

**LEGAL UNCERTAINTY:
THE NEED FOR EVIDENCE-BASED ABORTION POLICY IN
THE UNITED STATES AND MEXICO**

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INTRODUCTION

“Yes, I would kill myself or my baby if I can’t have an abortion.”¹
In 1960, Katherine Deutch Tatlock followed the coaching of a hospital

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psychiatrist in order to obtain an abortion, despite it largely being illegal.² Unfortunately, many people did not share Ms. Tatlock's experience and did not have access to medical services following the termination of their pregnancies.³

As of June 24, 2022, after nearly fifty years of the United States Supreme Court upholding an individual's constitutional right to obtain legal abortion services, individuals no longer have a constitutional right to abortion.⁴ States have swiftly implemented new legal barriers limiting access to abortion and reproductive healthcare, affecting millions of individuals. For example, in Louisiana, individuals are already experiencing the ramifications of the Court's drastic departure from constitutional precedent. Nancy Davis, a pregnant woman whose fetus has no skull, is being forced to either carry her fetus to full term or travel across state borders for abortion services she cannot get in her home state.⁵ At about ten weeks pregnant, Ms. Davis' ultrasound showed her fetus had a rare condition called acrania,⁶ which will lead

adolescent and through Planned Parenthood's Teen Council my passion for abortion policy would not be the same. I dedicate this Note to all the abortion workers and activists on the frontlines who tirelessly fight for bodily autonomy and human rights. Your unwavering commitment to this work is a constant inspiration.

1. Illana Panich-Lisman & Lauren Kelley, *Before Roe*, N.Y. TIMES (Jan. 1, 2022), <https://www.nytimes.com/interactive/2022/01/21/opinion/roe-v-wade-abortion-history.html>.

2. *Id.*

3. *Id.* (in 1968, another woman, Sandra, became pregnant at 19 years old. While Sandra knew her husband did not want children, she was desperate to find a way out and subsequently paid a man \$500 (equivalent to \$4,000 in 2022) to perform the abortion procedure in a dirty motel. The man injected her with something she described as smelling like bathroom soap. He then inserted a catheter into her uterus to perform the abortion. Later, she fainted at work and was taken to the hospital where she was treated for a severe, life-threatening infection. Sandra risked her life because she had no choice).

4. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2228 (2022).

5. Ramon Antonio Vargas, *'I Have to Carry My Baby to Bury my Baby': Woman Denied Abortion For Fetus With Fatal Condition*, THE GUARDIAN (Aug. 26, 2022, 2:09 PM EDT), <https://www.theguardian.com/world/2022/aug/26/woman-refused-abortion-fatal-abnormality-louisiana>.

6. Acrania is the absence of a cranial vault and cerebral hemisphere. This fetal abnormality is typically not suspected until around 12-weeks of pregnancy. If the pregnancy persists, around the 16-week mark the brain is destroyed. After birth, the prognosis for the fetus is death within the first week. *See* THE FETAL MEDICINE

to the fetus's death upon birth.⁷ Despite the early detection of the fetus' condition, due to the legal uncertainty surrounding abortion, Ms. Davis' medical providers refused to terminate her pregnancy.⁸ Instead, Ms. Davis' healthcare providers told her she had to carry her non-viable fetus to term, just to "bury [her] baby."⁹

The purpose of this Note is to explore abortion policy over time in the United States and Mexico. This Note highlights the need for an evidence-based policy that centers the life and health of the pregnant person over the embryo and fetus.¹⁰ Part I discusses the United States' abrupt departure from the *Roe* era, which established a constitutional right to abortion, to the present restrictive era under *Dobbs*. Specifically, Part I focuses on the impact of incrementalism on abortion policy and the corresponding push for fetal personhood. Part II continues by analyzing the history of abortion regulation in Mexico and recent developments following the Mexican Supreme Court decisions on the topic of abortion. Finally, Part III argues the need for evidence-based policies that emphasize the health of the pregnant person. Part III discusses the imperative components of abortion policy that are needed to protect and preserve abortion access without restrictive backslide. Within this Note, individuals seeking abortions are referred to as "individuals" or "persons," as opposed to simply "women," to recognize all gender identities who seek abortion services.¹¹

FOUNDATION, <https://fetalmedicine.org/education/fetal-abnormalities/brain/acrania> (last visited Sept. 7, 2022).

7. Ramon Antonio Vargas, *supra* note 5.

8. *Id.*

9. *Id.*

10. The term fetus is one of the most misused terms in the abortion debate. The fetal stage of pregnancy does not begin until after the eighth week of development. A fetus is not viable outside the womb until nearly twenty-weeks at which point it is nearly indistinguishable from a pre-mature infant. Donald Hope, *The Hand As Emblem of Human Identity: A Solution to the Abortion Controversy Based on Science and Reason*, 32 U. TOL. L. REV. 205 (2001).

11. Abortion policy impacts individuals of all genders. Although cis-gendered women are typically at the forefront of the reproductive rights movement, transgendered and non-binary individuals often face the worst outcomes and the most restrictive barriers. The reproductive rights movement and any abortion policy must center all people with uteruses to create equitable access and maintain the health of all. See generally Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223 (2016).

In the United States, *Roe v. Wade* is considered the landmark case for the pro-choice movement, as the Supreme Court declared that individuals have a constitutional right to obtain legal abortions.¹² Despite *Roe*, individuals across the United States continued to struggle to maintain access to safe, legal, and affordable abortions.¹³ For years, much of the pro-choice movement centered around the fear that if *Roe* were overturned then individuals would be forced to return to dangerous back alley, coat-hanger abortions.¹⁴ However, with many medical advancements over the past fifty years, this is no longer an accurate depiction of underground abortions.¹⁵

Although the mainstream media commonly refers to underground abortions as a method of the past, underground, illegal abortions still occur within the United States, and around the world, today.¹⁶ Unfortunately, it is difficult to quantify the exact number of underground abortions. This is true for many reasons, but safety concerns (for abortion recipients and providers) are a leading concern.¹⁷ Despite difficul-

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

13. *Pre-Roe Abortion Bans*, BIRTH RIGHT FILM, <https://www.birthingrightfilm.com/key-issue-areas/pre-ro-roe-abortion-bans> (last visited Apr. 8, 2022).

14. Lux Alptraum & Erika Moen, *Our of the Alley*, THE NIB (Apr. 4, 2022), <https://thenib.com/self-managed-abortion/>.

15. Although during the pre-*Roe* era many individuals sought abortion care through underground networks leading to “back alley abortions,” this is not the case in a post-*Roe* era. Due to the medical advancements of the 1990s, the abortion pill has become one of the most common ways to terminate a pregnancy. Forty percent of in-clinic abortions use the abortion pill. However, a black market now exists for the abortion pill. A medication abortion is done with two pills, mifepristone and misoprostol. Now that this option exists, the need for “back alley” or “coat-hanger” abortions is not the same. People now choose to self-induce or self-manage their abortions by sourcing mifepristone and misoprostol outside the clinical setting and often illegally. See Susan Rinkunas, *Unacceptable Care: Why Patients Manage Their Own Abortion*, REWIRE NEWS GROUP (Feb. 8, 2021, 8:45 AM), <https://rewirenewsgroup.com/article/2021/02/08/unacceptable-care-why-patients-manage-their-own-abortion>; Alptraum & Moen, *supra* note 14; Patty Skuster et al., *Self-managed Abortion Highlights Need to Decriminalize Abortion Worldwide*, Rewire News group (Nov. 12, 2018, 1:42 PM), <https://rewirenewsgroup.com/2018/11/12/self-managed-abortion-decriminalize/>.

16. Rinkunas, *supra* note 15.

17. Abortion providers have long been the target of the anti-choice movement. Many abortion providers have received threats; others have even been murdered. See Hope, *supra* note 10, at 206. With new restrictions to abortion access being introduced in the United States at such frequency, many women are scared to seek abor-

ty calculating the precise occurrence of underground abortions, evidence of their prevalence exists via online forums. Many forums, provide information and support for individuals preparing to self-induce an abortion.¹⁸ Self-induced abortions are often safe. However, the outcomes of self-managed and self-induced abortions are also associated with dire medical and social risks.¹⁹ The resurgence of anti-abortion policies will undoubtedly increase the number of individuals that are forced to seek underground abortions.

As noted, even before the Court's reversal of *Roe*, legal uncertainty and restrictive policies adversely impacted individuals.²⁰ The

tions or discuss their options. Specifically, bills like the Texas SB-8 allows for a private right of action against anyone who assists a woman in receiving an abortion. Thus, many healthcare providers have removed information they once shared openly online to protect themselves. *Id.* See also Mary Tuma, 'A Grave Warning': Six Months of Texas Abortion Ban Sow Fear and Anguish, THE GUARDIAN (Mar. 3, 2022, 2:00 PM EST), <https://www.theguardian.com/us-news/2022/mar/03/texas-abortion-ban-six-months-grave-warning>.

18. See e.g., (@a1996non), REDDIT (Apr. 7, 2022, 8:22 AM), https://www.reddit.com/r/abortion/comments/tyff7a/second_abortion/. See also Christina Cauterucci, *At Least 100,000 Women Have Attempted Self-Induced Abortions In Texas*, SLATE (Nov. 17, 2015, 4:20 PM), <https://slate.com/human-interest/2015/11/at-least-100000-women-have-attempted-self-induced-abortions-in-texas.html>.

19. In 2018, the SIA Legal Team released a report on abortion and "fulfilling *Roe's* promise." In this report, SIA identified twenty-one people across the United States who were arrested for self-managed abortions. Additionally, the report discussed how prosecutors across the United States sought ways to prosecute self-managed abortions despite their legality. See THE SIA LEGAL TEAM, *Roe's Unfinished Promise: Decriminalizing Abortion Once and For All*, available at https://docs.wixstatic.com/ugd/8f83e4_dd27a51ce72e42db8b09eb6aab381358.pdf. Moreover, WHO has published reports depicting data on abortion worldwide. See *Abortion*, WORLD HEALTH ORGANIZATION [WHO] (Nov. 25, 2021), <https://www.who.int/news-room/fact-sheets/detail/abortion> (reporting that forty-five percent of all abortions are unsafe and that the majority occur in developing countries with strict abortion regulation). The report also found that one-third of abortions that are considered unsafe are performed without a trained professional. *Id.*

20. In 2015, Purvi Patel was sentenced to forty-one years in prison for terminating her pregnancy at home in Indiana. In 2013, Patel went to St. Joseph Regional Medical Center in Mishawaka, Indiana, due to severe vaginal bleeding. At first, she denied the possibility of a relation between the bleeding and pregnancy, however, she later told her medical providers that she had a miscarriage. It was later discovered that Patel told a friend via text message that she ordered mifepristone and misoprostol. Together, these two drugs are often used to self-induce an abortion. Prosecutors used these text messages to build the case for Patel's illegal abortion. She was convicted of both feti-

World Health Organization (WHO) reported that approximately forty-five percent of abortions worldwide are unsafe.²¹ Among these unsafe abortions, ninety-seven percent take place in developing countries.²² Historically, Mexico has some of the most restrictive abortion laws. As a result, many individuals in Mexico terminate unwanted pregnancies through self-induced abortion.²³ Mexico regulates abortion at the state level and for many years abortion was criminalized in all thirty-two states.²⁴ Although most Mexican states provide an exception permitting abortion in instances of rape or incest, survivors of these heinous crimes still face significant barriers in terminating their pregnancies.²⁵ A tragic example includes the story of a 13-year-old girl from Sonora who became pregnant after a family acquaintance raped her.²⁶ Despite the penal code's exception in the instance of rape, she was barred from obtaining an abortion after her assailant's criminal charges were reduced from rape to sexual assault.²⁷ Similarly, in 2010, an 11-year-old rape survivor was denied an abortion because she was four months pregnant and thus considered beyond the legal cut-off.²⁸

It is critical to emphasize that the criminalization of abortion increases the stigma around abortion services and creates additional barriers to medical care.²⁹ An often-overlooked impact of the stigmatization perpetuated by criminalization of abortion is the criminalization of miscarriages. For example, in 2009, a woman from Quintana Roo

cide and felony neglect of a dependent; a judge later overturned her conviction. Imani Gandy, *Purvi Patel and the Case of the Self-Managed Abortion*, REWIRE NEWS GROUP (Feb. 8, 2021, 8:46 AM), <https://rewirenewsgroup.com/ablc/2021/02/08/purvi-patel-and-the-case-of-the-self-managed-abortion/>.

21. WHO, *supra* note 19.

22. *Id.*

23. *Id.*

24. Fatima Juarez et al., *Women's Abortion Seeking Behavior Under Restrictive Abortion Laws in Mexico*, 14 PLOS ONE (2019).

25. Mary Cuddehe, *Mexico's Anti-Abortion Backlash*, THE NATION (Jan. 4, 2012), <https://www.thenation.com/article/archive/mexicos-anti-abortion-backlash/>.

26. Nina Lakhani, *Mexican Rape Victim, 13, Denied Access to Abortion*, THE GUARDIAN (Aug. 1, 2016, 6:55 PM EST), <https://www.theguardian.com/world/2016/aug/01/mexican-victim-13-refused-access-to-abortion>.

27. *Id.*

28. Cuddehe, *supra* note 25.

29. WHO, *supra* note 19.

was wrongfully convicted and imprisoned for a miscarriage.³⁰ Stories of inaccessible care are more prevalent among rural and low-income Mexican individuals.³¹

However, reproductive rights activists saw a glimmer of hope in September 2021 when the Mexican Supreme Court released two historic abortion rulings.³² The first ruling deemed the complete criminalization of abortion as federally unconstitutional.³³ Just days later, the Court then ruled that a state constitutional amendment guaranteeing fetal personhood (also known as a “right to life”) is federally unconstitutional.³⁴

It is crucial to recognize that diverging viewpoints on abortion policy stem from deviations in moral and religious beliefs.³⁵ The pro-life movement is steeped in the historically religious belief that life begins at conception, and as such, abortion is murder.³⁶ In contrast, the pro-choice movement is rooted in the belief that individuals have a right to bodily autonomy and thus have the opportunity to choose whether or not to terminate their pregnancies.³⁷

Of course, it is critical to highlight that viewpoints within each movement vary greatly.³⁸ For example, some pro-choice individuals do not support an absolute right to voluntary abortion.³⁹ Whereas some pro-life individuals do support exceptions to a “right to life,” such as pregnancies resulting from rape or incest.⁴⁰ Abortion policy is

30. Cuddehe, *supra* note 25.

31. *Id.*

32. Natalie Kitroeff & Oscar Lopez, *Abortion Is No Longer A Crime in Mexico. But Most Women Still Can't Get One.*, N.Y. TIMES (Sept. 8, 2021), <https://www.nytimes.com/2021/09/08/world/americas/mexico-abortion-access.html>.

33. *Id.*

34. *Id.*

35. Liliana V., *Do Religious Beliefs Have Any Place in Abortion Laws?*, STORY MAP (Oct. 10, 2021), <https://storymaps.arcgis.com/stories/657661856fe64465b234d9f7a0306d98>.

36. *Id.*

37. *Id.*

38. PEW RSCH. CTR., *View About Abortion*, <https://www.pewforum.org/religious-landscape-study/views-about-abortion/> (last visited Apr. 8, 2022) [hereinafter *Views About Abortion*].

39. *Id.*

40. *Id.*

a complex multilayered topic that can generate robust emotional responses. It is important to emphasize that the regulation and criminalization of abortion access does not prevent abortions services, nor does it decrease the rate individuals seek abortion services.⁴¹ Indeed, research demonstrates that access to safe, legal abortion services does not increase the rate of abortions performed or obtained.⁴² Rather, the criminalization and strict regulation of abortion increases the number of unsafe and deadly abortions.⁴³ After *Roe* was decided in the United States in 1973, the rise in efforts to criminalize and restrict access to abortion services began.⁴⁴ Similarly, Latin America has faced an ongoing humanitarian crisis, as it experiences the highest rate of abortions, despite having some of the most restrictive abortion laws in the world.⁴⁵ Thus, both the United States and Mexico are experiencing a crucial moment for abortion policy. Many speculated the newly conservative United States Supreme Court would overturn *Roe*—and it did.⁴⁶ Consequently, the United States is experiencing an extreme backslide in abortion access and a significant uptick in oppressive and restrictive abortion laws.⁴⁷ In contrast, Mexico has made historic pro-

41. MICHELLE OBERMAN, *HER BODY OUR LAWS*, (Beacon Press ed. 2018).

42. *Views About Abortion*, *supra* note 38.

43. *Abortion: Mexico*, HUM. RTS. WATCH, <https://www.hrw.org/legacy/women/abortion/mexico.html> (last visited Apr. 8, 2022) [hereinafter *Abortion: Mexico*]. Preventing women from obtaining abortions creates economic hardship that can have a lasting impact on women's lives. Women who are precluded from receiving abortion services are more likely to stay in an abusive relationship or remain contact with a violent partner. Correspondingly, they are more likely to raise the child alone. *Id.* Childbirth is associated with more significant health impacts than abortion procedures. See DIANA GREENE FOSTER, PH.D., *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION* (Schribner, 2020).

44. Nina Martin, *The Supreme Court Decision That Made a Mess of Abortion Rights*, MOTHER JONES (Feb. 29, 2016), <https://www.motherjones.com/politics/2016/02/supreme-court-decision-mess-abortion-rights/>.

45. Hope, *supra* note 10, at 207.

46. See generally Jeffrey Hannan, *Dobbs v. Jackson Women's Health Organization and the Likely End of the Roe v. Wade Era*, 17 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 281 (2022); Adam Liptak, *Supreme Court Seem Poised to Uphold Mississippi's Abortion Law*, N.Y. TIMES (Dec. 1, 2021), <https://www.nytimes.com/2021/12/01/us/politics/supreme-court-mississippi-abortion-law.html?searchResultPosition=1>.

47. *Id.*

gress in fighting for an individual's right over bodily autonomy.⁴⁸ In fact, Mexican abortion activists have worked to help individuals in neighboring states like Texas, obtain access to abortion services.⁴⁹ Following the overruling of *Roe*, Mexican abortion activists continue to play an enormous role in helping individuals in the United States access abortion services. Thus, the United States and Mexico are uniquely positioned at the center of the abortion policy debate.

I. HISTORY OF ABORTION IN THE UNITED STATES

In the United States, abortion is central to many political debates. As noted, even after the 1973 landmark decision *Roe v. Wade*,⁵⁰ the fight for safe and accessible abortions persisted.⁵¹ In fact, since *Roe*, upwards of 1,200 abortion restriction bills have been introduced in the United States.⁵² Forty-percent of these restrictive measures were introduced between 2011 and 2019.⁵³ Despite the constitutional right to obtain an abortion announced in *Roe*, restrictive state laws made it increasingly difficult—and often impossible—for individuals to receive such services.⁵⁴ Consequently, the Supreme Court's reversal of *Roe* gave states enormous leeway to enact restrictive legislation and impose legal barriers that hinder access to reproductive healthcare.⁵⁵

48. Kitroeff & Lopez, *supra* note 32.

49. Although the United States has historically had more lenient abortion regulations than Mexico, pregnant individuals within the U.S. have often sought care in Mexico. Under the *Dobbs* ruling, the demand for abortion access on behalf of American citizens has increased. See Kitroeff & Lopez, *supra* note 32; Albinson Linares, Noticias Telemundo & Maricruz Gutierrez, 'We're Here': Mexican Groups Slam U.S. Abortion Restrictions as They Help More American Women, NBC NEWS (Jul. 1, 2022, 10:53 AM PDT), <https://www.nbcnews.com/news/latino/-mexican-groups-slam-us-abortion-restrictions-help-american-women-rcna36303>.

50. 410 U.S. 113 (1973).

51. Hope, *supra* note 10.

52. BIRTH RIGHT FILM, *supra* note 13.

53. Jaclyn Alston, *The Future of Roe v. Wade with A Conservative Super Majority Supreme Court*, 22 RUTGERS J. L. & RELIGION 446, 448 (2022).

54. BIRTH RIGHT FILM, *supra* note 13.

55. See generally Hannan, *supra* note 46.

A. Abortion Policy Prior to Roe v. Wade

Abortion was a crime in the United States from 1867 to 1973.⁵⁶ By the late nineteenth century, every state enacted restrictions for intentionally terminating a pregnancy, with only one exception: saving a pregnant person's life.⁵⁷ As a result, initial efforts in the fight for reproductive justice came from public health doctors.⁵⁸ Subsequently, feminists, human rights activists, members of the legal community, the clergy, and other prominent figures in American society participated in a nationwide effort to protect reproductive rights.⁵⁹ Feminist icon, Betty Friedan, famously stated,⁶⁰

[T]here is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand the control over our own bodies, over our own reproductive process So

56. LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973* 1 (Berkeley: University of California Press, 1997).

57. *Id.*

58. Vincent Vecera, *The Supreme Court and the Social Conception of Abortion*, 48 *LAW & SOC'Y REV.* 345, 352 (2014); See Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v Wade: New Questions About Backlash*, 120 *YALE L.J.* 2028 (2011) (In 1959, Dr. Mary Steichen Calderone, the medical director of Planned Parenthood, wrote a paper titled "*Illegal Abortion as a Public Health Problem.*" Dr. Calderone specifically called out the inequities of abortion as a public health issue).

59. *Roe v. Wade: Its History and Impact*, PLANNED PARENTHOOD (Jan. 2014), available at https://www.plannedparenthood.org/uploads/filer_public/c6/59/c65961ce-447c-48e1-b315-79bfac151e42/abortion_roe_history.pdf.

60. Betty Friedan authored *The Feminine Mystic* in 1963. Her book explored the new concept of women finding fulfillment outside the traditional housewife role. Betty Friedan is well-known as a leader of the women's rights movement and one of the founders of the National Organization for Women (NOW). In 1966, she even served as the first president for NOW. After the impact of her book, Friedan continued to encourage women to seek opportunities for themselves. As a hallmark of the women's rights movement, she is known as a force for change. By 1971, alongside Gloria Steinem and Bella Abzug, Friedan helped create the National Women's Political Caucus. Throughout her life, Friedan committed herself to women's rights and lead the feminist movement. See *Betty Friedan*, *HISTORY* (Aug. 21, 2018), <https://www.history.com/topics/womens-history/betty-friedan>.

this is the new name of the game on the question of abortion: that women's voices are heard.⁶¹

Reform efforts sought to mitigate the harmful effects of state legislation criminalizing abortion. The reform effort focused specifically on the criminalization of abortion, as nearly all fifty states had such legislation.⁶² Some state laws were so antiquated that they had not been changed since the 1860s.⁶³ Moreover, reformists recognized that criminalizing abortion would not actually prevent abortions. To the contrary, such laws inhibited access to safe, legal abortions.⁶⁴ In fact, between the 1950s and 1960s, 1.2 million illegal abortions were conducted each year.⁶⁵ This equates to slightly over twenty-five percent of pregnancies occurring each year.⁶⁶ In 1965, seventeen percent of all pregnancy and birth related deaths resulted from an illegal abortion.⁶⁷ Additionally, many individuals were left permanently injured or sterile from unsafe, illegal abortion procedures.⁶⁸ In comparison, today less than one percent of individuals sustain serious complications from legal abortions.⁶⁹

Notably, the criminalization of abortion detrimentally affected low-income individuals and people of color.⁷⁰ Individuals in poor communities typically did not have the financial means to travel

61. Greenhouse & Siegel, *supra* note 58.

62. REAGAN, *supra* note 56.

63. *Id.* In fact, some of these antiquated laws still exist today. Often referred to in the legal community as “zombie laws,” these laws were invalidated by the Court in 1973 because of the *Roe* decisions. However, the laws remained dormant in the legislature but laid dormant. Now, following *Dobbs* some of these laws are being revived. See Eliza Fawcett, *Arizona Judge Reinstates Strict Abortion Ban From 1864*, N.Y. TIMES (Sept. 23, 2022), <https://www.nytimes.com/2022/09/23/us/arizona-abortion-ban.html>.

64. *Roe v. Wade*, HISTORY (last updated June 24, 2022), <https://www.history.com/topics/womens-rights/roe-v-wade> [hereinafter *Roe v. Wade History*].

65. *Id.*

66. *Roe v. Wade History*, *supra* note 64; Greenhouse & Siegel, *supra* note 58, at 53.

67. PLANNED PARENTHOOD, *supra* note 59.

68. Greenhouse & Siegel, *supra* note 58, at 57.

69. PLANNED PARENTHOOD, *supra* note 59.

70. Vecera, *supra* note 58, at 349; Greenhouse & Siegel, *supra* note 58, at 57.

across state lines to gain access to safe abortion services.⁷¹ As a result, low-income individuals were forced to perform self-induced abortions, which posed significant risks including death or severe infection-related complications.⁷² In 1969, approximately half of birth-related deaths resulted from illegal abortions.⁷³ Seventy-nine percent of those who died from birth-related complications were individuals of color.⁷⁴

B. THE IMPACT OF *ROE V. WADE* ON AMERICAN ABORTION POLICY⁷⁵

The legal significance of *Roe* is highly contested.⁷⁶ Proponents of reproductive justice praise the opinion as a star example of the Court's role in upholding and protecting individual rights that come under attack during times of political division.⁷⁷ Opponents criticize the Court for stepping outside its defined role and creating new constitutional rights.⁷⁸ The majority opinion and the dissent reflect both of these arguments.⁷⁹

The ruling in *Roe* primarily extrapolates on the legal foundation of another major Supreme Court case: *Griswold v. Connecticut*.⁸⁰ *Griswold* famously announced a right to privacy stemming from an inter-

71. Vecera, *supra* note 58 at 349; Greenhouse & Siegel, *supra* note 58, at 57.

72. OBERMAN, *supra* note 41; Greenhouse & Siegel, *supra* note 58, at 57.

73. Greenhouse & Siegel, *supra* note 58, at 57.

74. FRANCES BEAL, *BLACK WOMEN'S MANIFESTO: DOUBLE JEOPARDY: TO BE BLACK AND FEMALE* (1969).

75. Any and all references to "women" within this section reflects the direct language used in the Court opinions. The choice in using this language is specifically intended to preserve the Court's authenticity. The author continues to recognize and uphold that transgendered and non-binary individuals are some of the most impact within the abortion debate.

76. Greenhouse & Siegel, *supra* note 58, at 71; Rachel Warren, *Pro (Whose?) Choice: How the Growing Recognition of A Fetus' Right to Life Takes the Constitutionality Out of Roe*, 13 *CHAP. L. REV.* 221, 228-31 (2009).

77. Greenhouse & Siegel, *supra* note 58, at 71.

78. *Id.* This is the same argument the Court uses to overrule *Roe* in the *Dobbs* decision. See generally *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)..

79. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

80. Greenhouse & Siegel, *supra* note 58, at 71; PLANNED PARENTHOOD, *supra* note 59.

pretation of the Ninth and Fourteenth amendments of the United States Constitution.⁸¹ *Roe* follows in *Griswold's* footsteps in that it specifically interprets the constitutional right to privacy under the Due Process Clause of the Fourteenth Amendment.⁸² The right to privacy is “founded in the Fourteenth Amendment’s conception of personal liberty and restrictions upon state action.”⁸³ The Court ruled that the Fourteenth Amendment right to privacy is broad enough to encompass a “woman’s” decision on whether or not to terminate a pregnancy.⁸⁴

At the time of *Roe*, nearly every state in the United States outlawed abortion. The only exceptions recognized included the pregnant person’s risk of death, risk of a fetal anomaly, instances of rape or incest, or some other limited reason for preserving a pregnant individual’s health.⁸⁵ *Roe* made these laws unconstitutional.⁸⁶ In fact, *Roe* dictated the government cannot interfere with certain personal decisions about procreation, marriage, and other aspects of family life.⁸⁷ However, *Roe* acknowledged that states hold a legitimate interest in protecting “potential life.”⁸⁸ “The state had ‘separate and distinct’ regulatory interests in protecting [a] pregnant person’s health and in protecting potential life, interests that grew as pregnancy progressed and eventually became ‘compelling.’”⁸⁹ In recognizing this distinction, the Court rejected Texas’s argument that unborn fetuses have a constitutionally protected right to life at conception under the Fourteenth

81. MELISSA MURRAY, *Sexual Liberty and Criminal Law Reform: The Story of Griswold v. Connecticut*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 11, 13 (Melissa Murray, Katherine Shaw & Reva B. Siegal ed. 2017). (*Griswold* became the foundational case which created a broad commitment to reproductive rights. This case not only expanded the right to contraception and laid the foundation for the right to choose an abortion, but also paved the road to the legal recognition of same sex marriages. However, *Griswold* is often criticized as an example of an overreaching judicial branch and the creation of rights not enumerated within the constitution. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965); Greenhouse & Siegel, *supra* note 58, at 69.

82. PLANNED PARENTHOOD, *supra* note 59.

83. *Roe*, 410 U.S. at 153.

84. *Id.*

85. PLANNED PARENTHOOD, *supra* note 59.

86. Greenhouse & Siegel, *supra* note 58, at 74.

87. PLANNED PARENTHOOD, *supra* note 59.

88. *Roe*, 410 U.S. at 162-63.

89. Greenhouse & Siegel, *supra* note 58, at 70.

Amendment.⁹⁰ From this, the Court created what is known as the “trimester framework.”⁹¹ The Court explained that a “woman’s” constitutional right to decide whether to carry a fetus to term was more compelling in the early stages of pregnancy.⁹² The Court recognized the state’s interest became compelling when the fetus “presumably has the capability of meaningful life outside the mother’s womb.”⁹³

Of great significance, the majority opinion in *Roe* expressly recognized that the health or life of the mother outweighs the state’s interest at all stages of pregnancy by stating: “Except when it is necessary to preserve the life or health of the mother.”⁹⁴ Thus, the 7-2 decision made history and became a landmark case in the reproductive rights movement for decades to come.⁹⁵

Immediately following the Supreme Court’s decision in *Roe*, the anti-choice and pro-life proponents urged state and federal politicians to pass laws banning abortions.⁹⁶ The anti-abortion movement pushed to amend the Fourteenth Amendment, and declare that a fetus is a “person” entitled to protection under the Equal Protection Clause.⁹⁷ Essentially, such a declaration would create a constitutional “right to life.” During this time, there was a rise in the “incrementalism” strategy.⁹⁸ According to Mary Zielger, the basic concept of incrementalism

90. *Id.* at 69.

91. *Id.* at 70.

92. *Id.*

93. *Roe*, 410 U.S. at 163-64.

94. *Id.*

95. Greenhouse & Siegel, *supra* note 58, at 53.

96. *Id.*; PLANNED PARENTHOOD, *supra* note 59.

97. Warren, *supra* note 75; Martin, *supra* note 44. As recently as September 1, 2022, The Catholics for Life filed a petition for certiorari. See Brief for Petitioner at 2 Jane Doe, as Parent and Next Friend of Baby Mary Doe, et al., Petitioners v. Daniel McKee, Governor of Rhode Island, et al. 2022-66-Appeal (Sept. 1, 2022), *cert denied*, available at https://www.supremecourt.gov/DocketPDF/22/22-201/236882/20220901130349933_Petition%20Brief.pdf.

98. Clarke D. Forsythe, *A Legal Strategy to Overturn Roe v. Wade After Webster: Some Lessons From Lincoln*, 1991 BYU L. REV. 519 (1991). Incrementalism is a gradual approach to overturning *Roe*. The basic concept is to understate four main things: (1) constitutional doctrine evolves slowly; (2) understanding the current judicial perspective; (3) understanding the broader significance and impact of the issue brought to the Court; and (4) give the Court the opportunity to uphold the state law within the current framework. An incremental approach is to craft laws with the

was to limit *Roe's holding* until it became so incoherent the Court would overrule it.⁹⁹ Specifically, the goal of incrementalism was (and is) to pass carefully drafted state laws intended to prompt a constitutional challenge.¹⁰⁰ To successfully implement this strategy, abortion opponents argued that certain restrictions to abortion services are compatible with *Roe* instead of against *Roe*.¹⁰¹ Incrementalist proponents understand key principles behind the challenges: the judiciary evolves slowly, they must appeal to the current judicial perspective, and changes to constitutional doctrines are based both in facts and an understanding of the issue's overall impact.¹⁰² Therefore, the ultimate goal was to allow the Court to uphold a state's abortion-limiting statute within the current framework of the law.¹⁰³

In 1992, incrementalism gained a substantial victory.¹⁰⁴ The lesser-known case surrounding abortion, *Planned Parenthood v. Casey*, created a new legal standard which provided the states a greater ability to regulate abortion services.¹⁰⁵ In *Casey*, the Court held that laws regulating abortion must have the purpose or effect of placing a substantial obstacle in the way of person seeking an abortion to be found unconstitutional.¹⁰⁶ This standard, also known as the "undue burden" test, replaced the application of the Court's "strict scrutiny" test, thereby substantially altering the foundational principles of *Roe*.¹⁰⁷ Under the original *Roe* framework, states were not allowed to regulate the first trimester of pregnancy or access to abortion.¹⁰⁸ However, *Ca-*

intent to have the law challenged in court, thus bringing it to the Supreme Court. The main idea is eventually, the current jurisprudence will become so watered down, the Court has no other option than to rewrite the doctrine). *Id.*

99. Martin, *supra* note 44

100. Forsythe, *supra* note 97; Paul Benjamin Linton, *The Pro-Life Movement at (Almost) Fifty: Where Do We Go from Here?*, 18 AVE MARIA L. REV. 15, 22 (2020).

101. Martin, *supra* note 44.

102. Forsythe, *supra* note 98.

103. *Id.*

104. *Id.*

105. Martin, *supra* note 44 (many years later it was revealed that Justice Rehnquist originally drafted an opinion that overturned *Roe* in whole).

106. *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992).

107. Martin, *supra* note 44.

108. *Id.*

sey limited this protection.¹⁰⁹ The Court held that “the state has legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”¹¹⁰ Also, *Casey* replaced the trimester approach with the “viability” approach, in which states could persuade individuals against abortion pre-viability while regulating abortions without limitations after viability.¹¹¹ Accordingly, *Casey* set forth the trend in United States case law, which preserves the right to “potential life” over the rights of equality, freedom, and liberty for the pregnant person.¹¹²

Following the Court’s ruling in *Casey*, many states adopted strict laws that made abortion services more difficult, and often impossible, for individuals to obtain.¹¹³ Under the “undue burden” test, many abortion restrictions were upheld, including restrictions that required individuals to make multiple trips to a medical provider and delay obtaining an abortion.¹¹⁴ Again, these further restrictions impacted low-income individuals and people of color at a disproportionate rate.¹¹⁵ Attorney and activist Stephanie Toti explained, “[Abortion becomes] an abstract right that doesn’t have any meaning” when these laws are upheld under the “undue burden” test.¹¹⁶ While *Roe* paved the way for abortion rights, *Casey* reined in these rights and, in some cases, made the right effectively obsolete.¹¹⁷

109. Warren, *supra* note 76, at 229 (highlighting how the Casey Court did not label abortion a fundamental right).

110. *Casey*, 505 U.S. at 878.

111. *Casey*, 505 U.S. at 878; Nina Martin, *supra* note 44 (at the time *Roe* was decided, viability was 28-weeks or “third trimester” medical advances has shortened viability to around 21-23 weeks).

112. Barbara Pfeffer Billauer, *Abortion, Moral Law, and the First Amendment: The Conflict Between Fetal Rights & Freedom of Religion*, 23 WM. & MARY J. WOMEN & L. 271, 284-289 (2017).

113. Martin, *supra* note 44.

114. PLANNED PARENTHOOD, *supra* note 59.

115. Greenhouse & Siegel, *supra* note 58.

116. Martin, *supra* note 44.

117. *Id.*; SERENA MAYERI, *Undue-ing Roe: Constitutional Conflict and Political Polarization In Planned Parenthood v. Casey*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES (Melissa Murray, Katherine Shaw & Reva B. Siegel ed. 2017).

In 2003, the United States Congress passed the Partial Abortion Ban Act (PABA).¹¹⁸ This Act makes certain aspects of a second-trimester abortion procedure federally illegal.¹¹⁹ The PABA specifically targeted what is commonly known as a “partial-birth” abortion, but is medically known as “dilation and evacuation.”¹²⁰ Dilation and evacuation is a rarer and more complicated type of abortion that is performed after the twentieth week of pregnancy.¹²¹ Prior to the PABA, the Supreme Court, in *Sternberg v. Carhart*, deemed a Nebraska state law that banned any abortion procedure in which doctors bring the fetal material from the cervix to the birth canal as constitutionally vague.¹²² In 2007, the Supreme Court upheld the PABA in a 5-4 decision in *Gonzales v. Carhart*.¹²³

By upholding the PABA, the Court effectively overturned a key component of *Roe* that had consistently affirmed that an individual’s health should be the central concern in laws that restrict abortion access.¹²⁴ Specifically, the PABA lacked any provision to protect an individual’s health and only carved out an exception for saving a pregnant person’s life.¹²⁵ Additionally, despite the American College of Obstetricians and Gynecologists’ statement that the procedure is the safest method to perform an abortion in the second trimester, the PABA stated that dilation and evacuations are never medically necessary.¹²⁶ In Justice Ginsberg’s famous dissent she noted:

Of signal importance here, the *Casey* Court stated with unmistakable clarity that state regulation of access to abortion procedures,

118. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (2003), <https://www.govinfo.gov/app/details/STATUTE-117/STATUTE-117-Pg1201>.

119. PLANNED PARENTHOOD, *supra* note 59.

120. *Id.*

121. *Id.* (in 2000, dilation and evacuation abortions only accounted for .2 percent of abortion services provided).

122. *Id.*

123. *Gonzales v. Carhart*, 550 US 124 (2007); Janice Hopkins Tanne, *US Supreme Court Approve Ban on Partial “Partial Birth Abortion,”* 334 BMJ 866 (2007).

124. PLANNED PARENTHOOD, *supra* note 59.

125. Janice Hopkins Tanne, *supra* note 123.

126. *Id.*

even after viability, must protect ‘the health of the woman.’ . . . Today’s decision is alarming. It refuses to take *Casey* and *Sternberg* seriously. It tolerates, indeed applauds, federal intervention to ban a nationwide procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists. It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman’s health. I dissent from the Court’s disposition.¹²⁷

With *Gonzales*, the Court solidified the creation of the right to be born,¹²⁸ thus marking another victory for the anti-abortion activists who stated after *Gonzales* they would seek to impose these restrictions on other abortion procedures.¹²⁹

C. 2022, *DOBBS*, AND THE OVERRULING OF *ROE* AND *CASEY*

In June 2022, anti-abortion activists and incrementalists alike were victorious in their efforts to curtail the constitutional right to abortion. After nearly 50 years, *Roe*’s and *Casey*’s holdings fell when the Supreme Court issued its decision in *Dobbs v. Jackson Women’s Health Org.*¹³⁰ A draft majority opinion in *Dobbs* leaked on May 2, 2022; public outcry immediately followed. Then, on June 24, 2022, the official opinion was released, with only minor changes from that which was leaked in May. The *Dobbs* opinion both deeply altered the state of the law and had immediate negative impacts on abortion access across the nation. In *Dobbs*, the Court expressly rejected the holdings of *Roe* and *Casey* and overruled.¹³¹ The majority opinion held, “abortion presents a profound moral question. The constitution does not prohibit the citizen of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decision and return that authority to the people and their elected representatives.”¹³²

127. *Gonzales*, 550 U.S. 124, 170-171.

128. Billauer, *supra* note 112.

129. Tanne, *supra* note 123.

130. *See generally* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

131. *Id.* at 2284.

132. *Id.*

In the decision, the *Dobbs* court reviewed whether the Fourteenth Amendment's liberty clause protects abortion.¹³³ The Court outlined the standard for which the Fourteenth Amendment guarantees some rights that are not found directly in the Constitution, holding "any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"¹³⁴ Following this standard, the Court then expressly denounced the notion that abortion can fall within this category.¹³⁵ Further, the Court stated, "in interpreting what is meant by the Fourteenth Amendment's reference to 'liberty,' we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy."¹³⁶ Prior to this the Court denounces *Casey*'s interpretation of "liberty" to include the right to abortion as "bold."¹³⁷ The Court continues its analysis, stating:

[G]uided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the Fourteenth Amendment means by the term 'liberty.' When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.¹³⁸

Through its analysis, the Court rejected *Casey* and rejected the *Casey* Court's interpretation that, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹³⁹ The Court specifically stated, "[t]hese attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much."¹⁴⁰

133. *Id.* at 2242.

134. *Id.*

135. *Id.*

136. *Id.* at 2247.

137. *Id.* at 2246.

138. *Id.* at 2248.

139. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

140. *Dobbs*, 142 S. Ct. at 2258.

Subsequently, the Court delves into its review of prior precedent and *stare decisis*.¹⁴¹ In its review of prior precedent,¹⁴² the Court distinguished the right to abortion from its precedential foundation, stating, “[w]hat sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call ‘potential life.’”¹⁴³ The Court further asserted, “[n]one of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion.”¹⁴⁴ The Court reasoned that abortion is not protected the same way that other rights (upon which *Roe* and *Casey* relied) are because abortion is a distinguished question.¹⁴⁵ The Court proceeded to outline the five factors it must balance in determining whether to apply the principles of *stare decisis*: (1) the nature of the Court’s error; (2) the quality of the reasoning; (3) the workability; (4) the effect of other areas of law; and (5) the reliance interests.¹⁴⁶ Throughout its analysis, the Court further revealed its disdain for *Roe* and *Casey* and ultimately held that the application of *stare decisis* did not apply.

141. “Stare decisis plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision. It ‘reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.’ It fosters ‘evenhanded’ decision making by requiring that cases be decided in a like manner. It ‘contributes to the actual and perceived integrity of the judicial process.’ And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. ‘Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel or judges.’” *Id.* at 2261-2262 (citations omitted).

142. The Court distinguishes some Fourteenth Amendment case law and then identifies a list of precedent involving marriage or procreation, including: *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry a person of a different race); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right not to be sterilized); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married persons to obtain contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right of unmarried persons to obtain contraceptives). *Dobbs*, 142 S. Ct. at 2268.

143. *Dobbs*, 142 S. Ct. at 2258.

144. *Id.* at 2258.

145. *Id.*

146. *Id.* at 2264.

First, in assessing the nature of the Court’s error, the majority stated, “*Roe* was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but ‘raw judicial power.’”¹⁴⁷ Second, the Court interjected a scathing review concerning the reasoning of *Roe* and *Casey* and pointed to the large body of legal scholarship that criticizes those decisions, even the proponents of abortion. In particular, the Court states:

[*Roe*] failed to ground its decision in text, history, or precedent. It relied on an erroneous historical narrative; it devoted great attention to and presumably relied on matters that have no bearing on the meaning of the Constitution; it disregarded the fundamental differences between the precedents on which it relied and the question before the Court; it concocted an elaborate set of rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source; and its most important rule . . . was never raised by any party and has never been plausibly explained.¹⁴⁸

The Court then emphasized that although the *Casey* Court reaffirmed the central holding of *Roe*, it refrained from endorsing the *Roe* Court’s reasoning.¹⁴⁹ Third, the Court addressed the workability of the rule imposed by *Casey*. Specifically, The Court addressed whether the rule from *Casey* could be understood and applied in a consistent and predictable manner.¹⁵⁰ The workability doctrine¹⁵¹ was one of the

147. *Id.* at 2265.

148. *Id.* at 2266.

149. *Id.*

150. *Id.* at 2272.

151. Workability is one of the factors the Supreme Court considers when applying a stare decisis analysis. Workability specifically looks to the ease of the application of the rule being assessed. The Court typically looks to the lower courts application to determine workability. If lower courts are able to apply the rule at issue in a fair and consistent manner, then it is a “workable” rule. See Audrey Lynn, *Let’s (Not) Make This Work! Why Stare Decisis Workability Should be a Sword a but Not a Shield*, 31 REGENT U.L. REV. 91 (2019).

many defensive tools the *Casey* Court used to preserve the central holding of *Roe*.¹⁵² Specifically, the *Casey* Court stated:

Although *Roe* has engendered opposition, it has in no sense proven ‘unworkable,’ representing as it does a simple limitation beyond which a state law is unenforceable. While *Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today’s decision, the required determination falls within judicial competence.¹⁵³

However, the *Dobbs* Court vehemently rejected this position and found the *Casey* standard unworkable. It stated:

[*Casey*] calls[s] on courts to examine a law’s effect on women, but a regulation may have a very different impact on different women for a variety of reasons, including their places of resident, financial resources, family situations, work and personal obligations, knowledge about fetal development and abortion, psychological and emotional disposition and condition, and the firmness of their desire to obtain abortions. In order to determine whether a regulation presents a substantial obstacle to women, a court needs to know which set of women it should have in mind and how many of the women in this set must find that an obstacle is ‘substantial.’ *Casey* provided no clear answer to these questions. It said that a regulation is unconstitutional if it imposes a substantial obstacle ‘in a large fraction of cases in which [it] is relevant,’ but there is no clear line between a fraction that is ‘large’ and one that is not. Nor is it clear what the Court meant by ‘cases in which’ a regulation is ‘relevant.’ These ambiguities have caused confusion and disagreement.¹⁵⁴

Next, the Court reviewed the effect of *Casey* within other areas of law. Specifically, the Court contended that *Roe* and *Casey* “distorted” important and unrelated legal doctrines. However, the Court failed to expand upon this conclusion. Lastly, the Court considered whether overruling *Roe* and *Casey* would “upend substantial reliance inter-

152. Lynn, *supra* note 151 at 104; *Casey*, 505 U.S. at 855-856.

153. *Casey*, 505 U.S. at 855 (citations omitted).

154. *Dobbs*, 142 S. Ct. at 2273 (internal citations omitted).

ests.”¹⁵⁵ The Dissent emphasized this point in its analysis of *stare decisis*. However, the majority opinion analyzes this factor to a minimal degree. The Court held that no concrete reliance on *Roe* and *Casey* existed, despite this being the factor that the *Casey* Court weighed most heavily in affirming *Roe*.¹⁵⁶ The majority opinion emphasized that *Dobbs*, “concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”¹⁵⁷ The Court declared the narrow holding in anticipation that many may fear overruling *Roe* and *Casey* implicates other precedents. Therefore, the Court implied that the Due Process Clause continues to protect other unenumerated rights. This debate is at the forefront of the legal academic community.¹⁵⁸

Finally, the *Dobbs* Court laid out the legal framework for constitutional challenges to abortion regulations moving forward. The Court held that abortion is subject to the same legal framework as other medical procedures—rational basis review.¹⁵⁹ Rational basis review is the lowest form of scrutiny applied by the Court. Under rational basis review, the Court grants the state a low threshold for enacting constitutional laws that must merely be “rationally related to the state’s legitimate interest.”¹⁶⁰ The burden falls on the party challenging the law.¹⁶¹ Under this lenient standard, the Court is highly deferential to

155. *Id.* at 2276.

156. *Id.* at 227; *Casey*, 505 U.S. at 855-857.

157. *Dobbs*, 142 S. Ct. at 2277-2278.

158. Nancy C. Marcus, *Yes, Alito, There is a Right to Privacy: Why the Leaked Dobbs Opinion is Doctrinally Unsound*, 13 CONLAWNOW 101 (2022) available at: <https://scholarlycommons.law.cwsl.edu/fs/388>.

159. *Dobbs*, 142 S. Ct. at 2283-2285. “It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot ‘substitute their social and economic beliefs for the judgment of legislative bodies.’ That respect for a legislature’s judgment applies even when the laws at issue concern matters of great social significance and moral substance. A law regulating abortion, like other health and welfare laws, is entitled to a ‘strong presumption of validity.’ It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.” *Id.* at 2284 (citations omitted).

160. Tara A. Smith, *A Conceivable Constitution: How the Rational Basis Test Throws Darts and Misses the Mark*, 59 S. TEX. L. REV. 77, 82 (2017) (noting that rational basis review is highly deferential to the government).

161. *Id.*

the government. The Court has previously explained, “A statutory discrimination will not be set aside if any [set] of facts reasonably may be conceived to justify it.”¹⁶² And, “those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.”¹⁶³

Under this framework, the Court applied the rational basis test and upheld the Mississippi law. As a result, the challenged law now successfully regulates abortion starting at fifteen weeks.¹⁶⁴ In upholding the Mississippi law, the Court affirmed that the legislative findings were “rationally related” to legitimate state interests. Thus, the majority supported the “finding” that the evacuation and dilation method as “barbaric.”¹⁶⁵ Despite the Court’s remarks, evacuation methods are safe and effective surgical procedures.¹⁶⁶

The majority opinion is only one of five opinions attached to the *Dobbs* decision. Justice Kavanaugh, Chief Justice Roberts, and Justice Thomas all write separate concurrences. Justice Kavanaugh’s concur-

162. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

163. *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 464 (1981) (internal quotations omitted).

164. *Dobbs*, 142 S. Ct. at 2283-2285. “These legitimate interests justify Mississippi’s Gestational Age Act. Except ‘in a medical emergency or in the case of a severe fetal abnormality,’ the statute prohibits abortion ‘if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.’ The Mississippi Legislature’s findings recount the stages of ‘human prenatal development’ and assert that State’s interest in ‘protecting the life of the unborn.’ The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure ‘for nontherapeutic or elective reasons [to be] barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession.’ These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents’ constitutional challenge must fail.” *Id.* at 2284 (citations omitted).

165. *See generally id.*

166. Only eleven percent of abortions in the United States occur after the first trimester of pregnancy, the dilation and evacuation method is used for about 95% of these abortions. Tara C. Jatlaoui et al. *Abortion Surveillance –United States, 2013*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 25, 2016), <https://www.cdc.gov/mmwr/volumes/65/ss/ss6512a1.htm#suggestedcitation>; *See also* Greer Donley & Jill Wieber Lens, *Second-Trimester Abortion Dangertalk*, 62 B.C. L. REV 2145 (2021) (discussing the wave of restrictive laws targeting second-trimester abortions with a “woman-protective” rationale).

rence focuses on a federalist perspective, stating that the *Dobbs* decision is only returning the power to the states.¹⁶⁷ Justice Kavanaugh attempts to reinforce the pronouncement that no other substantive due process or unenumerated rights are at issue or under attack.¹⁶⁸ Moreover, Justice Kavanaugh reaffirmed Justice Alito's analysis of *stare decisis*, and agreed with overruling *Roe* and *Casey*. Notably, this position contradicts his statements in his confirmation hearing in which he called *Roe* and *Casey* "settled precedents."¹⁶⁹ Then, Chief Justice Roberts concurred with the case's outcome in that he, too, would uphold the Mississippi law. However, he argued he would not have gone as far as to overturn *Roe* and *Casey*, although he would have changed the "undue burden" rule from *Casey*. Similar to the tone of other opinions authored by Chief Justice Roberts, his concurrence in *Dobbs* attempts to appear neutral.¹⁷⁰

Nevertheless, his opinion applied a weak interpretation of *stare decisis* as he noted he would have still deviated from the "undue burden" standard.¹⁷¹ Justice Thomas authored the final concurrence. Justice Thomas agreed with the majority opinion; but made sure to express his judicial belief that the reasoning in *Dobbs* can and should be applied to the other unenumerated liberty rights that the majority opinion promised are safe.¹⁷² In fact, Justice Thomas argued that this should be done at the earliest opportunity.¹⁷³

The final opinion published in *Dobbs* (arguably the most important for abortion activists) is a dissent jointly authored by Justice Breyer, Justice Kagan, and Justice Sonia Sotomayor. The three Justices authored the opinion as one voice, which rarely happens.¹⁷⁴ Together, the Justices expressed the implications of the majority decision and the consequences it would have on individuals across the nation.

167. *Dobbs*, 142 S. Ct. 2228.

168. *Id.*

169. Oriana Gonzales, *Collins Says Kavanaugh and Gorsuch Possibly Broke Promise on Roe v. Wade*, AXIOS (May 3, 2022), <https://www.axios.com/2022/05/03/susan-collins-kavanaugh-gorsuch-abortion-court-leak>.

170. *Dobbs*, 142 S. Ct. 2228.

171. *Id.*

172. *Id.*

173. *Id.*

174. Crooked, *Strict Scrutiny Podcast*, <https://crooked.com/podcast-series/strict-scrutiny/>.

The dissent underscored that *Dobbs* constituted a profound departure from precedent that would impact generations to come. The dissent noted:

For half a century, [*Roe*] and [*Casey*], have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: it could not determine what the woman's future would be. Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this personal and most consequential of all life decisions.¹⁷⁵

The dissent emphasized that the Court found balance in the competing interests and the divisive moral issue of abortion in *Roe* and *Casey*.¹⁷⁶ The dissent brought the risks associated with the majority opinion to the forefront of the discussion. It indicated that with the unlimited ability to regulate, restrict and criminalize abortion, states could: force a person to carry their pregnancies to full term: force survivors of sexual assault to carry the rapist's fetus, force a person to carry fetuses with severe anomalies that will die shortly after birth.¹⁷⁷ The dissent also highlights the disproportionate effect of *Dobbs* on poor individuals and people of color.¹⁷⁸

The dissent strongly asserted, "[t]he Constitution will, today's majority holds, provides no shield, despite its guarantees of liberty and equality for all."¹⁷⁹ The dissenting Justices directly questioned the majority's assertion. The dissent argued that the majority rationale for overturning *Roe* and *Casey* does not apply to other substantive due process rights.¹⁸⁰ The dissent further emphasized how the Court in fact did abandon the constitutional framework previously applied in

175. *Dobbs*, 142 S. Ct. at 2317 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) (Internal citations omitted).

176. *Id.*

177. *Id.* 2317-18.

178. *Id.* at 2318.

179. *Id.* at 2319.

180. *Id.*

substantive due process cases.¹⁸¹ The dissent analyzed the principles of *stare decisis*¹⁸² and highlighted that the majority opinion strayed too far from these principles.

Next, the dissenting Justices then assert that the majority opinion strays too far from the judicial principles of *stare decisis*. The dissent applies three factors to its *stare decisis* analysis: (1) Whether a legal change has come about that now undermines *Roe* and *Casey* making the standard unworkable; (2) whether a factual change has occurred making the standard unworkable; and (3) the reliance interests on the current standard.¹⁸³

In assessing the first two factors, the dissent determined that no legal doctrinal change nor factual change had occurred to make the application of the *Casey* standard unworkable.¹⁸⁴ In fact, when discussing the factual considerations and potential changes the dissent highlights that in Mississippi, sixty-two percent of pregnancies are unplanned.¹⁸⁵ If anything this data supports the need to preserve *Roe* and *Casey*. The dissent further illuminated the lack of governmental support available in Mississippi for pregnant people and the deficient sexual education provided across the state.¹⁸⁶ Although not discussed by the dissent, in a similar vein, the United States ranks fifty-ninth in the world for childbirth mortality rates.¹⁸⁷ In recent years, pregnancy mortality rates in the United States have gone up, despite the rest of the world's rates decreasing.¹⁸⁸ Again, this is another aspect that sig-

181. *Id.* at 2319-2320.

182. *Id.*

183. *Id.* at 2334; California Western School of Law, Jessica Fink, *Consequences of Dobbs*, <https://cwsll.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=751a5bd4-1b5a-4903-8022-aecc0015c91d> [hereinafter *Consequences of Dobbs*].

184. *Dobbs*, 142 S. Ct. at 2334-35.

185. *Id.* at 2339.

186. *Id.* at 2340. See also Donna L. Hoyert, *Maternal Mortality Rates in the United States*, NHCS Health E-Stats (Feb. 2020), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/maternal-mortality-rates-2020.htm>; Jamila Taylor, *The Worsening U.S. Maternal Health Crisis in Three Graphs*, THE CENTURY FOUNDATION (Mar. 2, 2022), <https://tcf.org/content/commentary/worsening-u-s-maternal-health-crisis-three-graphs/?agreed=1>.

187. Hoyert, *supra* note 186.

188. *Id.*

nificantly and disproportionately impacts people of color and poor people.¹⁸⁹ The dissent stated:

But the facts will not so handily disappear. *Roe* and *Casey* were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American. For in this Nation, we do not believe that a government controlling all private choice is compatible with a free people. So we do not (as the majority insists today) place everything within “the reach of majorities and [government] officials.”¹⁹⁰

The dissent pays considerable attention to the final factor the majority brushed over—the reliance on the current standard under *Roe* and *Casey*. The dissent criticized the majority’s surface-level consideration of this factor stating:

Casey understood that to deny individuals’ reliance on *Roe* was to “refuse to face the fact[s].” Today the majority refuses to face the facts. “The most striking feature of the [majority] is the absence of any serious discussion” of how its ruling will affect women. By characterizing *Casey*’s reliance arguments as “generalized assertions about the national psyche,” it reveals how little it knows or cares about women’s lives or about the suffering its decision will cause.¹⁹¹

Thus, the dissent illustrates that the Court’s decision to overturn *Roe* and *Casey* is unnecessary as a matter of law. In conclusion, the dissent reemphasized its sorrow for the millions of Americans who lost their fundamental right to abortion access.¹⁹²

189. See Melissa Murray, *Race-ing Roe: Reproductive Justice Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021) (explaining the racial history of reproductive healthcare in the United States and challenging the conservative assertion that abortion further race-based eugenics).

190. *Dobbs*, 142 S.Ct. at 2320 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

191. *Id.* at 2343.

192. *Id.* at 2350.

D. THE IMPACT OF DOBBS

Now that *Dobbs* officially overruled *Roe* and *Casey*, the direct and immediate impact stemmed from “zombie laws” and “trigger laws.” Zombie laws are laws that were invalidated when the Court decided both *Roe* and *Casey*.¹⁹³ These laws have lain dormant within a state’s legislation, despite being unconstitutional.¹⁹⁴ However, trigger laws are more commonly known; these laws were enacted after *Roe* and *Casey*, and designed to go into effect if *Roe* and *Casey* were ever overruled.¹⁹⁵ A potential issue facing the courts now is whether both types of laws are now valid, despite having been unconstitutional under *Roe* and *Casey*. Constitutional law professor and scholar, William Aceves, discussed two competing theories on these laws: (1) these laws are activated under *Dobbs*, or (2) these laws are void and cannot be activated by *Dobbs*.¹⁹⁶ Proponents of the first theory argue that *Roe* and *Casey* never rescinded any of these laws regulating and restricting abortion, but the laws were merely deemed unenforceable.¹⁹⁷ Specifically, this argument hinges on the assertion that courts do not have the authority to void or nullify a statute.¹⁹⁸ Conversely, proponents of the second theory argue that courts must reject any effort to rely on old, outdated, and void legislation.¹⁹⁹ If the *Dobbs* decision is truly a marker of federalism returning power to the people of the states, then the validity of the laws regulating, restricting, and criminalizing abortion should reflect the current desires of the citizens of that state. Until resolved²⁰⁰ by the courts, the *Dobbs* opinion will likely have a mass criminalization effect.²⁰¹ This is a historic time where a constitutional-

193. Howard M. Wasserman, *Zombie Laws*, 25 LEWIS & CLARK L. REV. 1047 (2022).

194. *Id.*

195. *Id.*

196. *Consequences of Dobbs*, *supra* note 183 (statements of Professor William Aceves).

197. *Id.*

198. *Id.*

199. *Id.*

200. An Arizona Judge has already allowed a “zombie law” from 1864 to be reinstated. Eliza Fawcett, *supra* note 63.

201. *Consequences of Dobbs*, *supra* note 183 (statements of Professor William Aceves).

ly protected right exists one day, then becomes a criminal action the next day in over half the nation.

In the fall of 2021, the rise of attacks on abortion protection took center stage in the media. Texas enacted SB-8, commonly called a “heartbeat bill,” which restricts access to abortion services after a fetal heartbeat is detected at six weeks²⁰² pregnant.²⁰³ Additionally, SB-8 does not include exceptions for victims of rape, incest, or fetal anomaly.²⁰⁴ Importantly, over eighty-five percent of people in the United States who seek abortion services are past the six-week mark.²⁰⁵ SB-8 is most notable for authorizing the right to civil action against any individual who performs, receives, or facilitates an illegal abortion.²⁰⁶ This action can impose a *minimum* fine of \$10,000 and allows the plaintiff to recover court costs and attorneys’ fees.²⁰⁷ This unique provision isolates people seeking abortion services.²⁰⁸ Even though the woman seeking an abortion cannot be personally sued, her doctor can.²⁰⁹ Thus, for example, the doctor of a person in an abusive relationship or with an unsupportive family is at risk if the people in the pregnant person’s life decide to target the pregnant person’s doctor or abortion provider in court.²¹⁰ The uniqueness of this bill raises new legal questions and makes it particularly hard to challenge, as en-

202. Six weeks of pregnancy is the embryonic stage. Embryos do not have hearts. The sound that is detected via ultrasound at around the six-week mark is truly a signal to the doctor of normal development. The pulsing sound comes from the grouping of cells that will eventually make up the cardiovascular system. This pulsing sound is more accurately referred to as cardiac activity instead of a heartbeat, due to the absence of a heart. See Katie Heaney, *Embryos Don’t Have Hearts*, THE CUT (May 24, 2019), <https://www.thecut.com/2019/05/embryos-dont-have-hearts.html>.

203. TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West).

204. PLANNED PARENTHOOD, *What you need to know about Texas’ new abortion ban effective Sept. 1, 2021 (SB 8)*, <https://www.plannedparenthood.org/planned-parenthood-greater-texas/senate-bill-8> (last visited Apr. 8, 2022).

205. Ann Marinow, *Lawsuit Targets Texas Abortion Law Deputizing Citizens to Enforce Six-Week Ban*, WASH. POST (July 13, 2021, 2:38 PM), https://www.washingtonpost.com/politics/courts_law/texas-abortion-lawsuit/2021/07/13/e0cee10c-e33c-11eb-b722-89ea0dde7771_story.html.

206. TEX. HEALTH & SAFETY § 171.208.

207. *Id.* § 171.208.

208. Marinow, *supra* note 205.

209. *Id.*

210. *Id.*

forcement of SB-8 is triggered by private actors, and not government officials.²¹¹ However, in December 2021, the Supreme Court refused to enjoin the law.²¹² Now that *Roe* is overturned and *Dobbs* is the controlling law, Texas' SB-8 validly stands today.

Following Texas' SB-8, many states began to propose similarly restrictive abortion bills. In March 2022, Idaho passed an SB-8-inspired anti-abortion bill.²¹³ The Statement of Purpose from the State Legislature is, "this legislation amends the Fetal Heartbeat Preborn Child Protection Act to include a private enforcement mechanism allowing civil lawsuits against medical professionals who perform after a fetal heartbeat can be detected. Although life begins at conception, a detectable heartbeat is a key indicator of the existence of life."²¹⁴

Notably, the Idaho legislature "finds and declares" that life begins at conception or fertilization.²¹⁵ Idaho's SB-1309 allows for "potential family members" of the fetus to sue the abortion provider for a *minimum* of \$20,000 in damages.²¹⁶ A potential family member includes the father of the fetus, grandparents, siblings, and aunts and uncles; these family members retain this right for up to four years.²¹⁷ If the pregnancy results from a sexual assault, the assailant does not have a legal right to sue the abortion provider; however, other members of the assailant's family have the right.²¹⁸ While Texas's SB-8 does not provide exceptions for instances of rape, Idaho's SB-1309 does. Still, people are required to file a police report before obtaining an abortion.²¹⁹

211. *Id.*

212. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 531 (2021). When the Court refused to enjoin the law before the *Dobbs* ruling, the Court in effect overruled *Roe* for pregnant people in Texas; *see* REAGAN, *supra* note 56 at xxiv.

213. Kate Zernike, *Idaho Is First State to Pass Abortion Ban Based on Texas' Law*, N.Y. TIMES (Mar. 14, 2022), <https://www.nytimes.com/2022/03/14/us/idaho-abortion-bill-texas.html>.

214. 2022, Idaho Sess. Laws S.B. 1309.

215. *Id.*

216. *Id.*

217. Zernike, *supra* note 213.

218. Bess Levin, *Idaho's Uniquely Evil Abortion Bill Gives Rapists' Families A Say*, VANITY FAIR (Mar. 15, 2022), <https://www.vanityfair.com/news/2022/03/idaho-abortion-bill-rapist-families>.

219. Kate Zernike, *supra* note 213.

The rapid advancement of civil action bills endangers individuals and severely obstructs abortion access. However, data indicates that these bills do little to nothing to prevent abortion services.²²⁰ Since September 2021, abortion services in Texas have decreased by approximately sixty percent.²²¹ However, neighboring states have seen an eight-hundred percent increase in abortion services.²²² It is clear from this data that people will continue to seek abortion services, regardless of the legality.²²³

Like Texas, the states surrounding Missouri have seen an increase in abortion services, as Missouri law limits abortion access within the state.²²⁴ In response, Missouri has coined the term “abortion traffick-ing.”²²⁵ Missouri State Representative Mary Elizabeth Coleman is set to propose an amendment to HB-2012, which would outlaw seeking an abortion outside the state’s lines.²²⁶ The proposed bill covers more than just driving across state lines. It also outlaws internet providers allowing access to certain abortion related webpages, and any abortion fund providing assistance for “evading Missouri state laws.”²²⁷

Missouri’s Representative Brian Seitz proposed a new bill, HB-2810, which specifically targets the “trafficking” of abortion-inducing drugs or devices.²²⁸ Under HB-2810, an abortion performed on an individual past ten weeks of pregnancy is a class A felony.²²⁹ The charge would come with a minimum sentence of ten years, but could

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. 2022 Mo. Laws. HCS HB 2810.

226. Galen Bacharier, *Missouri Anti-Abortion Bill Seeks to Stop Crossing of State Lines, Ending Ectopic Pregnancies*, USA TODAY (Mar. 11, 2022, 3:08 PM), <https://www.usatoday.com/story/news/politics/2022/03/11/missouri-house-anti-abortion-bills-take-aim-crossing-state-lines-ectopic-pregnancies/7003993001/>; ASSOCIATED PRESS, *Missouri lawmakers propose banning getting abortions in other states*, NBC NEWS (Mar. 17, 2022, 10:04 AM), <https://www.nbcnews.com/news/us-news/missouri-lawmakers-propose-banning-obtaining-abortion-another-state-rcna20465> [hereinafter *Missouri Lawmakers Propose Ban on Out of State Abortions*].

227. *Missouri Lawmakers Propose Ban on Out of State Abortions*, *supra* note 226.

228. 2022 Mo. Laws. HCS HB 2810.

229. *Id.*

even provide a life sentence.²³⁰ Notably, the initial proposal of this bill included outlawing ectopic pregnancy procedures.²³¹ An ectopic pregnancy is when a fertilized egg implants outside of the uterus, most commonly the fallopian tube.²³² Although the ban for ectopic pregnancies was cut from this bill, the traction it built in such a short period illustrates the broad attack on reproductive health.²³³

Until March 2022, Florida allowed abortion services to be provided until 24-weeks of pregnancy.²³⁴ Notably, the conservative southern state had fewer restrictions than most of its neighboring states.²³⁵ However, in 2022, the state passed a bill which would ban abortion services at 15-weeks without exceptions for instances of rape or incest.²³⁶ Florida's new law went into effect with the Supreme Court's release of the *Dobbs* decision.²³⁷

Currently, seventeen states have banned or significantly restricted abortion, and a total of twenty-six states are expected to increase restrictions.²³⁸ The continued restriction has increased the average distance to an abortion provider by about 285 miles, meaning that most people will face travel distances of 500 miles just to obtain safe, legal

230. Galen Bacharier, *supra* note 226.

231. *Id.*

232. PLANNED PARENTHOOD, *Ectopic Pregnancy*, <https://www.plannedparenthood.org/learn/pregnancy/ectopic-pregnancy> (last visited Apr. 8, 2022) [hereinafter *Ectopic Pregnancy*]. Ectopic pregnancies are life-threatening to the pregnant person. The fertilized egg is unable to survive outside of the uterus and when it implants elsewhere, this can lead to extreme blood loss and death. While ectopic pregnancies are rare, they cause death in approximately four percent of pregnancies. *Id.* See also Adam Felman, *What to know about an ectopic pregnancy*, MEDICAL NEWS TODAY (Aug. 11, 2021), <https://www.medicalnewstoday.com/articles/164989>.

233. Jonathan Shorman, *Missouri lawmakers delete ectopic pregnancy provision from abortion bill after uproar*, KANSAS CITY STAR (Mar. 23, 2022, 12:06 PM), <https://www.kansascity.com/news/politics-government/article259664605.html>.

234. Patricia Mazzei & Alexandra Glorioso, *Florida Lawmakers Vote to Ban Abortions After 15 Weeks*, N.Y. TIMES (Mar. 3, 2022), <https://www.nytimes.com/2022/03/03/us/florida-abortion-ban.html>.

235. *Id.*

236. Mazzei & Glorioso, *supra* note 234.

237. 2022 Fla. Laws. 390.0111.

238. Oriana Gonzalez & Jacob Knutson, *Where abortion has been banned now that Roe v. Wade is overturned*, AXIOS (Dec. 05, 2022), <https://www.axios.com/2022/06/25/abortion-illegal-7-states-more-bans-coming>.

abortion services.²³⁹ With the *Dobbs* decision overruling *Roe* and *Casey*, the disparate impact on low-income individuals and people of color will continue to grow.²⁴⁰ In restricting access to abortion, the states are essentially forcing people into childbirth.²⁴¹ Childbirth in the United States is more dangerous for an individual than legal abortion services.²⁴² This was a fact the *Roe* and *Casey* courts took heavily into consideration when weighing the States' interest in regulating abortion.²⁴³ Only approximately one out of every one million abortions performed within the first trimester results in death in the United States.²⁴⁴ However, childbirth has a mortality rate of fourteen times higher than that.²⁴⁵ Importantly, the childbirth mortality rates are highest in the conservative states that are currently introducing and enacting the most restrictive abortion legislation.²⁴⁶ The rates of childbirth mortality are experienced at the highest level among Black women.²⁴⁷ Without the protection of *Roe*, the life of the pregnant person is at risk.²⁴⁸

The current instability and historic shift in United States abortion law can be attributed to many factors, including religion, which is explored in depth later in this Note. But it is important to take note of the impact the Trump administration has left on the judicial system. When President Donald Trump entered office in 2016, he made his intentions to overturn *Roe* expressly clear.²⁴⁹ President Trump set the courts up to do just this. Specifically, in his one term as President, Trump appointed fifty-four federal appellate judges.²⁵⁰ To compare,

239. Alston, *supra* note 53, at 461.

240. *Id.*

241. *Id.* at 448.

242. *Id.* at 448-49.

243. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2259 (2022).

244. Alston, *supra* note 53, at 461.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 449.

249. Liptak, *supra* note 46.

250. John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RSCH. Ctr. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>.

President George W. Bush appointed sixty-two judges in two presidential terms and President Barrack Obama appointed fifty-five judges in two presidential terms.²⁵¹ In 2021, about twenty-eight percent of active federal judges were appointed by President Trump.²⁵² This clearly shows that President Trump's mark was left on the judicial system. In addition to the fifty-four appellate judges, President Trump also appointed three young Supreme Court Justices.²⁵³ The Supreme Court is now occupied by the most conservative justices that the United States has seen in seventy years.²⁵⁴ Due to their age, it is likely these justices will serve on the high Court for over two decades.²⁵⁵ The same is true for his federal judge appointees. Trump himself stated that his appointees were "a full ten years younger than the average age of President Obama's circuit nominees."²⁵⁶ President Trump hand selected judges backed by the Federalist Society and worked to move the judicial system toward upholding right-wing politics.²⁵⁷ This shift includes an impact on abortion policy that was immediately felt at the appellate level.²⁵⁸ The *Dobbs* decision is a clear indicator of the impact the new composition of the Supreme Court has.²⁵⁹ Accordingly, Trump made an unprecedented impact on the judicial system.²⁶⁰

II. HISTORY OF ABORTION IN MEXICO

Mexico, home to one of the world's largest Catholic populations, has historically had some of the most restrictive abortion laws in the

251. *Id.*

252. *Id.*

253. *Id.*

254. Alston, *supra* note 53, at 450.

255. Gramlich, *supra* note 250.

256. Ian Millhiser, *What Trump has done to the courts, explained*, VOX (Sept. 29, 2020, 10:32 PM), <https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump-supreme-court-federal-judges>.

257. Millhiser, *supra* note 256; Lawrence Hurley, *On guns, abortion and voting rights, Trump leaves lasting mark on U.S. judiciary*, REUTERS (Jan 15, 2021, 3:52 AM), <https://www.reuters.com/article/us-usa-trump-judges/on-guns-abortion-and-voting-rights-trump-leaves-lasting-mark-on-u-s-judiciary-idUSKBN29K162>.

258. Hurley, *supra* note 257.

259. *Id.* See generally Hannan, *supra* note 46.

260. Millhiser, *supra* note 256.

world.²⁶¹ Despite a tumultuous history with Catholicism, Mexican culture and society are still deeply intertwined with Catholicism.²⁶² In September of 2021, in a unanimous decision the Mexican Supreme Court deemed abortion a federal constitutional right entrenched in the right to health in Mexico's Constitution.²⁶³ Now, the majority of states in Mexico must amend their legislation to reflect this decision.²⁶⁴ However, the societal attitude toward abortion in Mexico is lukewarm.²⁶⁵ While many Mexicans support abortion for health reasons, the vast majority do not support voluntary abortion.²⁶⁶

*A. RELIGIOUS AND POLITICAL IMPACTS ON THE
CRIMINALIZATION OF ABORTION*

Although abortion is regulated primarily at the state level, Mexico's federal law has criminalized abortion since 1931.²⁶⁷ This federal law served as a model for the criminal code in most of Mexico's states for over seventy years.²⁶⁸ Under this law, individuals who receive abortions and the medical providers who perform abortion services can be sentenced to prison anywhere from one to three years.²⁶⁹ The federal law only applies if the abortion was carried out exclusively under federal jurisdiction.²⁷⁰ Due to this governing structure, the federal law's relevance is confined to the guidance it has provided to the states.²⁷¹

261. Hope, *supra* note 10, at 237.

262. David Agren, *Separation of Catholics and State: Mexico's Divisive Religious History*, THE GUARDIAN (Feb. 12, 2016, 7:00 AM), <https://www.theguardian.com/world/2016/feb/12/mexico-catholicism-politics-religious-history-pope-francis>.

263. Kitroeff & Lopez, *supra* note 32.

264. *Id.*

265. Thea Johnson, *Guaranteed Access to Safe and Legal Abortions: The True Revolution of Mexico City's Legal Reforms Regarding Abortion*, 44 COLUM. HUM. RTS. L. REV. 437 (2013).

266. *Id.*

267. *México: Código Penal Federal* [Mexico], 14 August 1931.

268. *Abortion: Mexico*, *supra* note 43.

269. *Id.*

270. Juarez et al., *supra* note 24.

271. Johnson, *supra* note 265.

The Catholic church has led the anti-abortion and right-to-life movement.²⁷² The Catholic influence in Mexico is deeply intertwined with the cultural views on abortion.²⁷³ The Catholic church's stance on abortion is abundantly clear; under the 1988 Vatican ruling, anyone who receives or performs an abortion is excommunicated from the Church.²⁷⁴ Although the Mexican Constitution recognizes the separation between church and state, and priests are forbidden from discussing politics, the clergy maintains political influence in Mexico.²⁷⁵ To keep this influence, members of the Church and Church clergy work within the political organizations.²⁷⁶

Along with the Church, political parties have played key roles in both the anti-abortion and pro-choice movements. During the majority of Mexico's Modern history, the country was controlled by the Partido Revolucionario Institucional (PRI).²⁷⁷ However, its power started declining in 1968, with the greatest shift coming from losing the presidential election in 2000.²⁷⁸ Although the PRI maintained power for a long period of time, as a political group its views on abortion were split.²⁷⁹ The National Action Party (PAN) is the voice of national conservatism in Mexico.²⁸⁰ It works to organize the nation around a socially conservative political agenda.²⁸¹ Specifically rooted in Catholicism, the PAN favors church activism and educates the wealthy Mexican elite through private church schools.²⁸² During the 1980s, Mexi-

272. *Id.*

273. David Agren, *Separation of Catholics and State: Mexico's Divisive Religious History*, THE GUARDIAN (Feb. 12, 2016, 7:00 AM), <https://www.theguardian.com/world/2016/feb/12/mexico-catholicism-politics-religious-history-pope-francis>.

274. Malcolm Moore & Jerry McDermott, *Catholics to Appeal Mexico City's Abortion Law*, THE TELEGRAPH (Apr. 26, 2007, 12:01 AM), <https://www.telegraph.co.uk/news/worldnews/1549761/Catholics-to-appeal-Mexico-City-abortion-law.html>.

275. Agren, *supra* note 273.

276. Andrzej Kulczycki, *The Abortion Debate in Mexico: Realities and Stalled Policy Reform*, 26 BULLETIN OF LATIN AMERICAN RSCH. 50 (2007).

277. Johnson, *supra* note 265, at 446.

278. *Id.*

279. Corene T. Kendrick, *The Illegality of Abortion in Mexico*, 39 STAN. J. INT'L 125, 132 (2003).

280. Kulczycki, *supra* note 276.

281. *Id.*

282. Kendrick, *supra* note 279; *see also* Kulczycki, *supra* note 276.

can bishops assumed a public role based on PAN's electoral gains.²⁸³ It has been observed that "[t]he Church hierarchy and church-backed groups have since become more assertive in rallying against abortion."²⁸⁴ As the PAN gained presidential power in 2000, this transformed the legal system by reviving the Suprema Corte de Justicia.²⁸⁵ Around the same time, the anti-choice movement gained traction.²⁸⁶ The PAN's ties to the Catholic church played an undeniable role in this.²⁸⁷

After the PAN won the presidency, President-elect Vincent Fox made public statements regarding abortion exceptions.²⁸⁸ He stated that abortion should be allowed when the individual's life is at risk or when the fetus is unable to survive long after birth.²⁸⁹ Most controversially, he noted that he did not support abortion for rape survivors.²⁹⁰ Shortly after these statements, Pope John Paul II visited Mexico.²⁹¹ During his three-day visit, the Pope, in front of two million people, declared, "[m]ay no Mexican dare to harm the precious and sacred gift in the maternal womb."²⁹² This significantly reminded the Mexican people of the Church's power and the political repercussions of supporting abortion reform.²⁹³

By the mid-2000s, every state in Mexico had legislation criminalizing abortion for pregnant people and medical providers.²⁹⁴ The most common sentencing scheme under these laws was a sentence of between six months and five years in prison.²⁹⁵ Interestingly, under eleven states' laws and the federal penal code, abortion sentencing is

283. Kulczycki, *supra* note 276.

284. *Id.*

285. Johnson, *supra* note 265, at 447.

286. Kulczycki, *supra* note 276.

287. *Id.*

288. Marta Lamas & Sharon Bissell, *Abortion and Politics in Mexico: Context is All*, 8 REPRODUCTIVE HEALTH MATTERS 10, 11 (2000).

289. *Id.*

290. *Id.*

291. *Id.*

292. Lamas & Bissell, *supra* note 288.

293. *Id.*

294. *Id.*

295. *Id.*

reduced when it is determined that the woman receiving the abortion does not have a “bad reputation.”²⁹⁶ This reduction in sentencing illustrates the negative cultural perception of abortion. This is especially true as the factors impacting the reduced sentence and reputation often relate to the marital status of the pregnant woman and the community’s particularized view of her.²⁹⁷ Nearly every state in Mexico provides an exception permitting abortion when pregnancy is the result of rape, but even this exception has its limits.²⁹⁸ Many states also provide exceptions for negligent behavior resulting in pregnancy and when the life of the pregnant person is at risk.²⁹⁹

Although the Mexican sentiment was that abortions should be available to people in specific instances, the 2000s saw an emergence of efforts to further criminalize and decriminalize abortion.³⁰⁰ The two measures were squarely at odds with one another. In 1997, the Democratic Revolution Party (PRD) took gained political control in Mexico City.³⁰¹ This set the stage for progress. The PRD is the voice of national liberalism in Mexico.³⁰² The PRD has been the most active political group advocating for abortion rights.³⁰³ The PRD joined forces with the Labor Party (PT), which supported the concept of “voluntary motherhood.”³⁰⁴ Abortion activists hoped this meant that the outdated 1931 Federal Penal Code would be amended to allow more exceptions for people seeking abortions outside the scope of the law.³⁰⁵ However, anti-abortion advocates began to advocate for less exceptions to abortion law.³⁰⁶ In 2000, Guanajuato approved reforms that eliminated the

296. *México: Código Penal Federal* [Mexico], 14 August 193; Johnson, *supra* note 265.

297. Johnson, *supra* note 265.

298. *Abortion: Mexico*, *supra* note 43.

299. *Id.*

300. Johnson, *supra* note 265.

301. Lamas & Bissell, *supra* note 288.

302. Kendrick, *supra* note 279, at 144.

303. *Id.*

304. The concept of voluntary motherhood is composed of four main feminist demands: (1) comprehensive sexual education; (2) inexpensive, reliable, and accessible birth control; (3) the end of forced sterilization; and (4) legal abortion as a last resort. See Lamas & Bissell, *supra* note 288, at 11.

305. *Id.*

306. *Id.*

long-standing exception to abortion in cases of rape.³⁰⁷ Fortunately for reproductive rights activists, the law never materialized as the new Governor vetoed the law after continued political pressure from abortion activists.³⁰⁸ Simultaneously, a study conducted by the Information Group on Reproductive Choice (GIRE) revealed that only twenty-four percent of Mexicans supported voluntary abortion,³⁰⁹ a discouragingly low number for reproductive rights activists.

Nonetheless, not all progress toward abortion reform was lost. In Morelos, in 2000, the state added an article to the criminal procedure code that set out specific procedures for accessing legal abortions.³¹⁰ Initially, the Morelos governor threatened to veto the amendment, but after receiving pressure from women and health advocates, the law took effect.³¹¹ Additional legal reforms to expand abortion access followed in 2003 and 2005.³¹²

In 2003, Mexico City updated its general health codes to require abortion access free of charge in cases where abortion was not criminal.³¹³ Despite social outcry in 1999 when a 13-year-old girl, Paulina, became pregnant after being raped and was denied access to abortion, Baja California did not amend its laws to expressly establish access to abortion services until 2005.³¹⁴ The amended penal code now includes an additional exception permitting abortion when the pregnancy endangered a woman's health.³¹⁵ Its neighboring state, Baja California Sur, similarly reduced its penalties for illegal abortions and amended the penal code to provide specific access to legal abortion in cases of rape.³¹⁶

The efforts to decriminalize abortion in Mexico further picked up movement as international attention was drawn to the "humanitarian

307. *Abortion: Mexico, supra* note 43.

308. *Id.*

309. Lamas & Bissell, *supra* note 288.

310. *Id.*

311. *Abortion: Mexico, supra* note 43.

312. Johnson, *supra* note 265.

313. *Abortion: Mexico, supra* note 43.

314. *Id.* See also Lamas & Bissell, *supra* note 288.

315. *Abortion: Mexico, supra* note 43.

316. *Id.*

crisis” of all of Latin America.³¹⁷ This crisis specifically garnered attention due to the high rate of death and illness from illegal abortions.³¹⁸ Despite having some of the most restrictive laws on abortion, all of Latin America experiences the highest rates of abortion in the world.³¹⁹ Notwithstanding the decriminalization movement’s success, in 2009, approximately fifty-five percent of all pregnancies in Mexico were unintended.³²⁰ From these pregnancies, thirty-four percent ended in illegal, induced abortions.³²¹ It is estimated that in 2009, over one million abortions were performed.³²² More than thirty-three percent of people who receive illicit abortions are expected to have severe complications that require medical attention.³²³ However, it is estimated that at least twenty-five percent of these people do not receive any medical care.³²⁴ These numbers are disproportionately representative of poor, rural people who experience medical complications almost half the time.³²⁵

B. MEXICO CITY’S REVOLUTIONARY ABORTION POLICY

Following legislation reform, Mexico City legalized abortion under any circumstances up to twelve weeks of pregnancy in 2007.³²⁶ Mexico City was the first state in Mexico to legalize voluntary abortion and create expansive protections for abortions, including establishing access requirements.³²⁷ Mexico City’s decriminalization efforts followed the international movement highlighting how the crimi-

317. Hope, *supra* note 10, at 207.

318. *Id.*

319. *Id.*

320. Allison Ford, *Mexico City Legalizes Abortion*, 16 L. & BUS. REV. AM. 119, 120 (2010); *Unintended Pregnancy and Induced Abortion in Mexico*, GUTTMACHER INSTITUTE (Nov. 2013), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-and-induced-abortion-mexico>.

321. Ford, *supra* note 319, at 119.

322. *Id.* at 119-120.

323. *Id.* at 119.

324. *Id.*

325. *Id.*

326. Lina Forero-Niño, *The Abortion Debate in Latin America*, 18 L. & BUS. REV. AM. 235, 237 (2012).

327. *Id.*

nalization of abortion fails to prevent abortions. Instead, criminalization leads to illegal, unsafe, and often deadly abortions.³²⁸ The focal point of Mexico City's legalization was to incorporate a woman's right to safe abortions and provide a legal mechanism to ensure legitimate access to safe abortions.³²⁹ Under the new legislation, abortion services must be available to individuals at the Ministry of Health facilities, free of charge to the residents of Mexico City, and offered on a sliding scale basis for non-residents.³³⁰ This progressive abortion legislation also included improvements to sexual education in schools.³³¹

Focusing on access to safe, legal, professional medical services is significant in light of the deadly outcomes as a result of limited abortion access.³³² When individuals have adequate and meaningful access to safe, legal abortions, the chances of medical complications are reduced.³³³ Specifically, people in Mexico City who have access to safe, legal abortions experience essentially zero complications.³³⁴ The abortion laws within Mexico City stem from the right to health engrafted within Article 4 of Mexico's Constitution.³³⁵ Article 4 of the 1917 Constitution of Mexico reads, "Every person has the right to health protection. The law shall determine the bases and terms to access health services and shall establish the competence of the federation and the Local governments in regard to sanitation according to the item XVI in Article 73 of this constitution."³³⁶ A study conducted in 2000s by GIRE found that seventy-two percent of Mexicans supported abortion in cases of rape; seventy-three percent supported abortion where pregnancy is a threat to the pregnant person's life; sixty-one percent supported abortion in cases of fetal impairment or death; and sixty-three percent supported non-life threatening health compli-

328. Johnson, *supra* note 265.

329. *Id.*

330. Forero-Niño, *supra* note 326, at 237.

331. *Id.*

332. *Id.*

333. *Id.*

334. GUTTMACHER INSTITUTE, *supra* note 320.

335. Johnson, *supra* note 265.

336. Mex. Const. art. IV.

cations.³³⁷ These statistics highlight the importance of this right within Mexican society and its relationship with the right to health. Indeed, the importance the right to health holds in Mexican abortion policy can even be seen within its religious sector. The Church uses the health-based rationale to influence abortion policy.³³⁸ However, the Church's use of a health-based rationale opposes the foundations of the "choice" rationale.³³⁹ Moreover, the Church only supports a health-based exception for rare circumstances in which it can exclude abortion as a moral wrong under God.³⁴⁰ Because of the broad access granted by the new abortion law, the Catholic Church collected over 70,000 signatures to create a referendum to the law.³⁴¹ Immediately following the enactment of the law, the Archbishop spoke out and stated that abortion is as "repugnant" as "terrorism."³⁴² Furthermore, the Archbishop threatened that anyone who participated in performing, receiving, or encouraging abortions would be ex-communicated from the Church.³⁴³

As opposition stirred, anti-abortion activists led legal challenges to reject the law on constitutional grounds.³⁴⁴ Nevertheless, in August 2008, the Supreme Court deemed Mexico City's abortion law constitutional.³⁴⁵ This decision represented a significant victory for abortion activists, and laid the foundation for their future efforts.³⁴⁶ Through affirming Mexico City's law, the Mexican Supreme Court established

337. Lamas & Bissell, *supra* note 288.

338. Johnson, *supra* note 264.

339. *Id.*

340. *Id.*

341. Malcolm Moore & Jerry McDermott, *supra* note 347.

342. Moore, *supra* note 347; Kendrick, *supra* note 278.

343. Moore, *supra* note 347; Kendrick, *supra* note 278 (the Church has become more vocal on its opposition to family planning and abortion in recent years).

344. Johnson, *supra* note 264; Ford, *supra* note 320, at 122 (the constitutional challenges consisted of three main arguments: (1) the Mexican constitution guarantees a right to life from conception; (2) the abortion reform disregards men's rights; and (3) the legislature is not authorized to create health laws).

345. Forero-Niño, *supra* note 326, at 237.

346. *Id.* See also GUTTMACHER INSTITUTE, *supra* note 319.

a state constitutional right to abortion within the first twelve weeks of pregnancy.³⁴⁷

Still, the Court's decision did not pave the path for progress that activists had hoped for.³⁴⁸ Virtually all states in Mexico continued to face various forms of regulations and restrictions on abortion services.³⁴⁹ Specifically, the conservative backlash in sixteen Mexican states—which comprises of over half the country—resulted in local state amendments creating a state constitutional “right to life.”³⁵⁰ As a consequence, this right directly conflicts with the right to health enshrined in Article 4 of Mexico's federal Constitution. Surveys conducted in 2008 showed that the “right to life” amendments had low levels of public awareness as only twenty-three percent of Mexican adults were aware of states reforms.³⁵¹ In fact, the lack of public awareness and education about abortion and abortion policy remains a consistent feature of the abortion debate in Mexico.³⁵² Thus, the general public was largely unaware of these local amendments implemented to hinder abortion services.

These “right to life” amendments to state constitutions were enacted with the intention to prevent more progressive abortion legislation from moving forward.³⁵³ In 2011, abortion activists brought forth legal challenges against the “right to life” amendments.³⁵⁴ However, the Mexican Supreme Court upheld the amendments, resulting in a devastating loss for the decriminalization movement.³⁵⁵ This ruling further confounded the legal status of abortions, making it more diffi-

347. *México: Código Penal Federal* [Mexico], 14 August 1931, amend. July 1, 2020.

348. DEUTSCHE WELLE, 2021: *Changes in Abortion Laws Worldwide* (Dec. 29, 2021), <https://www.dw.com/en/2021-changes-in-abortion-laws-worldwide/a-60280568>.

349. Davida Becker & Claudia Diaz Olavarrieta, *Decriminalization of Abortion In Mexico City: The Effects on Women's Reproductive Rights*, 103 AM J PUBLIC HEALTH 590 (2013).

350. *Id.* See also Lina Forero-Niño, *supra* note 325, at 237.

351. GUTTMACHER INSTITUTE, *supra* note 236.

352. Kulczycki, *supra* note 275.

353. Becker & Olavarrieta, *supra* note 349, Forero-Niño, *supra* note 326, at 237.

354. Cuddehe, *supra* note 25.

355. *Id.*

cult for courts to interpret.³⁵⁶ More significantly, healthcare providers found it challenging to work within this legal ambiguity, leading to an increase in prosecutions for illegal abortions.³⁵⁷ Confusion also seeped into a long-standing legal exception to abortion: instances of rape.³⁵⁸ For example, in 2010, an 11-year-old girl was raped by her stepfather.³⁵⁹ This rape resulted in a pregnancy for which she continued to be denied access to an abortion.³⁶⁰ Similar to the story of Paulina in the 1990s, this incident sparked public uproar regarding local “right to life” amendments.³⁶¹

C. SEPTEMBER 2021: HISTORIC ABORTION RIGHTS VICTORIES

After a long battle culminating in minor successes and major defeats, in September 2021, the Mexico Supreme Court released two historic rulings.³⁶² After upholding a right to life amendment in 2011, the Supreme Court found a state “right to life” amendment unconstitutional. It deemed the complete criminal penalization of abortion unconstitutional.³⁶³ Thus, the Court decrees introduced the federal constitutional right to abortion access across Mexico.³⁶⁴

The first decision the Court delivered stemmed from a legal challenge to Coahuila’s 2017 law, which imprisoned individuals for up to three years if they terminated a pregnancy.³⁶⁵ Mexico’s Attorney General challenged Coahuila’s law on the grounds that it violated the

356. Kulczycki, *supra* note 275.

357. Cuddehe, *supra* at note 25 (Quintana Roo, woman wrongfully convicted of illegal abortion after miscarriage).

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. Stephania Taladrid, *Mexico’s Historic Step Toward Legalizing Abortion*, THE NEW YORKER (Oct. 28, 2021), <https://www.newyorker.com/news/news-desk/mexicos-historic-step-toward-legalizing-abortion>.

363. Lizbeth Diaz & Laura Gottesdiener, *Mexico’s Top Court Decriminalizes Abortion in ‘Watershed Moment’*, REUTERS (Sept. 8, 2021, 12:37 AM), <https://www.reuters.com/world/americas/mexico-supreme-court-rules-criminalizing-abortion-is-unconstitutional-2021-09-07/>.

364. Stephania Taladrid, *supra* note 362.

365. *Id.*

pregnant person's autonomy and reproductive freedom.³⁶⁶ Indeed, the right to human dignity, autonomy, equality, and health are central features of this decision.³⁶⁷ The Court held that these rights within the Mexican Constitution guarantee people with gestational capacity the right to choose whether or not to become a parent, thus freeing them from criminalization concerns.³⁶⁸

The Coahuila ruling created a precedent that will require judges across Mexico's thirty-two states to issue similar judgments.³⁶⁹ The Coahuila state government issued a statement following the ruling that applied its effects retroactively, thus immediately releasing women imprisoned for seeking previously illegal abortions.³⁷⁰

The Supreme Court issued its second critical decision on the topic of abortion just days after the first. The Court deemed Sinaloa's state amendment protecting the "right to life" starting at conception as federally unconstitutional.³⁷¹ The Court held that granting a fetus personhood status restricts the right to reproductive autonomy, thereby violating a pregnant person's right to health.³⁷² Thus this ruling specifically reaffirmed that a pregnant person's constitutional right to healthcare as a greater virtue than the "right to life" contemplated by such state amendments.³⁷³ Under the growing body of judicial precedent, the remaining twenty "right to life" amendments to state constitutions will soon be obsolete.³⁷⁴ The significant impact of these rulings stems from the Court's rationale centering on personal auto-

366. Acción de Inconstitucionalidad 148/2017, Pleno de la Suprema Corte de Justicia [SCJN], Gaceta del Semanario Judicial de la Federación, Undécima Época, Tomo II, Junio de 2022, Libro 14, página 873 (Mex.), formato HTML, <https://sjf2.scjn.gob.mx/detalle/ejecutoria/30665> (consultada el 13 de octubre de 2022).

367. *Id.*

368. *Id.*

369. Taladrid, *supra* note 362.

370. Diaz et al., *supra* note 363.

371. Maria Verza, *Mexico Takes Major Step Toward Depenalizing Abortion*, AP NEWS (Sept. 9, 2021), <https://apnews.com/article/health-religion-mexico-crime-courts-72a491d852921bbf045631e744021d24>.

372. Acción de Inconstitucionalidad 148/2017, Pleno de la Suprema Corte de Justicia [SCJN], Gaceta del Semanario Judicial de la Federación, Undécima Época, Tomo II, Junio de 2022, Libro 14, página 873 (Mex.), formato HTML, <https://sjf2.scjn.gob.mx/detalle/ejecutoria/30665> (consultada el 13 de octubre de 2022).

373. *Id.*

374. *Id.*

my.³⁷⁵ Accordingly, the Coahuila ruling outlines the need to assess abortion cases through a “gender perspective,” citing to various international human rights rules and decisions for support.³⁷⁶

Following the Supreme Court rulings, the Mexican Bishops made public statements denouncing the rulings, calling the decision “dangerous.”³⁷⁷ To protest the rulings, Catholic groups conducted a “March for Women and Life” in October 2021.³⁷⁸ Despite the new Court rulings, the states where abortion restrictions remain continue to be heavily influenced by the Church. For example, in Sonora, one of the most densely populated states in Mexico, ninety percent of residents identify as Catholic.³⁷⁹ As such, Sonora remains one of the most restrictive and punitive states in Mexico on abortion regulations.³⁸⁰ In Sonora, those charged with unlawful termination of a pregnancy face up to six years in prison, which is double the time specified in the federal statute.³⁸¹ At least six women are actively serving sentences for receiving abortion services, and the state initiated another ten abortion investigations before September 2021.³⁸²

Although Guerrero has now legalized abortion, its change was heavily influenced by tragedy.³⁸³ A nine-year-old-girl was raped and impregnated by a family member, yet the state denied her access to abortion because she was past the twelve-week mark.³⁸⁴ The Church, which maintains heavy influence in Guerrero, voiced its strong objec-

375. *Id.*

376. *Id.*

377. Maria Verza, *supra* note 371.

378. *Thousands attend anti-abortion rally in Mexico*, TRT WORLD (Oct. 3, 2021), <https://www.trtworld.com/americas/thousands-attend-anti-abortion-rally-in-mexico-50453>.

379. Kendal Blust, *Despite Mexico’s Supreme Court ruling, the fight for abortion rights continues in Sonora*, KJZZ (June 15, 2022, 12:54 PM), <https://kjzz.org/content/1721193/despote-mexicos-supreme-court-ruling-fight-abortion-rights-continues-sonora>.

380. *Id.*

381. *Id.*

382. *Id.*

383. Fabiola Sánchez, *Abortion access still difficult after historic Mexico ruling*, ABC NEWS (Mar. 7, 2022, 6:44 AM), <https://abcnews.go.com/International/wireStory/abortion-access-difficult-historic-mexico-ruling-83296167>.

384. *Id.*

tions against the girl receiving an abortion.³⁸⁵ The bishop stated that the abortion should not be allowed because “life must be respected.”³⁸⁶ He further stated that abortion activists are advocating “against an innocent creature” rather than the rapist.³⁸⁷ Local advocates in Guerrero have documented a minimum of eight cases of girls and women being denied abortion services after rape.³⁸⁸ Thus, legislative change is needed to ensure greater access to abortion.³⁸⁹

Legislatures throughout Mexico’s states must now enact laws aligning with the Supreme Court’s rulings. Considering the Coahuila decision makes no determination as to the stage of pregnancy in which abortion is federally protected, each individual state in Mexico is free to define this as it sees fit.³⁹⁰ Abortion activists believe a twelve-week timeframe beginning from conception will garner the most support to uphold this right of access.³⁹¹ This is especially true considering Mexico City’s twelve-week law has been affirmed.³⁹² Abortion activists in Coahuila are pushing the state to do the same.³⁹³

Despite the Supreme Court’s monumental rulings, people in a majority of the country continue to face significant barriers to obtaining safe and legal abortions. Only Mexico City and nine Mexican states have legalized abortion up to a certain timeframe: Guerrero, Oaxaca, Coahuila, Baja California, Hidalgo, Veracruz, Colima, Sinaloa, and Baja California Sur.³⁹⁴ However, twenty-three states remain slow to progress their respective penal codes on abortion.

The PAN continues to hold close ties to the Church and still largely opposes abortion.³⁹⁵ Having led the movement for the increase in

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.* See also Acción de Inconstitucionalidad 148/2017.

391. GUTTMACHER INSTITUTE, *supra* note 320.

392. *Id.*

393. *Id.*

394. *Mexico*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/about-us/planned-parenthood-global/where-we-work/mexico> (last visited Oct. 13, 2022).

395. *National Action Party*, ENCYCLOPEDIA BRITANNICA (Dec. 4, 2018), <https://www.britannica.com/topic/National-Action-Party-political-party-Mexico>; Lamas & Bissell, *supra* note 288, at 20.

the now-unconstitutional “right to life” amendments, the political divisiveness on the issue is not over.³⁹⁶ In a socially conservative country like Mexico, only thirty-three percent of its adults are in favor of the full legalization of abortion, with the vast majority opposed.³⁹⁷ Due to the strong opposition, uncertainty exists as to whether abortion proponents would garner the legal support necessary to uphold abortion service access after twelve weeks.

III. Moving Forward: Policy Consideration for the Future of Abortion Care

The current trend in United States abortion regulation is removing the country as an international leader for reproductive rights. Although progress is slow, Mexico’s historic Supreme Court decisions position the country to develop progressive and supportive abortion legislation. As previously emphasized, the negative impacts of strict abortion regulation and criminalization are fatal for pregnant people and reproductive health. Overall, abortion services persist at the same rate regardless of whether or not the services are legal.³⁹⁸ Evidence-based policy is the safest way to serve people in both the United States and Mexico.³⁹⁹ Evidence-based policy is policy that is driven by scientific, psychological, epidemiology, economical, and sociological data, which largely shows that abortion does not harm the health or wellbeing of the pregnant person. In fact, most evidence indicates that being denied an abortion results in worse financial, health, and familial outcomes.⁴⁰⁰ Despite the large and growing body of research clearly indicating poor outcomes for individuals when denied access to abortion, policy decisions in both the United States and Mexico continue to frame the debate around fetal personhood. This framing inherently makes the pregnant person’s life second to that which some call “potential life.”

396. Kulczycki, *supra* note 275.

397. Kitroeff & Lopez, *supra* note 32.

398. Jeff Roberson, *When Religious Ideology Drives Abortion Policy Poor Women Suffer the Consequences*, THE CONVERSATION (Aug. 30, 2019, 9:12 AM).

399. *Id.*

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

Abortion policy must shift away from centering a fetus's potential right to be born, and instead adopt a health-based rationale in support of the pregnant person. Abortion services must remain legal and accessible to ensure that people have access to safe and effective methods to terminate pregnancy. As discussed, restriction, regulation, and criminalization does nothing to change the rate at which abortion occurs. This fact is clearly evidenced by countries and states with restrictive policy, yet high rates of abortion. Research indicates that the best way to decrease the number of abortions provided is to increase the availability of general reproductive healthcare to all.⁴⁰¹ In addition, centering education within abortion policy is vital for individuals to understand their own bodies and make informed decisions as to how to plan or prevent pregnancy.⁴⁰² The rate of unintended pregnancies is closely linked to the rate of abortions.⁴⁰³

Mexico is at a pivotal point for abortion policy development; the vast majority of states still lack updated legislation aligned with the newly established right to abortion. It is imperative to preserve the health of the pregnant person that this policy is developed through evidence-based practices that are not guided by individualized moral and religious beliefs. However, in a country where Catholicism is deeply rooted in society, activists and policy makers likely need to balance the competing interests. The framework for balancing societal views and evidence-based policy is already set. Mexico's constitutional right to health provides the basis for socially acceptable evidence-based policy. This is further supported by the rationale in the Coahuila decision, in which the Court strongly supported the pregnant person's right to dignity and autonomy. Thus, laying a strong foundation for the development of evidence-based policy; especially now that the Supreme Court has affirmed this.⁴⁰⁴ The Mexican states must follow suit in codifying abortion protections entrenched in the right to health. Historically, the majority of Mexicans have supported progressive abortion policy when framed as healthcare or a health concern.⁴⁰⁵ This is evidenced through public health surveys and the public uproar in

401. WHO, *supra* note 19.

402. *Id.*

403. *Id.*

404. Taladrid, *supra* note 362.

405. Lamas & Bissell, *supra* note 288, at 10.

the face of injustice when people are denied abortion services after experiencing acts of violence or significant health barriers.⁴⁰⁶

As the United States backslides in its abortion policy, the future of abortion access feels grim. However, efforts should mirror that of Mexico's, with a focus on health. The United States needs to abandon the emphasis on "potential life" and "viability." "Potential life" is a legal fiction that lacks a salient definition.⁴⁰⁷ Yet, the Court seems to emphasize that the distinguishing factor of abortion from other constitutional rights, is that it implicates a "potential life."⁴⁰⁸ This distinction creates an implied right to be born.⁴⁰⁹ In *Dobbs*, the Court affirmed that a pregnant person's rights to equality, freedom, and liberty are second to the fetus's right to be born. The emphasis on the "destruction" of "potential life" and the minimization of the immediate impact on millions of people's lives in the majority opinion makes this clear. Thus, currently, the risk of loss to a "potential life" takes the center stage in policy development than the life that is already living. It is imperative to the public health and equal rights that the United States re-evaluate the emphasis on potential life and focus on the life of the ascertainable pregnant person.

Moving forward, health-based rationales for both Mexico and the United States should not be narrow in concept. Health-based rationales can and should include broad concepts of health, like overall well-being. Arguably, historic exceptions to abortion criminalization for the risk of the pregnant person's life, rape, or incest are all encompassed within a health-based perspective. A broad health focus does more for pregnant individuals than a sole focus on the risk of death. The next wave of abortion policy should encompass considerations of physical health, mental health, and overall wellness for the pregnant person.⁴¹⁰ Individuals should not have to risk their life seeking

406. *Id.*

407. Billauer, *supra* note 111, at 295.

408. *Id.* at 284.

409. *Id.* at 285.

410. The Turnaway study clearly demonstrates that abortion services do not have a large mental or physical impact on people obtaining abortions. However, the denial of abortion services is in stark contrast. Subjecting a person to forced birth hurts them physically and mentally for long periods of time. See DIANA GREENE FOSTER, PH.D., THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION (Schribner ed. 2020).

illegal, dangerous abortion services, nor should pregnancy be forced upon someone to their detriment.

Further, abortion policy must focus on the accessibility of abortion services. Even the most progressive and permissible policies will fail without access to services. Mexico City is an excellent example of how to prioritize access in abortion policy. The legislation in Mexico City should act as a model for other Mexican states. Under the current framework in Mexico, the Supreme Court has already affirmed that this framework is constitutional.⁴¹¹ Thus, the twelve-week gestational period is likely to survive a constitutional challenge if codified into law. Since most people do not learn they are pregnant until at least six weeks pregnant, the shorter the period to access abortion services, the more critical accessibility to services is to preserve the pregnant person's health. The unique features of the Mexico City legislation, including that access requirements, are something all states should incorporate to promote health.

In the United States, access is directly under attack through narrow periods to seek services and proposed legislation governing "abortion trafficking." This regression is heavily misguided by the assertion that it protects the interests of health and wellbeing, as well as the fetus's potential life. The trend in restrictive abortion regulation is the attempt to codify one specific moral belief that is often theologically driven. This trend ignores the vast diversity of the population within the United States. More importantly, this trend does not reflect the majority viewpoint of Americans, who largely support access to abortion.⁴¹² Further restriction, regulation, and criminalization needs to end as a matter of public health.

CONCLUSION

Overall, the pregnant person's health should be central to all abortion policies. Evidence-based policy accounts for the pregnant person's health, emphasizing physical and mental health, along with overall wellness. In the United States, policymakers must shift from

411. Forero-Niño, *supra* note 325, at 237.

412. Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should be Legal in all or Some Cases*, PEW RSCH. CTR. (May 6, 2021), <https://www.pewresearch.org/fact-tank/2021/05/06/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases/>.

the minority viewpoint, emphasizing a need to protect “potential life” to further support pregnant people and prevent mass criminalization. The cost of continuing on the road of highly regulated, restrictive, and illegal abortions is too high. In Mexico, policymakers should embrace the constitutional right to health, dignity, and autonomy to support policymaking in alignment with the societal views on abortion. Mexico’s current progress in abortion policy must further center access for all pregnant individuals to ensure the health and safety of the pregnant person. Although much is unknown about the next phase of abortion policy in Mexico and the United States, providing access to safe, legal abortions is the key to protecting the health and safety of pregnant people in both countries.