, 9:20 PM), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504>.

5. *See Linda Greenhouse, The Supreme Court Is Now 6-3. What Does That Mean?*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/opinion/supreme-court-amy-coney-barrett.html>.

6. *Timeline of Attacks on Abortion: 2009-2021*, PLANNED PARENTHOOD ACTION FUND, <https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/timeline-attacks-abortion> (last visited Apr. 5, 2021) [hereinafter *Timeline of Attacks on Abortion*] (explaining "how anti-abortion politicians have tried to undercut *Roe v. Wade* and access to safe, legal abortion across the last decade"); *see also* Amelia Thomson-DeVeaux, *Here's Why the Anti-Abortion Movement is Escalating*, FIVETHIRTYEIGHT (May 21, 2019), <https://fivethirtyeight.com/features/we-categorized-hundreds-of-abortion-restrictions-heres-why-the-anti-abortion-movement-is-escalating/> (listing Georgia, Ohio, Mississippi, Kentucky, and Alabama as states that enacted severely restrictive abortion laws in 2019); Kaia Hubbard, *States Enact Record Number of Abortion Restrictions in 2021*, U.S. NEWS (Oct.

advent of the Tea Party movement in 2010,⁷ conservative state legislatures have competed to pass the nation's most restrictive abortion legislation.⁸ These restrictions have attacked all areas of abortion care by implementing targeted restrictions on abortion providers (or TRAP laws),⁹ extra hurdles such as waiting periods¹⁰ or unnecessary ultrasounds,¹¹ and restrictions on both public and private insurance coverage.¹² Further, some laws have dictated different circumstances in which abortion is illegal.¹³ With these laws, non-medically-trained legislators are telling doctors what procedures they can and cannot perform.¹⁴ Unsurprisingly, these restrictions monumentally

5, 2021, 4:25 PM), <https://www.usnews.com/news/national-news/articles/2021-10-05/states-enact-record-number-of-abortion-restrictions-in-2021>.

7. The Tea Party movement was a subset of conservative Republicans who believed that the federal government uses government spending, taxation, and regulation "to infringe on Americans' personal liberties as outlined in the Constitution." Kimberly Amadeo, *The Tea Party Movement, Its Economic Platform, and History*, BALANCE, <https://www.thebalance.com/tea-party-movement-economic-platform-3305571> (Feb. 25, 2022).

8. See *Timeline of Attacks on Abortion*, *supra* note 6.

9. See *What Are TRAP Laws?*, PLANNED PARENTHOOD ACTION FUND, <https://www.plannedparenthoodaction.org/issues/abortion/types-attacks/trap-laws> (last visited Apr. 5, 2022).

10. See *Waiting Periods for Abortion*, GUTTMACHER INST. (Jan. 22, 2020), <https://www.guttmacher.org/evidence-you-can-use/waiting-periods-abortion> (explaining that waiting periods "introduce an unnecessary hurdle to obtaining medical care and intrude on the patient-provider relationship, while failing to protect the best interests of the patient").

11. See *Requirements for Ultrasound*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound> (Apr. 1, 2022) ("[Six] states mandate that an abortion provider perform an ultrasound on each person seeking an abortion and require the provider to show and describe the image.>").

12. See *Regulating Insurance Coverage of Abortion*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/regulating-insurance-coverage-abortion> (Apr. 1, 2022) ("[Eleven] states have laws in effect restricting insurance coverage of abortion in all private insurance plans written in the state, including those offered through health insurance exchanges established under the ACA. . . . [Twenty-two] states restrict abortion coverage in health insurance plans for public employees.>").

13. See Kaia Hubbard, *A Guide to Abortion Laws by State*, U.S. NEWS (Sep. 1, 2021), <https://www.usnews.com/news/best-states/articles/a-guide-to-abortion-laws-by-state>.

For example, the Arkansas Unborn Child Protection Act bans abortion even in cases of rape or incest but makes an exception if the mother's life is endangered. See *id.* In Idaho, abortion is banned if a fetal heartbeat is detected unless a medical emergency endangers the life of the mother. See *id.*

14. See *id.*

impact patient care, especially for people of color and impoverished or rural patients.¹⁵

Each abortion restriction has its own unique story, with some causing more harm than others. However, this Article will discuss only the restrictions that have put us on our current path—abortion bans that are specifically designed to end legal abortion. Unfortunately, this path will likely overturn *Roe v. Wade* right around the time this Article is published.

This Article proceeds in four Parts. Part I explains the strategy of the anti-abortion movement, focusing on gestational age bans and federal court packing. Part II demonstrates the result of this strategy, introducing two state laws that have captured the nation's attention: Texas's radical six-week ban and Mississippi's fifteen-week ban. Part III provides a brighter outlook, highlighting current action by feminists and abortion activists to preserve reproductive rights. Finally, Part IV concludes with a call to action, proposing possibilities for pro-choice activists within the current landscape.

I. PLAYING THE LONG GAME: ANTI-ABORTION MOVEMENT STRATEGY

The anti-abortion movement's multifaceted strategy has consistently included, among other things, two vital and interdependent components: (1) passing more and more abortion restrictions, knowing these restrictions will be challenged by pro-choice lawyers, while (2) packing the federal courts—especially the U.S. Supreme Court—with judges who will, at a minimum, look favorably on abortion restrictions when those cases reach them, and at a maximum, try to overturn *Roe* whenever the opportunity arises.¹⁶ This strategy

15. See DAVID S. COHEN & CAROLE JOFFE, OBSTACLE COURSE: THE EVERYDAY STRUGGLE TO GET AN ABORTION IN AMERICA 1, 57, 88 (2020); Manuella Libardi, *Anti-Abortion Laws: A War Against Poor Women*, EQUAL TIMES, <https://www.equaltimes.org/anti-abortion-laws-a-war-against#.YbDd4PHMLDI> (Oct. 22, 2021).

16. See Mary Ziegler, *The Anti-Abortion Movement Will Win Even if It Loses*, THE ATL. (Nov. 2, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/anti-abortion-movement-sb-8/620586/>.

has finally succeeded on both fronts, as states have recently passed extreme abortion bans that will be evaluated by the most conservative Supreme Court since the 1930s.¹⁷

A. New Wave of Legislation: Gestational Age Bans

In recent years, state legislatures have become more aggressive in passing a different type of restriction—gestational age bans—and doing so earlier and earlier in pregnancy.¹⁸ At first, twenty-week bans were popular because, according to the anti-abortion movement, this was the point at which a fetus could feel pain.¹⁹ This claim, however, is not backed by science.²⁰ Within the early wave of gestational age bans, some went into effect because providers in the state did not provide abortion that late in pregnancy or just did not think it was worth challenging.²¹ Others were struck down as an unconstitutional infringement on pre-viability abortion.²² With these bans as a first salvo, the anti-abortion movement's intent became clear: to shorten the time in which someone could get an abortion, challenge the constitutional guidepost of viability (about twenty-three or twenty-four weeks),²³ and possibly take a case to a Supreme Court willing to overturn *Roe*.

After some states succeeded with the twenty-week gestational age ban, new legislation became more aggressive,

17. See Joan Biskupic, *The Supreme Court Hasn't Been this Conservative Since the 1930s*, CNN POLS., <https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html> (Sept. 26, 2020, 6:33 PM).

18. Megan K. Donovan, *Gestational Age Bans: Harmful at Any Stage of Pregnancy*, GUTTMACHER INST. (Jan. 9, 2020), <https://www.guttmacher.org/gpr/2020/01/gestational-age-bans-harmful-any-stage-pregnancy> (explaining that gestational age bans—"laws that prohibit abortion after a specific point in pregnancy,"—became popular in 2019).

19. See Press Release, Lindsey Graham, *Graham Reintroduces 20-Week Abortion Ban* (Jan. 27, 2021), <https://www.lgraham.senate.gov/public/index.cfm/2021/1/graham-reintroduces-20-week-abortion-ban>.

20. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> (Apr. 14, 2022).

21. *Id.*

22. See, e.g., *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013).

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

and states began passing bans on abortion even earlier in pregnancy. North Dakota and Iowa were the first states to enact six-week bans, which then saw a spike in the beginning of 2019 when several states—Georgia, Ohio, Kentucky, Mississippi, Louisiana, Tennessee, and South Carolina—passed their own versions.²⁴ A six-week ban prohibits abortion only two weeks after a missed period and four weeks after conception (six weeks is measured from the start of the last menstrual period).²⁵

Other states enacted different limits. Missouri banned abortion after eight weeks but included an escalator clause to capture other weeks if eight was struck down.²⁶ Arkansas banned abortion at twelve weeks.²⁷ And in 2019, Alabama passed a law to ban abortion at conception.²⁸ When challenged in federal court, each of these bans were found unconstitutional, even by the country's most conservative federal judges.²⁹ However, these attempts were not completely useless for the anti-abortion movement. By passing so many of these early

24. Ivan Pereira, *Georgia's 6-Week Abortion Ban Officially Struck Down*, ABC NEWS (July 13, 2020, 5:10 PM), <https://abcnews.go.com/Health/georgias-week-abortion-ban-officially-struck/story?id=71759054>; Gabe Rosenberg, *A Bill Banning Most Abortions Becomes Law in Ohio*, NPR (Apr. 11, 2019, 6:37 PM), <https://www.npr.org/2019/04/11/712455980/a-bill-banning-most-abortions-becomes-law-in-ohio>; Brigitte Amiri, *Kentucky Just Banned Abortion*, ACLU: BLOG (Mar. 14, 2019, 10:30 PM), <https://www.aclu.org/blog/reproductive-freedom/abortion/kentucky-just-banned-abortion>; Kate Smith, *Mississippi's Controversial Six-Week Abortion Ban Struck Down by Federal Judge Panel*, CBS NEWS, <https://www.cbsnews.com/news/mississippi-six-week-abortion-ban-struck-down-federal-judge-today-2020-02-20/> (Feb. 20, 2020, 7:29 PM); Meghan Keneally, *Louisiana Governor Signs 6-Week Abortion Ban into Law*, ABC NEWS (May 30, 2019, 6:06 PM), <https://abcnews.go.com/US/louisiana-set-latest-state-sign-abortion-ban-law/story?id=63370943>; Liam Stack, *Tennessee House Passes Bill to Ban Abortion After Detection of Fetal Heartbeat*, N.Y. TIMES (Mar. 7, 2019), <https://www.nytimes.com/2019/03/07/us/fetal-heartbeat-bill.html>; *Six Week Abortion Ban*, ACLU S.C., <https://www.aclusc.org/en/legislation/six-week-abortion-ban> (last visited Apr. 8, 2022).

25. *Bans on Abortion at 6 Weeks*, PLANNED PARENTHOOD ACTION FUND, <https://www.plannedparenthoodaction.org/issues/abortion/types-attacks/6-week-bans> (last visited Apr. 8, 2022).

26. H.B. 126, 100th Gen. Assemb., Reg. Sess. (Mo. 2019).

27. ARK. CODE ANN. § 20-16-1304(a) (2013).

28. H.B. 314, Reg. Sess. (Ala. 2019).

29. *Reproductive Health Servs. of Planned Parenthood v. Parson*, 389 F. Supp. 3d 631, 633, 637, 640 (W.D. Mo. 2019), *aff'd*, 1 F.4th 552, 556–57 (8th Cir. 2021); *Edwards v. Beck*, 786 F. 3d 1113, 1115–17 (8th Cir. 2015), *cert. denied* 136 S. Ct. 895 (2016); *Robinson v. Marshall*, 415 F. Supp. 3d 1053, 1055 (M.D. Ala. 2019).

pregnancy abortion bans, these states brought the idea of banning abortion early in pregnancy into the mainstream. The anti-abortion movement used emotional language like “heartbeat bills” to push the public into thinking that there is a real-live baby with a heartbeat, despite the fact that there is no fetal heartbeat at six weeks, just electrical impulses that an ultrasound machine converts via computer program to the sound of a heartbeat.³⁰ For those experiencing a wanted pregnancy, these sounds are magical. But for those experiencing an unwanted pregnancy, it is the manufactured sound of guilt. For states though, this sound is the justification for this new wave of bans.

B. Hitting the Court-Packing Lottery

The anti-abortion movement’s organization has also benefited from seriously good luck. Thurgood Marshall’s 1991 retirement a year before Bill Clinton’s election (rather than, say, a year after) cleared the way for Justice Clarence Thomas, one of the Court’s most conservative voices.³¹ Similarly, when Justice Sandra Day O’Connor’s husband’s medical condition necessitated her retirement in 2006, Justice Samuel Alito was appointed by Republican President George Bush; if her husband had gotten sick years earlier or later, her replacement would have been appointed by the preceding or succeeding Democrats, Bill Clinton or Barack Obama.³² Just nine months before the 2016 election, Senator Mitch McConnell successfully

30. Selena Simmons-Duffin, *The Texas Abortion Ban Hinges on ‘Fetal Heartbeat.’ Doctors Call That Misleading*, NPR (Sept. 3, 2021, 3:14 PM), <https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion?t=1630836931519>; see also Anne Ryman & Matt Wynn, *For Anti-Abortion Activists, Success of ‘Heartbeat’ Bills Was 10 Years in the Making*, CTR. FOR PUB. INTEGRITY (June 20, 2019), <https://publicintegrity.org/politics/state-politics/copy-paste-legislate/for-anti-abortion-activists-success-of-heartbeat-bills-was-10-years-in-the-making/>.

31. *Thurgood Marshall Retiring from Supreme Court*, AP NEWS (June 27, 1991), <https://apnews.com/article/f10d6e4172ccc67bb2fc4cb9070ab2b5>.

32. William Branigin, Fred Barbash & Daniela Deane, *Supreme Court Justice O’Connor Resigns*, WASH. POST (July 1, 2005, 7:11 PM), <https://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100653.html>.

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pushed Justice Antonin Scalia's replacement to the next president, who appointed conservative Neil Gorsuch.³³ Finally, a mere forty-five days before the 2020 election, Justice Ruth Bader Ginsburg died suddenly and opened a seat for the appointment of conservative Justice Amy Coney Barrett, perhaps the most pro-life justice to ever sit on the Supreme Court.³⁴

While the anti-abortion movement's long-played strategy certainly paid dividends, happenstance played an undeniable role in creating the perfect storm that currently exists.³⁵ The restrictions described in the preceding section came to increasingly conservative courts, setting the stage for the current threat to *Roe*.

II. GESTATIONAL LIMITS AND A CONSERVATIVE COURT: THE PERFECT STORM

Despite lower courts consistently finding these gestational age bans unconstitutional, the anti-abortion movement continued to pass them. Two such bans, one from Texas and one from Mississippi, have created a perfect storm that will likely result in the overruling of *Roe* around the time this Article is published.

33. Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016, 6:34 PM), <https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248>; Elana Schor, *Senate Confirms Gorsuch to Supreme Court*, POLITICO, <https://www.politico.com/story/2017/04/senate-confirms-gorsuch-to-supreme-court-237005> (last updated Apr. 7, 2017, 1:22 PM).

34. *Justice Ruth Bader Ginsburg Passes, Justice Amy Coney Barrett Seated as Replacement*, A.B.A. (Jan. 25, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/year-end-2020/amy-coney-barrett-replaces-ginsburg-on-supreme-court/; see also *Amy Coney Barrett: The Supreme Court Nominee on Abortion, Healthcare and Her Faith*, BBC NEWS (Oct. 13, 2020), <https://www.bbc.com/news/election-us-2020-54512678>.

35. David S. Cohen, *Chaos and the United States Supreme Court*, LEX MAG., Fall 2021, at 35–39 (“The basic unpredictability of exactly when the human body will suffer its inevitable breakdown has played an outsized role in determining the fate of the Supreme Court and the law it decides.”).

A. SB8: Texas Extremism and Supreme Court Silence

Texas is no stranger to extreme anti-abortion action. In 2012, the Texas legislature passed House Bill 2 (or HB2)—over Senator Wendy Davis’ famous midnight filibuster.³⁶ A challenge to HB2 eventually made it to the Supreme Court and was struck down in *Whole Woman’s Health v. Hellerstedt*.³⁷ However, Texas’ efforts were revitalized in the beginning of the COVID-19 pandemic, when states were dealing with the question of “what is essential care?” When Texas Governor Greg Abbott banned all non-essential medical procedures, he did not exempt abortion.³⁸ Before the pandemic, states’ attempts to ban abortion never resulted in complete unavailability because the bans were found unconstitutional.³⁹ However, in Texas, the back and forth between the district court and the Fifth Circuit over Governor Abbott’s COVID-19 ban resulted in multiple periods in which abortion was, for a short time, entirely unavailable in the state.⁴⁰ The result was that COVID-19 put a unique shield over Texas, allowing it to ban abortions in a way that would have been impossible pre-pandemic.

36. H.B. 2, 83d Leg., 1st Spec. Sess. (Tex. 2013); see Elise Hu, *Texas Lawmaker’s 11-Hour Filibuster Ended on a Technicality*, NPR (June 26, 2013, 1:21 AM), <https://www.npr.org/sections/thetwo-way/2013/06/26/195723770/texas-lawmakers-11-hour-filibuster-ended-on-a-technicality>.

37. *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 627 (2016).

38. See Tex. Exec. Order No. GA-09 (March 22, 2020) (failing to mention abortion).

39. See *supra* text accompanying note 29.

40. *Planned Parenthood Ctr. for Choice v. Abbott*, 450 F. Supp. 3d 753 (W.D. Tex. 2020) (granting a temporary restraining order (TRO) that prohibits enforcement of Governor Abbott’s executive order banning abortion); *In re Abbott*, 954 F.3d 772 (5th Cir. 2020) (issuing a writ of mandamus to vacate the district court TRO); *In re Abbott*, 809 Fed. App’x 200 (5th Cir. 2020) (denying an emergency petition to stay the vacatur of the April 9 TRO as it applies to medication abortions); *In re Abbott*, 956 F.3d 696 (5th Cir. 2020) (directing the district court to vacate any part of the April 9 TRO that (1) restrains enforcement of GA-09 as a “categorical ban on all abortions provided by Plaintiffs”; (2) restrains the Governor and Attorney General; (3) restrains enforcement of GA-09 after 11:59 PM on April 21, 2020; (4) “restrain[s] enforcement of GA-09 as to medication abortions”; and (5) restrains enforcement of GA-09 as to abortions for patients who will reach 18 weeks LMP during the operation of GA-09 and would be “unlikely” to obtain abortion services in Texas) (internal quotations omitted).

When life in Texas returned to normal,⁴¹ the state continued its never-ending march to restrict abortion. So, while the world was still fighting the pandemic, Texas passed Senate Bill 8, or what everyone now knows as “SB8.”⁴² Substantively, SB8 is exactly like the previous unconstitutional gestational age bans, banning abortions after six weeks of pregnancy.⁴³ However, Texas created an abortion ban designed specifically to evade federal court review. And so far, it has worked exactly as planned. SB8 puts enforcement in the hands of everyone except for Texas government officials.⁴⁴ The bill states that private individuals—without requiring any connection to the patient or even the state of Texas—can sue a person who performs an unlawful abortion and anyone who aids and abets that person.⁴⁵ The lawsuit can be for \$10,000 or more, without exception for rape or incest.⁴⁶

Providers in Texas sued to stop the law, but the law’s unique features caused problems.⁴⁷ Initially, a district court judge found that the lawsuit could proceed, but before the judge could hold a preliminary injunction hearing, the Fifth Circuit stepped in and put the case on hold.⁴⁸ The day before the law was scheduled to take effect, a large group of abortion

41. Press Release, Gregg Wayne Abbott, 48th Governor of the State of Tex., Governor Abbott Lifts Mask Mandate, Opens Texas 100 Percent (Mar. 2, 2021), <https://gov.texas.gov/news/post/governor-abbott-lifts-mask-mandate-opens-texas-100-percent>.

42. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

43. *Id.*

44. See *Whole Woman’s Health v. Jackson*, No. 22-0033, 2022 WL 726990, at *24 (Tex. 2022) (“Senate Bill 8 provides that its requirements may be enforced by a private civil action, that no state official may bring or participate as a party in any such action, that such an action is the exclusive means to enforce the requirements, and that these restrictions apply notwithstanding any other law.”).

45. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

46. *Id.*

47. See Mary Anne Pazanowski, Maeve Allsup & Laurel Calkins, *Abortion Providers Win Order to Stop Group Enforcing Texas Law*, BLOOMBERG L., <https://news.bloomberglaw.com/health-law-and-business/abortion-providers-sue-to-stop-enforcement-of-texas-six-week-ban> (Sept. 3, 2021, 7:39 PM).

48. *Whole Woman’s Health v. Jackson*, No. 21-50792, 2021 WL 3919252 (5th Cir. 2021).

providers filed an emergency appeal to the Supreme Court in *Whole Woman's Health v. Jackson*.⁴⁹

By nightfall on August 31, 2021 the Supreme Court was silent, and SB8 went into effect.⁵⁰ Just before midnight on September 1, 2021, the Court issued a twelve sentence, one paragraph order that acknowledged the potential unconstitutionality of the law but failed to do anything to stop it because of the "complex and novel antecedent procedural questions on which [the providers] ha[d] not carried their burden."⁵¹ Essentially, the Court said, "Sorry, this law is too complicated for us to figure out, so we will let it take effect." The decision was 5-4, with Chief Justice Roberts joining the three liberal Justices in dissent.⁵² Following the decision, President Biden condemned the ruling, stating that it "unleashes unconstitutional chaos."⁵³ But unfortunately, this was just the beginning of the chaos.

After the Supreme Court's refusal to intervene, SB8 went into effect and has been in effect since September 1, 2021, with the exception of one forty-eight-hour period.⁵⁴ In early September, the United States Department of Justice filed a new lawsuit against Texas.⁵⁵ Following the lawsuit, a federal district judge issued a temporary injunction lifting the abortion ban.⁵⁶ Throughout the following forty-eight hours, abortion providers resumed operations. However, because Texas requires a twenty-four-hour waiting period,⁵⁷ abortions were performed for only one day before the Fifth Circuit put an emergency

49. Emergency Application to Justice Alito for Writ of Injunction &, in the Alt., to Vacate Stays of Dist. Ct. Proc., *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021).

50. *See id.*

51. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021).

52. *See id.*

53. Nina Totenberg, *Supreme Court Upholds New Texas Abortion Law, For Now*, NPR (Sept. 2, 2021, 12:20 PM), <https://www.npr.org/2021/09/02/1033048958/supreme-court-upholds-new-texas-abortion-law-for-now>.

54. Paul J. Weber, *US Appeals Court Lets Texas Resume Ban on Most Abortions*, AP NEWS (Oct. 9, 2021), <https://apnews.com/article/abortion-texas-courts-bills-health-adaf9baabf57a425c8596454286842d0>.

55. Complaint, *United States v. Texas*, No. 1:21-cv-796 (W.D. Tex. Sept. 9, 2021).

56. *United States v. Texas*, No. 1:21-CV-796-RP, 2021 WL 4593319 (W.D. Tex. Oct. 6, 2021).

57. TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2021).

hold on the district court's ruling.⁵⁸ This hold immediately reinstated SB8.⁵⁹ Shortly after, the Department of Justice filed an emergency appeal to the Supreme Court.⁶⁰ The Court heard arguments on November 1,⁶¹ and nearly six weeks later, on December 10, the Supreme Court yet again failed to block SB8, but allowed abortion providers to continue a narrow challenge to the law in lower courts.⁶²

The battle did not end there, however. After the Supreme Court remanded the case, the Fifth Circuit certified a question to the Texas Supreme Court.⁶³ It asked the court to issue a definitive answer as to whether SB8 allows state licensing officials to have any role in enforcement, the one avenue the Supreme Court found that would give rise to a lawful pre-enforcement challenge.⁶⁴ In March, the Texas Supreme Court answered in the negative, ruling that state licensing officials have no enforcement authority.⁶⁵ As a result of this binding state court interpretation of state law, the one avenue for federal court review is now foreclosed.⁶⁶ The providers might once again appeal to the U.S. Supreme Court, but given the narrowness of the December ruling and the Court's apparent lack of appetite to intervene further, their chances will be slim.

Amid this legal wrangling and as SB8 remains in effect, what does this mean for Texas? With just one small exception, Texas abortion providers are following the law.⁶⁷ Some people have

58. *United States v. Texas*, 2021 WL 4706452 (5th Cir. 2021).

59. *See id.*

60. Application to Vacate Stay of Preliminary Injunction Issued by the United States Court of Appeals for the Fifth Circuit, No. 21-50949, 2021 WL 4706452 (5th Cir. 2021).

61. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021).

62. *Id.*

63. *See Whole Woman's Health v. Jackson*, No. 21-50792, 2022 U.S. Dist. LEXIS 1255 (5th Cir. 2022).

64. *See id.* at *5.

65. *See Whole Woman's Health v. Jackson*, No. 22-0033, 2022 WL 726990 (Tex. 2022).

66. *See id.* at *8-9.

67. Jennifer Gerson, 'No One Wants to Get Sued': Some Abortion Providers Have Stopped Working in Texas, THE 19TH (Sept. 15, 2021, 6:00 AM), <https://19thnews.org/2021/09/abortion-providers-texas-stopped-working-under-threat-sued/>.

called for civil disobedience, with abortion providers daring people to sue them.⁶⁸ But except for one doctor who admitted to performing an unlawful abortion to test the law, doctors and clinics have not challenged the law for fear of lawsuits.⁶⁹ This fear, however, is not rooted in the cost of the lawsuit. Rather, doctors and clinics fear the professional consequences from licensing boards and malpractice insurers of being sued, especially since doctors in Texas often perform abortions out of state and could lose those licenses with too many Texas lawsuits.⁷⁰ However, Texas clinics have seen a surprise increase in abortions before six weeks. While many feared that clinics would see reduced volume approaching 90%, the reality is that Texans are rushing to get abortions earlier in order to comply with the law and the in-state clinical abortion volume is down only 50%.⁷¹ The people who have not been able to get abortions in Texas clinics have been traveling out of state or obtaining abortion pills online, with very few carrying their pregnancy to term when they would otherwise want an abortion.⁷²

Despite abortion numbers not dropping as expected for Texans, the effect of SB8 is still punitive. The most privileged Texans—those with access to early pregnancy tests, money, transportation, support, and time—continue to have access to abortion.⁷³ Everyone else is sacrificing to obtain an abortion, risking law enforcement or immigration checkpoints while

68. Alexi Pfeffer-Gillet, *Civil Disobedience in the Face of Texas's Abortion Ban*, 106 MINN. L. REV. 203, 206 (2021).

69. Madlin Mekelburg, *'I Want to See What the Law Is': Man Sues Texas Doctor Who Violated Abortion Ban to Test Law's Constitutionality*, USA TODAY, <https://www.usatoday.com/story/news/politics/2021/09/20/texas-doctor-sued-arkansas-man-violating-texas-abortion-ban/5790907001/> (Sept. 21, 2021, 7:01 AM).

70. Emergency Motion for Temporary Restraining Order or Preliminary Injunction at 11, *United States v. Texas*, No. 1:21-CV-796-RP, 2021 WL 4593319 (W.D. Tex. Sept. 14, 2021).

71. Margot Sanger-Katz, Claire Cain Miller & Quoc Trung Bui, *Most Women Denied Abortions by Texas Law Got Them Another Way*, N.Y. TIMES, <https://www.nytimes.com/2022/03/06/upshot/texas-abortion-women-data.html> (Mar. 9, 2022).

72. *Id.*

73. See Holly Honderich, *What You Need to Know: Why US Abortion Laws Could Be Changed by Supreme Court Ruling*, RNZ (May 3, 2022, 6:52 PM), <https://www.rnz.co.nz/news/world/466381/what-you-need-to-know-why-us-abortion-laws-could-be-changed-by-supreme-court-ruling>.

traveling long distances, or carrying their pregnancy to term against their will.⁷⁴ Following the results from the Turnaway Study—a massive multiyear study of what happens to people who are unable to obtain an abortion—we know that people who carry a pregnancy to term when they were denied a wanted abortion suffer emotionally, physically, financially, and in their relationships.⁷⁵ In other words, Texas is showing us the beginnings of what a world without nationwide legal abortion looks like even before *Roe* is overturned, a fate that is looking more and more likely with each passing day.

B. Dobbs v. Jackson: A Monumental Challenge to Roe

Texas is not the only state that has caught the attention of the Supreme Court. On December 1, the Court heard oral argument in *Dobbs v. Jackson Women's Health Organization*.⁷⁶ This case reviewed the constitutionality of Mississippi's ban on abortion at fifteen weeks.⁷⁷ This law, similar to many other gestational age bans, premises its reasoning on a fetus's ability to feel pain before viability⁷⁸ which, as previously mentioned, has been debunked by the American College of Obstetricians and Gynecologists (ACOG).⁷⁹ The lone remaining abortion clinic in Mississippi, which provides abortions only up to sixteen weeks, challenged the law, and the lower courts, even the rabidly anti-

74. Yelena Dzhanova, *Undocumented Immigrants Are Forced to Choose Between Deportation and Abortion Because of the Restrictive New Abortion Law in Texas*, BUS. INSIDER (Sept. 29, 2021, 7:43 PM), <https://www.businessinsider.com/undocumented-immigrants-weigh-deportation-and-abortion-in-texas-2021-9>; see also *TCF Health Care Experts React to Texas' Restrictive Anti-Abortion Law, SB8*, CENTURY FOUND. (Sept. 2, 2021), <https://tcf.org/content/about-tcf/tcf-health-care-experts-react-texas-restrictive-anti-abortion-law-sb8/?session=1>.

75. See generally DIANE GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION* (2020).

76. See generally Transcript of Oral Argument, *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392).

77. H.B.1510, Reg. Sess. (Miss. 2018).

78. See *id.* at 2.

79. Sara G. Miller, *Do Fetuses Feel Pain? What the Science Says*, LIVE SCI. (May 17, 2016), <https://www.livescience.com/54774-fetal-pain-anesthesia.html> (“The science shows that based on gestational age, the fetus is not capable of feeling pain until the third trimester,” said Kate Connors, a spokesperson for ACOG.”).

abortion Fifth Circuit, struck it down as unconstitutional.⁸⁰ Despite this, the Supreme Court, after Amy Coney Barrett solidified the Court's six-to-three conservative majority, decided to hear the case.⁸¹ This case presents a direct challenge to *Roe v. Wade* and *Planned Parenthood v. Casey* because the only way to uphold Mississippi's fifteen-week ban would be to radically change *Roe* and *Casey*, if not overrule them altogether.⁸²

While the Court has yet to issue a ruling, it seems that the conservative majority is prepared to uphold Mississippi's fifteen-week ban and overrule *Roe*.⁸³ No one expects Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch to do anything other than vote to overturn *Roe*. They need two other Justices to join their cause, and oral argument indicated they might be successful. Newcomers Justices Brett Kavanaugh and Amy Coney Barrett were extremely critical of *Roe* at oral argument. Justice Kavanaugh argued repeatedly that the Court's abortion jurisprudence was improper because the Court was taking sides in a national debate regarding which it should remain neutral,⁸⁴ and Justice Barrett argued that adoption and safe-haven laws show that abortion is no longer needed.⁸⁵ Chief Justice John Roberts was the only conservative who indicated an interest in compromise, suggesting the Court could uphold Mississippi's law without overturning precedent.⁸⁶

80. *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021).

81. *Id.*

82. See Brief for Respondents at 6–9, *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392).

83. Ariane de Vogue, *Takeaways from the Historic Supreme Court Arguments on Abortion Rights*, CNN POLS., <https://www.cnn.com/2021/12/01/politics/takeaways-supreme-court-abortion/index.html> (Dec. 1, 2021, 9:54 PM).

84. Transcript of Oral Argument, *Dobbs*, 141 S. Ct. 2619 (2021) (No. 19-1392), at 43–44, 76–80.

85. *Id.* at 56–57.

86. *Id.* at 53–56.

The liberal Justices pushed back, but there simply are not enough votes. Justice Stephen Breyer focused on the magnitude of potentially overturning a case as controversial as *Roe v. Wade*, stating that “it is particularly important to show what we do in overturning a case is grounded in principle and not social pressure, not political pressure.”⁸⁷ Justice Sotomayor echoed Justice Breyer, questioning how the Court would survive “the stench” of political interference.⁸⁸

Despite these concerns, the conservative Justices look poised to win and thus allow the states to freely regulate abortion.⁸⁹ The issue with shifting the choice to the states is simple: twenty-six states are likely or certain to ban abortion if *Roe v. Wade* is overturned.⁹⁰ Many states have already instituted “trigger” laws to do so immediately.⁹¹ Roughly half the states banning abortion would force pregnant people in those states to carry out unwanted pregnancies or risk financial and personal security to travel to a state where they will be able to obtain an abortion.⁹²

Predicting the outcome in *Dobbs* seems simpler now (even before the draft leak) than at the same point in time last year. Before September 1, 2021, the chance that the Supreme Court

87. *Id.* at 10.

88. *Id.* at 15.

89. In fact, on May 2, 2022, a draft majority opinion of the *Dobbs* decision, written by Justice Samuel Alito, was unprecedentedly leaked and published by Politico, in which Alito definitively writes, “We hold that *Roe* and *Casey* must be overruled.” *Read Justice Alito’s Initial Draft Abortion Opinion Which Would Overturn Roe v. Wade*, POLITICO (May 2, 2022, 9:20 PM), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504>; Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO, <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> (May 3, 2022, 2:14 PM). The draft opinion was leaked as this Article was being finalized so the lessons learned from the leak have not been fully incorporated into the analysis here.

90. Elizabeth Nash & Lauren Cross, *26 States Are Certain or Likely to Ban Abortion Without Roe: Here’s Which Ones and Why*, GUTTMACHER INST., <https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why> (Apr. 19, 2022).

91. Some trigger laws have been in place for over fifteen years. See LA. STAT. ANN. § 40.1061 (2006). However, others have been enacted recently in response to the conservative majority on the Court. See KY. REV. STAT. ANN. § 311.772(2) (LexisNexis 2022); IDAHO CODE § 18-622 (2022).

92. See *supra* text accompanying notes 73–75.

would use *Dobbs v. Jackson Women's Health* to overturn *Roe v. Wade* appeared about as likely as a coin toss. Pre-viability bans have not fared well in court in the past,⁹³ but the Justices might have carved out an exception because the clinic in the state performs only a small number of procedures impacted by the law.⁹⁴ The possibility that the conservative Court would overrule *Roe* was certainly present, but many people believed it might not use the first abortion case with Justice Barrett on the Court to go all the way and overrule an almost-fifty-year-old precedent. However, after the Court's refusal to intervene in Texas and its initial order regarding SB8, it seemed almost certain that *this Court* will overturn *Roe v. Wade* and do so explicitly.

By its refusal to intervene to stop SB8, the Court's message was crystal clear: five Justices do not think the right to abortion in the United States is worthy of respect. If a majority of Justices cared at all about the constitutional right at issue, they would have stopped SB8 in its tracks. Imagine if a law with the same civil enforcement mechanism as SB8 came before the Court, but instead of abortion, the law authorized suing anyone who engaged in a gun sale or provided Catholic school education. There is no doubt that this Court would have enjoined the law immediately. But because the right at issue is abortion, the Court is willing to allow clever legal tricks to circumvent its protection. In other words, five Supreme Court Justices were telling the world that they do not think abortion is a constitutional right. Based solely on the Court's actions with SB8, it seems likely that *Dobbs* will put the final nail in *Roe's* coffin.

For many states, overruling *Roe* is not enough. An amicus brief filed in *Dobbs* by Texas Right to Life asks the Court to

93. The Court has previously found pre-viability bans unconstitutional in many states including Alabama, Missouri, and Arkansas. See *supra* notes 26–28 and accompanying text.

94. Caroline Kitchener & Casey Parks, *How Mississippi Ended up with One Abortion Clinic and Why it Matters*, WASH. POST (Nov. 30, 2021, 9:00 AM), <https://www.washingtonpost.com/dc-md-va/2021/11/30/abortion-mississippi-closed-clinics/> ("The clinic only offers abortions up to 16 weeks, and the proposed law would ban the procedure after 15.").

overrule not only *Roe v. Wade*, but also *Obergefell v. Hodges*, the same-sex marriage case, and *Lawrence v. Texas*, the same-sex sexual activity case.⁹⁵ The brief states: “These ‘rights,’ like the right to abortion from *Roe*, are judicial concoctions, and there is no other source of law that can be invoked to salvage their existence.”⁹⁶ Further, the brief hints that it wants the Court to reach all the way back to overrule *Griswold v. Connecticut*, the contraception case from 1965.⁹⁷ Plainly, this brief wants the Court to overrule all privacy rights associated with procreation, family, sexuality, and intimate relationships.⁹⁸ In contrast to seeking to have these privacy rights obliterated, there is no doubt that Texas Rights to Life and similar groups would ask the Court to vigorously protect private enterprise and to extend religious rights, particularly for conservative Christian religions.

Unfortunately, using religious rights to infringe on privacy rights is not new. Last term, amidst a winning run for groups claiming religious exemptions to general laws, the Court recognized an exception for foster care placement in Philadelphia, allowing Catholic Social Services to continue to contract with the city even though the organization refused to place children with or work with gay individuals.⁹⁹ As more religious exemptions come before the Court, more and more exceptions will be carved out. Eventually, these same groups will ask the Court to find a constitutional right to life for fetuses. This right would not only allow states to ban abortion, but it would also force a nationwide ban on abortion.¹⁰⁰ *Dobbs* and its

95. Brief of Texas Right to Life as Amicus Curiae in Support of the Petitioners at 25, *Dobbs v. Jackson Women’s Health Organization* (2021) (No. 19-1392) (stating that the Court should not “hesitate to write an opinion that leaves those decisions hanging by a thread. . . . *Lawrence* and *Obergefell*, while far less hazardous to human life, are as lawless as *Roe*.”).

96. *Id.* at 24.

97. *See id.* at 23.

98. *See id.*

99. *See* *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1882 (2021).

100. *See* Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners at 31–32, *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392).

surrounding efforts display yet another attempt to engraft a pro-business Christian nationalism onto our constitutional order, and the movement just may have found the five Justices who will go along with them in that quest.

III. LEARNING FROM THE PAST TO FORGE A PATH FORWARD

This Article has thus far provided a rather depressing look into the future of reproductive rights. It does not have to be this bleak and terrifying—but time is of the essence. We can translate what we have learned from the COVID-19 pandemic, mass mobilization, and recent action by the states into creative, tangible strategies to protect the future of reproductive rights and access.

A. Lessons from a Twenty-First Century Pandemic

There is significant opportunity to translate what we have learned from the COVID-19 pandemic into our attempts to improve reproductive health care. Such lessons have been highlighted by legal scholars and activists alike during *Drexel Law Review's* 2021 symposium covering COVID-19, reproduction, and the law.¹⁰¹ NYU Law Professor Anna Arons described the various lessons we can learn from how children in New York City were safer during the pandemic.¹⁰² Jenifer Groves, Vice President of Administration at the Women's Centers, stated that clinics developed evidence-based ways to reduce touches with patients, including through telemedicine and remote delivery of abortion pills.¹⁰³ Temple Law's Dean

101. See 'Reproducing Injustice' Symposium Explores Reproductive Rights and Justice During COVID-19, DREXEL UNIV. THOMAS R. KLINE SCH. OF L. (Nov. 18, 2021), <https://drexel.edu/law/about/news/articles/overview/2021/November/drexel-law-review-symposium-reproducing-injustice/>.

102. Drexel University Thomas R. Kline School of Law, *Panel Three: Parenting and Families, Concluding Discussion: Looking to the Future*, YOUTUBE (Nov. 9, 2021), <https://www.youtube.com/watch?v=m4ZKSfchPXY> [hereinafter *Panel Three*].

103. Drexel University Thomas R. Kline School of Law, *Panel One: Abortion and Access to Care*, YOUTUBE (Nov. 9, 2021), <https://www.youtube.com/watch?v=ZgFBJqbnrjc> [hereinafter *Panel One*]; see also Ushma D. Upadhyay, Roaslyn Schroeder & Sarah C.M. Roberts, *Adoption of*

Rachel Rebouché explained that the Biden administration is reconsidering the restrictions on who can administer this medication.¹⁰⁴ Since she spoke of this, the Biden Administration has lifted many of the FDA restrictions on medication abortion, allowing greater access to abortion pills via pharmacies and the mail.¹⁰⁵ Notably, however, if *Dobbs* ushers in a new era of statewide abortion bans, the FDA change will help with patient access to abortion only in states where it is allowed.

We have also seen an increase in access to court hearings during the pandemic, specifically with judicial bypass proceedings.¹⁰⁶ As explained by Christine Castro, a staff attorney for the Women's Law Project,¹⁰⁷ some of these hearings were conducted via video because of the pandemic.¹⁰⁸ Remote hearings are another innovation that would greatly improve access for marginalized populations.¹⁰⁹ If remote hearings can be carried forward after the immediate need presented by the pandemic has passed, it will significantly improve access for minors who would no longer have to leave their homes for these hearings. Increased access of this form would alleviate some of the issues that arise when minors leave their home and

No-Test and Telehealth Medication Abortion Care Among Independent Abortion Providers in Response to COVID-19, CONTRACEPTION: X, Nov. 16, 2020, at 1, 3–4.

104. See *Panel One*, *supra* note 103.

105. See Letter from Patrizia Cavazzoni, Director, Ctr. For Drug Evaluation & Rsch., to Graham Chelius, The Soc'y of Fam. Planning, The Cal. Acad. of Fam. Physicians (Dec. 16, 2021), https://www.aclu.org/sites/default/files/field_document/fda_letter_to_chelius.pdf.

106. See *Bellotti v. Baird*, 443 U.S. 622, 647 (1979). Judicial bypass proceedings are sought by pregnant teenagers, where a judge will order that they can move forward with an abortion without needing to first inform their parent or guardian. See *id.*

107. See *About*, WOMEN'S L. PROJECT, <https://www.womenslawproject.org/about/> (last visited May 9, 2022). Women's Law Project is a nonprofit legal organization based in Pennsylvania with a mission to "defend and advance the rights of women, girls, and LGBTQ+ people" and "leverage[] the power of the law to eliminate gender bias and discrimination." *Id.*

108. *Panel One*, *supra* note 103; see also Hum. Rts. Watch & ACLU of Ill., "The Only People It Really Affects Are the People It Hurts": The Human Rights Consequences of Parental Notice of Abortion in Illinois, HUM. RTS. WATCH (Mar. 11, 2021), <https://www.hrw.org/report/2021/03/11/only-people-it-really-affects-are-people-it-hurts/human-rights-consequences>.

109. See Steve Rubley, *Improving Access to Justice: How Technology Companies Can Help*, FORBES (Aug. 31, 2021, 7:00 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/08/31/improving-access-to-justice-how-technology-companies-can-help/>.

raise the suspicion of their parents, or when they are missing more school than necessary due to travel time.¹¹⁰

Innovations surrounding the online availability of abortion medication during the pandemic should also continue and expand moving forward. As Dean Rebouché highlighted, more people are learning about and accessing abortion pills,¹¹¹ and the improvements in the information around them and their delivery via internet providers or pharmacies is a beneficial development that cannot be ignored. Not only does medication abortion make the individual feel safer during a pandemic because it can be administered at home, it has also proven to decrease access complications related to travel¹¹²—which is a significant obstacle for people living in states with few clinics and long distances between them.¹¹³

B. Reproductive Activism

The United States has witnessed the beginning effects that mass attention and mobilization can have on the issues of reproductive health, rights, and justice. With the marches in opposition to SB8 in early October 2021, people are making explicit demands for reproductive rights, and are drawing attention by doing so.¹¹⁴ Such activism will likely only become more intense as the Supreme Court acts and the state of reproductive rights becomes even more dire, though it is unclear whether such activism will affect how the Court rules in the upcoming reproductive rights cases. Regardless, taking

110. *See id.*

111. *See Panel One, supra* note 103; *see also Evidence You Can Use: Medication Abortion*, GUTTMACHER INST. (Feb. 2021), <https://www.guttmacher.org/evidence-you-can-use/medication-abortion>.

112. *See, e.g.,* Kirsten M. J. Thompson, Hugh J. W. Sturrock, Diana Greene Foster & Ushma D. Upadhyay, *Association of Travel Distance to Nearest Abortion Facility With Rates of Abortion*, 4 JAMA NETWORK OPEN 1, 9, (2021); Taylor Freeburg, Meghna Nandi & Andrea Arena, *Emerging Advances and Existing Barriers for Medication Abortion*, 104 R.I. MED. J. 71, 71 (2021).

113. NAT'L ORG. FOR WOMEN, RURAL WOMEN & ABORTION ACCESS 1–2 (2018).

114. *See, e.g.,* Deepa Shivaram, *5th Women's March Focuses on Reproductive Rights After New Texas Abortion Law*, NPR, <https://www.npr.org/2021/10/02/1042707939/womens-march-abortion-protests-washington-texas> (Oct. 2, 2021).

to the streets can influence politics in other ways: it can put pressure on the Biden administration to be more proactive, it can change the course of the 2022 midterm elections, and very importantly, it can impact state and local elections and policy.¹¹⁵

Additionally, such mass mobilization can facilitate the formation of a broad coalition on topics beyond abortion. *Roe* captures headlines, but the growing concerns of reproductive justice are being woven into the framework of discussing other prevalent issues, especially among young people.¹¹⁶ Racial equity, gender justice, birth justice, and class awareness, among others, are increasingly present in the mainstream reproductive rights movement.¹¹⁷ There is clearly work to be done to eradicate white supremacy and other ills from the movement,¹¹⁸ but the shift in how people talk about these issues is palpable. When conversations about abortion are integrated with topics such as birth, child-rearing, and families as well as the environment, criminal justice reform, and immigration, more people are reached who realize that the reproductive rights and justice movement is about self-determination and uplifting those who are the most significantly impacted by oppressive government policies. By appealing to more people,

115. See, e.g., *What if Roe Fell?*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/what-if-roe-fell/> (last visited May 9, 2022); see also David S. Cohen, Greer Donley & Rachel Rebouché, *States Want to Ban Abortions Beyond Their Borders. Here's What Pro-Choice States Can Do*, N.Y. TIMES (Mar. 13, 2022), <https://www.nytimes.com/2022/03/13/opinion/missouri-abortion-roe-v-wade.html> (describing how state legislators can protect reproductive rights and justice through legislation).

116. See, e.g., LORETTA ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 1 (2017) (“This primer will also help readers understand how reproductive justice is significantly different from the pro-choice/antiabortion debates that have dominated the headlines and mainstream political conflict for so long.”); Leah Rodriguez, *5 Amazing Young People Fighting for Women’s Right to Control Their Own Bodies*, GLOB. CITIZEN (Dec. 8, 2021), <https://www.globalcitizen.org/en/content/activists-fighting-womens-right-to-control-body/>.

117. See, e.g., *Reproductive Justice is Racial Justice*, ACLU IND. (Sept. 28, 2021, 9:00 AM), <https://www.aclu-in.org/en/news/reproductive-justice-is-racial-justice>; *Applying an Intersectional Analysis to Reproductive Justice and Other Forms of Oppression: Collaborating Across Movements and Issues*, VAWNET, <https://vawnet.org/sc/reproductive-justice-building-upon-reproductive-health-and-reproductive-rights> (last visited May 9, 2022).

118. See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2037–40, 2055–59 (2021).

the right to abortion can be solidified while also expanding the focus to other issues that are just as important.

This increased attention from the public building a more active movement can also translate to more direct activism, which will be needed in the coming years as we deal with the considerable steps backward made by the restrictive laws and oppressive policies recently passed by conservative legislatures.¹¹⁹ For instance, after Alabama passed its abortion ban at conception in 2019, millions of dollars in donations flowed to the state's abortion fund.¹²⁰ The fund used this money to buy one of the state's abortion clinics and to reimagine service delivery for the patients the clinic served.¹²¹ Even more recently, with Texas shutting down abortion for anyone seeking abortion after six weeks, volunteers in the state have stepped up to provide practical support—driving patients across borders, watching their kids while they are away, and even housing them overnight.¹²² These practical support networks exist all over the country, but will need to be expanded even more so in the future. The intense focus on the issue right now

119. See *States Passed a Record Number of Restrictive Abortion Laws in 2021*, USA FACTS, <https://usafacts.org/articles/states-passed-a-record-number-of-restrictive-abortion-laws-in-2021/> (Feb. 25, 2021, 11:24 AM). In 2021, Alaska, Arkansas, Idaho, Montana, and Wyoming restricted insurance coverage of abortions. *Id.* Kansas and Kentucky approved ballot measures to amend their state constitutions to explicitly exclude rights to abortion and to prohibit public funding for abortions, which will be voted on by voters in the 2022 midterm elections. *Id.* Arizona, Arkansas, Indiana, Montana, Ohio, Oklahoma, South Dakota, and West Virginia enacted restrictions on access to medical abortion. *Id.* Texas, Idaho, Oklahoma, and South Carolina passed bills prohibiting abortion at detection of a fetal heartbeat. *Id.* Oklahoma and Texas joined ten other states in passing “trigger” laws, which are currently inactive bans on abortion that will become enforceable if the Supreme Court overturns *Roe*. *Id.*

120. See Abbey Crain, *Alabama's Yellowhammer Fund Faces Growing Pains Amid Flood of Donations*, AL.COM, <https://www.al.com/news/2019/06/alabamas-yellowhammer-fund-faces-growing-pains-amid-flood-of-donations.html> (July 2, 2019, 5:10 PM).

121. See Josiah Bates, *Alabama Reproductive Rights Nonprofit Buys One of the State's Few Abortion Clinics to Keep It Open*, TIME (May 16, 2020, 5:04 PM), <https://time.com/5837882/alabama-abortion-clinic-yellowhammer-fund/>.

122. See *Our Program*, FUND TEX. CHOICE, <https://fundtexaschoice.org/our-program/> (last visited Mar. 20, 2022); *About Us*, CLINIC ACCESS SUPPORT NETWORK, <https://www.clinicaccess.org/about-us> (last visited Apr. 11, 2022); Grace Duginski, *9 Organizations Making Abortion Access a Reality in Texas*, EVERYACTION (Apr. 11, 2021), <https://www.everyaction.com/blog/9-organizations-making-abortion-access-a-reality-in-texas/>.

will hopefully lead to a steady stream of volunteers committed to helping the people hurt the most by these policies.

C. *Lessons from the States*

Although the outlook is bleak at the Supreme Court and in states like Texas and Mississippi, the outlook in other states and local governments is rather encouraging. Indra Lusero, Director and President of the Birth Rights Bar Association, spoke during the symposium about the Birth Equity Bill Package in Colorado as a possible test bill for other states.¹²³ On abortion, New Jersey Governor Phil Murphy approved new regulations that lifted the state's ban on abortions in doctor's offices after fourteen weeks and, with even greater impact, allowed the state's nurses, physician assistants, and midwives to perform abortions.¹²⁴ These new rules will open up abortion access across the state.¹²⁵ Additionally, in January the Governor signed the Reproductive Freedom Act into law, further cementing abortion rights into law.¹²⁶

Other states have taken similar action. In 2019, the citizens of Maine elected a pro-choice, first-female governor after enduring eight years of one of the worst, most racist governors

123. See Drexel Univ. Thomas R. Kline Sch. of L., *Panel Two: Pregnancy and Childbirth*, YOUTUBE (Nov. 9, 2021), <https://www.youtube.com/watch?v=-eOPf5PoAR4>. The Birth Equity Bill Package, also called Colorado's Omnibus, is comprised of a comprehensive set of bills (SB21-193, SB21-194, and SB21-101) intended to "address lack of access, inequities, and mistreatment throughout the obstetric system." Alexa Richardson, *Colorado Passes Landmark Birth Equity Bill Package*, BILL OF HEALTH (June 22, 2021), <https://blog.petrieflom.law.harvard.edu/2021/06/22/colorado-passes-landmark-birth-equity-bill-package/>.

124. See Press Release, N.J. Off. of the Governor, New Jersey Expands Access to Reproductive Health Care, Adopts New Rules from Unanimous Vote by State Board of Medical Examiners (Dec. 6, 2021), <https://nj.gov/governor/news/news/562021/approved/20211206a.shtml>.

125. *Id.*

126. See Freedom of Reproductive Choice Act, 2021 N.J. Laws 49; see also Press Release, N.J. Dep't of Health, Governor Murphy Signs Historic Legislation to Expand and Protect Reproductive Freedom in New Jersey (Jan. 13, 2022), <https://www.nj.gov/health/news/2022/approved/20220113a.shtml>.

in the country,¹²⁷ and thereafter, the state legislature took two important proactive steps to increase abortion access. First, the state lifted its ban on allowing Medicaid coverage for abortion services.¹²⁸ Then, like New Jersey, Maine allowed nurse practitioners and physician assistants to perform abortions.¹²⁹ In a sparsely populated rural state like Maine, these two laws have radically changed how patients access abortion in the state.

On the West Coast, the California legislature has been rather innovative. It already had some of the most liberal reproductive health laws in the country,¹³⁰ but the state has been expanding access even more. In 2019, the state passed legislation that requires all public universities to provide access to abortion pills on campus.¹³¹ In 2021, a bill was signed that requires public schools for grades six through twelve, community colleges, and the state university system to provide free menstrual products in restrooms.¹³²

Unfortunately, the current Pennsylvania legislature will not take similar action, given its anti-abortion leanings. However, there is a case pending in the Pennsylvania Supreme Court that might increase access. After mobilization from abortion rights groups and unions in 2015, the Pennsylvania Supreme Court flipped to a majority liberal court for the first time in decades.¹³³ As a result, the court has been a leader among state supreme

127. See *About the Governor*, MAINE.GOV, <https://www.maine.gov/governor/mills/about> (last visited Apr. 8, 2022); Li Zhou, *Janet Mills Becomes Maine's First Woman Governor*, VOX, <https://www.vox.com/2018/11/7/18049530/election-results-senate-maine-janet-mills-winner> (Nov. 7, 2018, 1:06 PM); Amber Phillips, *LePage Doubles Down: 'The Enemy Right Now' Is 'People of Color or People of Hispanic Origin'*, WASH. POST (Aug. 27, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/08/26/this-is-gov-paul-richard-lepage-i-would-like-to-talk-to-you-about-your-comments-about-my-being-a-racist-you-expetive/>.

128. See ME. REV. STAT. ANN. tit. 24-A, § 4320-M (2021).

129. *Id.*

130. See, e.g., Assemb. B. 775, 2015-2016 Leg., Reg. Sess. (Cal. 2015); Exec. Dep't: State of Cal., California Proclamation on Reproductive Freedom (2019), <https://www.gov.ca.gov/wp-content/uploads/2019/05/Proclamation-on-Reproductive-Freedom.pdf>.

131. S.B. 24, 2019-2020 Leg., Reg. Sess. (Cal. 2019).

132. Assemb. B. 367, 2021-2022 Leg., Reg. Sess. (Cal. 2021).

133. See Peter Jackson, *Democrats Gain Control of Pennsylvania's Supreme Court*, MORNING CALL (Nov. 4, 2015, 12:17 PM), <https://www.mcall.com/news/local/mc-pa-supreme-court-election-20151103-story.html>.

courts on issues related to gerrymandering,¹³⁴ environmental justice,¹³⁵ equitable educational funding,¹³⁶ and criminal justice reform,¹³⁷ among others. In the pending case that will be argued in 2022, Professor David S. Cohen—one of the authors of this Article—along with attorneys from the Women’s Law Project,¹³⁸ Planned Parenthood, and law firm Troutman Pepper represent nearly all of the freestanding clinics in Pennsylvania in a challenge to the state’s ban on Medicaid funding for abortion.¹³⁹ The clinics have asked the court to rule that under the equal rights amendment of the Pennsylvania Constitution, the Medicaid funding ban is an unconstitutional form of sex discrimination.¹⁴⁰ They have also asked the court to rule that abortion is a fundamental right in Pennsylvania and that funding pregnancy care, but not abortion care, is an unconstitutional burden on that right.¹⁴¹ These arguments are being made under the Pennsylvania state constitution—so whether the United States Supreme Court upholds *Roe* is irrelevant. Given the precarious situation at the Supreme Court, more and more advocates are going to look to state supreme courts for protection of the rights at issue here.

134. See, e.g., *League of Women Voters v. Commonwealth*, 178 A.3d 737, 818 (Pa. 2018) (holding that a partisan gerrymandering plan “deprive[d] Petitioners of their state constitutional right to free and equal elections”).

135. See, e.g., *Pa. Env’t Def. Found. v. Commonwealth*, 161 A.3d 911, 931 (Pa. 2017) (holding that laws which unreasonably impair the right to clean air, pure water, and environmental preservation are unconstitutional).

136. See, e.g., *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 463 (Pa. 2017) (holding that petitioners had a justiciable equal protection claim).

137. See, e.g., *Commonwealth v. Alexander*, 243 A.3d 177, 181 (Pa. 2020) (holding that Article I, Section 8 of the Pennsylvania Constitution requires “both a showing of probable cause and exigent circumstances to justify a warrantless search of an automobile”).

138. Including Christine Castro, who also presented at the *Drexel Law Review Symposium*.

139. See Petitioner’s Omnibus Brief in Opposition to Preliminary Objections, *Health Ctr. v. Pa. Dep’t of Hum. Servs.*, 249 A.3d 598 (Pa. Commw. Ct. 2021) (No. 26 MD 2019) [hereinafter Omnibus Brief]; see also Tara Murtha, *Medicaid Abortion Ban Case Heads to Pennsylvania Supreme Court*, WOMEN’S L. PROJECT (Oct. 13, 2021), <https://www.womenslawproject.org/2021/10/13/medicaid-abortion-ban-case-heads-to-pennsylvania-supreme-court/>.

140. Omnibus Brief, *supra* note 139, at 1.

141. *Id.* at 2.

While all states obviously will not protect reproductive rights, some conservative states may take surprising action. For example, in 2019 the Kansas Supreme Court, in a 200-page opinion, found a constitutional right to abortion under its state constitution, protecting abortion rights in that state regardless of *Roe*.¹⁴² Victories such as this are not permanent and must be protected from recall efforts against state justices and state constitutional amendment referenda,¹⁴³ but they show that there is promise in state law when federal law fails us, even in heavily conservative states.

Local governments also cannot be overlooked. New York City,¹⁴⁴ Austin,¹⁴⁵ and Portland¹⁴⁶ have sent city funds to abortion funds, helping patients with the financial burden of abortion. They can act beyond abortion as well. For instance, St. Louis, in deep-red Missouri, passed the Discrimination Based on Health Decisions or Pregnancy Ordinance in 2017, which protects people in the city from discrimination in the employment and housing contexts on the basis of reproductive health decisions.¹⁴⁷ Then in 2019, the city passed a bill ensuring access to quality prenatal and postpartum health care, nutritious food, and tampons or pads for incarcerated people.¹⁴⁸

These state- and local-level changes are happening because advocates are being proactive instead of reactive. Rather than simply relying on the Supreme Court to guarantee abortion access, advocates are considering how their states or cities can improve access on a smaller scale. They understand the

142. Hodes & Nauser v. Schmidt, 440 P.3d 461, 502 (Kan. 2019).

143. See, e.g., H. Con. Res. 5003, 98th Leg., Reg. Sess. (Kan. 2020).

144. Nikita Stewart, *New York City Allocates \$250,000 for Abortions, Challenging Conservative States*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/nyregion/abortion-funding-ny.html>.

145. Mary Tuma, *City Council Redirects APD Funds to Abortion Support Access*, AUSTIN CHRON (Aug. 14, 2020, 11:27 AM), <https://www.austinchronicle.com/daily/news/2020-08-14/city-council-redirects-apd-funds-to-abortion-support-access/>.

146. Press Release, Nat'l Inst. for Reprod. Health, *Portland City Council Allocates \$200,000 to Fund Abortion Care* (Sept. 15, 2021), <https://www.nirhealth.org/blog/2021/09/15/portland-city-council-allocates-200000-to-fund-abortion-care/>.

147. ST. LOUIS, MO., CODE OF ORDINANCES tit. 15, div. IX, ch. 15.175, § 15.175.020 (2017).

148. *Id.* tit. 16, ch. 16.16, §§ 16.16.350(E), 16.16.360 (2019).

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importance of electoral politics, not just judicial opinions, to the cause of reproductive justice. They know to form coalitions to win at the polls and impact abortion and reproductive rights policy for years to come. Although this will not solve the glaring issue that some states will completely ban abortion if *Roe* is overturned, it will increase access and promote reproductive autonomy in crucial locations around the country that hopefully are accessible enough to people in restrictive locations.

IV. DESPERATE TIMES CALL FOR STRATEGIC MEASURES: A CALL TO ACTION

Necessity is the mother of invention, and this dire state of reproductive rights will hopefully push the reproductive rights and justice movement to try new strategies and promote creative, bold ideas. It should push legislators—federal, state, and local—to take meaningful action to further reproductive rights and justice, rather than simply taking money from Planned Parenthood and Emily’s List when they campaign, yet taking no action to push the agenda forward once they are in office and have reaped the benefits of those campaign contributions.

The reproductive rights movement needs to take a few pages from the anti-abortion movement’s playbook. For decades, anti-abortion activists and politicians have tried almost anything imaginable to rid the country of legal abortion. They passed laws they knew would be challenged in court and found unconstitutional,¹⁴⁹ but they did it anyway. They knew the media would portray them as extremists, but they acted anyway. They rallied their base around abortion, knowing that party moderates might not agree with them, but they did it anyway. They created fictional terms like “partial birth

149. See, e.g., *June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (holding that a Louisiana law mandating admitting privilege was a substantial obstacle for women seeking abortions); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310–13, 2318 (2016) (holding that an admitting privilege requirement and surgical center requirement were undue burdens).

abortion” and “heartbeat ban” that they knew were not based in science¹⁵⁰—but they did it anyway.

This is not to say that the reproductive rights and justice movement should resort to lying or unethical and harmful behavior, but pro-choice advocates must be willing to think creatively and take risks. For example, the enforcement mechanism for SB8 was thought up by a lawyer, Jonathan Mitchell, who proposed something similar in a law review article in 2018.¹⁵¹ From there, cities in Texas used his model to ban abortion in their city limits.¹⁵² Once those attempts were successful, they took it to the Texas legislature, and now SB8 is wreaking havoc for patients in Texas.¹⁵³ There is no doubt that Jonathan Mitchell and the Texas legislature knew that when SB8 was passed, there was a serious possibility it would be struck down as unconstitutional. But their strategy is to attempt many things and see what works, and if not SB8, then maybe it will be another state’s legislation, like the fifteen-week ban in Mississippi.¹⁵⁴ The obvious lesson from the origins of SB8 is that, in its arsenal, the reproductive rights movement must also have creative, clever attempts to mold the law in its favor,¹⁵⁵ and it must be willing to risk failure.

Advocates need to take risks with legislation and strategies that may seem less likely to succeed. We cannot lawyer ideas to death and foreclose possibilities before they see the light of day. Government actors need to be urged to follow the anti-

150. See Julie Rovner, *‘Partial-Birth Abortion’: Separating Fact from Spin*, NPR (Feb. 21, 2006, 9:44 PM), <https://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin>; Julie Carr Smyth & Kimberlee Kruesi, *‘Fetal Heartbeat’ in Abortion Laws Taps Emotion, Not Science*, AP NEWS (May 14, 2021), <https://apnews.com/article/abortion-laws-government-and-politics-health-77c9ba98c4f4ab46fdbd5bcc47b5b938>.

151. Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES, <https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html> (Nov. 1, 2021).

152. Jessica Gresko & Paul J. Weber, *Origin Story of the Texas Law That Could Upend Roe v. Wade*, CTV NEWS (Sept. 4, 2021, 10:01 AM), <https://www.ctvnews.ca/health/origin-story-of-the-texas-law-that-could-upend-roe-v-wade-1.5573642>.

153. See *supra* Section II.A.

154. See *supra* Section II.B.

155. See, e.g., CT HB 5414.

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abortion playbook and act even when doubt exists about the ultimate outcome. For example, if *Roe* is overturned and states implement more abortion bans, maybe the Food and Drug Administration (FDA), rather than just approving the safety of abortion pill availability outside clinics, goes a step further by actually prohibiting states from restricting access to abortion pills. Although preemption law has its many complications, if federal law preempts state law, maybe the FDA can preempt state bans on medical abortions. Similarly, perhaps the U.S. Postal Service could release a policy affirmatively stating that abortion pills can be sent via mail, thus preempting states' policies to the contrary. Or, in a different vein, could federal property be leased to abortion clinics, so that states would have to enter federal land to arrest abortion providers? Maybe an alternative USPS regulation could permit individuals who receive abortion pills through the mail to take the pills on Post Office grounds, even if the state itself prohibits abortion. Additionally, pro-choice states could pass SB8-style laws that allow lawsuits against people who harass patients outside clinics or people who use fake clinics to deceive patients seeking abortion.¹⁵⁶

These proposals make up only a short list of possibilities for pro-choice advocates, but the point should be clear: if we take our cautious lawyer hats off and put our creative, bold, push-the-envelope lawyer hats on, we can devise a multitude of compelling strategies to protect abortion access, and further push for such strategies to become law. The crisis we are facing makes it a necessity, and the more activists, strategists, politicians, and movement players understand the gravity of the situation and see that we have no other choice than to try, the better.

156. See David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023).

CONCLUSION

With the Supreme Court poised to overturn *Roe v. Wade* and *Planned Parenthood v. Casey* as this Article is being published, we find ourselves in a reproductive rights and justice emergency — even though we have had every reason to see it coming. But just because the Court is forcing us backwards, does not mean we are left without a path forward. The road ahead will surely be treacherous; the state of reproductive rights could soon get much worse. But dire straits create an opportunity for fighting back in new and innovative ways, and in doing so, we can evade the current hostile environment and build a more just world that better protects reproductive health, rights, justice, and freedom.