

CHAPTER FOUR

THE LABOR AND DELIVERY OF REPRODUCTIVE JUSTICE FOR WORKERS: THE POST-*DOBBS* WORKFORCE

Reproductive injustice affects who can get work, who can go to work, and who can stay at work.

It is October 2022. A human resources worker in Arizona is deciding which candidate will best fit the middle-management position that just opened at a bath products company. They look at the files in front of them. One is a profile of a slightly more qualified woman of color who is single and age thirty. One is a profile of a slightly less qualified white man, age forty-five, who has a wife and two teenage children. Though there are a hundred levels of unconscious bias at play in this scenario, the argument the human resources worker makes to their department head is that they cannot possibly know whether the woman will get pregnant — by her own choice or not. She carries the liability of potential leaves and inconsistency. The woman candidate could not make any promises to the contrary in her interview. As bitter as that might have tasted, those promises were impossible to make. She knows that she could be assaulted and impregnated. And she knows that if she doesn't realize that she is pregnant within a narrow timeframe¹ — because she is reckoning with trauma and working at her job — carrying her forced pregnancy to term will not be her choice.² It will be a government mandate.³

On June 24, 2022, the Supreme Court in *Dobbs v. Jackson Women's Health Organization*⁴ held that the Constitution of the United States does not confer a right to abortion.⁵ Never before had the Court revoked a right so fundamental to people's lives.⁶ The opinion, authored by

¹ Many laws passed to restrict abortion access do not account for menstrual realities and the amount of time it takes to determine if a person is pregnant. See Jennifer Weiss-Wolf, *When "Six Weeks" Is Actually Two: Understanding Periods Is Essential to Fighting Abortion Bans*, BRENNAN CTR. FOR JUST. (Nov. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/when-six-weeks-actually-two-understanding-periods-essential-fighting> [https://perma.cc/76CL-YYNE]. Menstrual and reproductive illiteracy hampers the inclusion of women in the workplace.

² See Maeve Reston, *Arizona Judge Rules State Can Enforce Near-Total Abortion Ban*, CNN (Sept. 24, 2022, 10:16 AM), <https://www.cnn.com/2022/09/23/politics/arizona-abortion-ban-ruling/index.html> [https://perma.cc/GMV6-FRSL].

³ See, e.g., Ashton Pittman, *12-Year-Old Incest Victims Should Birth Dad's Child, House Speaker Gunn Says*, MISS. FREE PRESS (June 29, 2022), <https://www.mississippifreepress.org/25273/12-year-old-incest-victims-should-birth-dads-child-house-speaker-gunn-says> [https://perma.cc/N5AS-WDXU].

⁴ 142 S. Ct. 2228 (2022).

⁵ *Id.* at 2242.

⁶ Marjorie Cohn, *For the First Time, Supreme Court Is Poised to Retract a Fundamental Right*, TRUTHOUT (Dec. 3, 2021), <https://truthout.org/articles/for-the-first-time-supreme-court-is-poised-to-retract-a-fundamental-right> [https://perma.cc/PE2F-6282]; see also *Dobbs*, 142 S. Ct. at 2347 (Breyer, Sotomayor & Kagan, JJ., dissenting).

Justice Alito, argued that the right was not “deeply rooted in this Nation’s history and traditions” and thus should be at the discretion of individual states.⁷ A variegation at this scale creates a dearth of abortion access in half the country.⁸ By August 2022, “1 in 3 American women ha[d] already lost abortion access.”⁹ By the end of 2022, most abortions were banned in at least thirteen states.¹⁰ *Dobbs* entrenches and exacerbates the oppressions that exclude reproductive subjects from the job market. Corporate action has been sought as a solution, but workers with reproductive needs must be protected by the state. Section A of this Chapter examines how reproductive health care access affects who can enter the workforce. Section B lays out the potential corporate solutions that employers have offered and argues that they are stopgap measures and do not offer a true protection of reproductive freedom. Section C argues that solutions must come from the states and local governments, examining a familiar history of federal antidiscrimination law alongside an unfamiliar contemporary surge of support for pro-choice, direct-democracy measures as roadmaps for potential solutions.

A. *Who Gets Hired? And Who Doesn’t Get Fired?*

Access to abortion, contraception, and reproductive care affects who works. A dearth of abortion access disproportionately affects people of color and gender minorities (a term this Chapter uses to refer specifically to non-cis women who can get pregnant).¹¹ Black, Brown, and Indigenous communities deal with higher rates of unintended pregnancy due to a lack of access to contraception and sex education; higher rates of forced pregnancy have been and will be imposed on racially marginalized people.¹² Trans*, nonbinary, and gender-nonconforming people who can become pregnant face intersecting barriers to health care that are compounded by a dearth of access to reproductive care.¹³ People who are already marginalized across multiple axes face compounding

⁷ *Dobbs*, 142 S. Ct. at 2242, 2283–84.

⁸ *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state> [https://perma.cc/B85J-K3V7].

⁹ Katie Shepherd et al., *1 in 3 American Women Have Already Lost Abortion Access. More Restrictive Laws Are Coming.*, WASH. POST (Aug. 22, 2022, 3:36 PM), <https://www.washingtonpost.com/nation/2022/08/22/more-trigger-bans-loom-1-3-women-lose-most-abortion-access-post-roe> [https://perma.cc/MMV9-CCJU].

¹⁰ *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Feb. 10, 2023, 5:00 PM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [https://perma.cc/S4RK-KRWE].

¹¹ Anne Branigin & Samantha Chery, *Women of Color Will Be Most Impacted by the End of Roe, Experts Say*, WASH. POST (June 24, 2022, 8:04 PM), <https://www.washingtonpost.com/nation/2022/06/24/women-of-color-end-of-roe> [https://perma.cc/3ER9-HVXA].

¹² See generally Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, GUTTMACHER POL’Y REV., Summer 2008, at 2.

¹³ See Olivia McCormack, *Transgender Advocates Say the End of Roe Would Have Dire Consequences*, WASH. POST (May 6, 2022, 11:37 AM), <https://www.washingtonpost.com/politics/2022/05/06/transgender-men-nonbinary-people-abortion-roe> [https://perma.cc/2LF3-8BFQ].

oppressions that limit their economic mobility. Workers who are active contributors to reproductive care — or who facilitate access to such care through advocacy or funding — face compounding conflicts and barriers to work in a post-*Dobbs* labor landscape.

1. *Disproportionate Exclusion of People of Color.* — Restricting access to abortion will disproportionately affect people of color. Due to discrimination against pregnant workers¹⁴ and the negative impacts of forced births on socioeconomic outcomes and career prospects,¹⁵ people of color will be disproportionately excluded from the workforce. Many states that have passed outright or extreme bans on abortion are in the South, where nearly half of the country's Black population lives.¹⁶ The South has a disproportionately high percentage of the Black¹⁷ and Latinx¹⁸ populations, despite being the regional home to less than forty percent of the total U.S. population.¹⁹ A lack of access also unduly burdens poor people, who cannot afford to cross state lines or access nonsurgical abortion pills and whose employment is less likely to provide opportunities for leave.²⁰ Abortion access as an economic justice issue runs together with racial justice questions. Black and Brown people are 1.8 and 1.5 times more likely than white people to be in poverty, respectively.²¹ The average abortion patient already has one or more children, is in their late twenties, is low income, is unmarried, is in the first six weeks of their pregnancy, and is having their first abortion.²²

¹⁴ See, e.g., Emily Martin, Opinion, *Pregnant Workers Are Pushed Out of Work, And It's Time to Finally Protect Them*, THE HILL (Oct. 21, 2022, 4:30 PM), <https://thehill.com/opinion/finance/3698877-pregnant-workers-are-pushed-out-of-work-and-its-time-to-finally-protect-them> [<https://perma.cc/F4M8-UVSZ>].

¹⁵ See Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407, 410–12 (2018).

¹⁶ Anastasia Moloney, *Why Black Women Bear Brunt of Strict U.S. Abortion Laws*, CONTEXT (Sept. 23, 2022), <https://www.context.news/socioeconomic-inclusion/why-black-women-bear-brunt-of-strict-us-abortion-laws> [<https://perma.cc/APG3-PWXT>].

¹⁷ See *id.*

¹⁸ See Jens Manuel Krogstad, *Hispanics Have Accounted for More than Half of Total U.S. Population Growth Since 2010*, PEW RSCH. CTR. (July 10, 2020), <https://www.pewresearch.org/fact-tank/2020/07/10/hispanics-have-accounted-for-more-than-half-of-total-u-s-population-growth-since-2010> [<https://perma.cc/C4ZK-Z2G9>] (noting that half of the Latinx population in the United States live in border states in the Southwest).

¹⁹ *United States Population Growth by Region*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/data_tables.php?component=growth [<https://perma.cc/ZQL4-FKN2>].

²⁰ See Karen Attiah, Opinion, *As Abortion Rights Collapse, Black and Brown Women Will Suffer Most*, WASH. POST (July 1, 2022, 3:33 PM), <https://www.washingtonpost.com/opinions/2022/07/01/abortion-rights-loss-black-hispanic-women-suffer-most> [<https://perma.cc/3APB-WPCM>].

²¹ Kiara Alfonseca, *Why Abortion Restrictions Disproportionately Impact People of Color*, ABC NEWS (June 24, 2022, 10:43 AM), <https://abcnews.go.com/Health/abortion-restrictions-disproportionately-impact-people-color/story?id=84467809> [<https://perma.cc/FZB3-9UT6>].

²² Margot Sanger-Katz et al., *Who Gets Abortions in America?*, N.Y. TIMES (Dec. 14, 2021), <https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortion-in-america.html> [<https://perma.cc/G6GL-RWY7>].

The later the abortion happens in a pregnancy, the more it costs.²³ The further one must travel, the more it costs.²⁴ The more complicated the procedure, the more it costs.²⁵ The more legal barriers there are (that is, the potential for patients or providers to be sued or arrested), the more it costs.²⁶ All of these factors mean that carrying a (safe) pregnancy is expensive, and, for many, unaffordable.²⁷ In the United States, maternal morbidity is off par with other developed countries,²⁸ costing society billions of dollars.²⁹ In another aspect of reproductive injustice intersecting inextricably with racial injustice, maternal mortality³⁰ and injury³¹ rates are extremely high for Black, Brown, and Indigenous people who can get pregnant. Even if a person can stay at work while pregnant, facing one of the most traumatic health outcomes of one's life can take an immense toll on one's overall life and ability to work because of the lingering effects from the intense physical pain.³² A forced pregnancy is not only the imposition of grave violations of bodily

²³ See Jennifer Gerson Uffalussy & Ana Escalante, *Here's the Cost of an Abortion: Different Types, Insurance Plans, and More*, GLAMOUR MAG. (Aug. 16, 2022), <https://www.glamour.com/story/how-much-does-an-abortion-cost> [<https://perma.cc/8QKL-LZCP>] (explaining that medication and aspiration abortions cost \$504 and \$750 on average respectively, but up to \$1500 later in pregnancy).

²⁴ Allison McCann, *What It Costs to Get an Abortion Now*, N.Y. TIMES (Sept. 28, 2022), <https://www.nytimes.com/interactive/2022/09/28/us/abortion-costs-funds.html> [<https://perma.cc/YC5N-NAVV>].

²⁵ See Gerson Uffalussy & Escalante, *supra* note 23.

²⁶ McCann, *supra* note 24.

²⁷ See *Evidence Summary: Prevent Unintended Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 10, 2022), <https://www.cdc.gov/sixteen/pregnancy/index.htm> [<https://perma.cc/H299-YUP2>].

²⁸ Roosa Tikkanen et al., *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, COMMONWEALTH FUND (Nov. 18, 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries> [<https://perma.cc/Z3MU-JDWM>].

²⁹ So O'Neil et al., *The High Costs of Maternal Morbidity Show Why We Need Greater Investment in Maternal Health*, COMMONWEALTH FUND (Nov. 12, 2021), <https://www.commonwealthfund.org/publications/issue-briefs/2021/nov/high-costs-maternal-morbidity-need-investment-maternal-health> [<https://perma.cc/L65S-9PAV>].

³⁰ *Racial/Ethnic Disparities in Pregnancy-Related Deaths — United States, 2007–2016*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 13, 2022), <https://www.cdc.gov/reproductivehealth/maternal-mortality/disparities-pregnancy-related-deaths/infographic.html> [<https://perma.cc/M9DK-CDWE>] (“Data confirms significantly higher pregnancy-related mortality ratios among Black and American Indian/Alaskan Native women.”).

³¹ Black and Latinx women experience pregnancy and health complications at higher rates than white women, and this gap is increasing. See Press Release, Blue Cross Blue Shield, *Blue Cross Blue Shield Association Study Reports Higher Childbirth Complication Rates for Black and Hispanic Women Regardless of Age* (May 20, 2021), <https://www.bcbs.com/press-releases/blue-cross-blue-shield-association-study-reports-higher-childbirth-complication> [<https://perma.cc/362N-Z9JA>].

³² See, e.g., Tressie McMillan Cottom, *I Was Pregnant and in Crisis. All the Doctors and Nurses Saw Was an Incompetent Black Woman*, TIME (Jan. 8, 2019, 7:57 AM), <https://time.com/5494404/tressie-mcmillan-cottom-thick-pregnancy-competent> [<https://perma.cc/4SUT-TNEM>].

autonomy and dignity, but also a massive economic burden³³ — especially considering how the capacity to be pregnant can affect even prospective employment. In hiring for nontemporary positions, even the vaguest impression that a worker may be “vulnerable” to pregnancy can affect a decision at the outset. There is an implicit bias about “hyperfertility”³⁴ in Brown and Black women that has been cultivated over centuries, stemming from a history of reproductive oppression and the use of Brown and Black bodies to reproduce a workforce that upheld racialized capitalism.³⁵ Without the possibility of abortion, and with limitations on contraception on the horizon, this implicit bias concerning fertility cannot be overridden by promises or reassurance from Brown and Black individuals in job interviews.³⁶

Due to gaps in the scope and enforceability of federal laws protecting pregnant people, pregnant workers are often discriminated against in the workplace and in hiring decisions. This fact reflects the acute need for choice about when one becomes pregnant, as well as for broader enforceable protections for pregnant people. The protections of the Pregnancy Discrimination Act of 1978³⁷ (PDA), designed to prevent employer discrimination on the basis of pregnancy, do not require accommodations that are not provided to workers with different disability-based needs³⁸: workers from Oregon to South Carolina report being assigned tasks that they are physically hindered from doing (such as standing constantly or heavy lifting), then being suspended without pay when they cannot perform them.³⁹ In spite of the legal obligations of employers, there is no enforcement unless overburdened pregnant workers expend time and money on a civil suit. After requesting

³³ See Press Release, Mount Sinai, New Parents Risk Financial Burden Because of the Costs of Pregnancy and Delivery, Study Finds (Mar. 11, 2022), <https://www.mountsinai.org/about/newsroom/2022/new-parents-risk-financial-burden-because-of-the-costs-of-pregnancy-and-delivery-study-finds> [https://perma.cc/SSZ4-N7QT] (“Birthing parents risk being financially burdened by the out-of-pocket medical costs of pregnancy and delivery, which cost some low-income parents close to 20 percent of their annual income.”).

³⁴ Edna Bonhomme, Opinion, *How the Myth of Black Hyper-Fertility Harms Us*, AL JAZEERA (Aug. 16, 2020), <https://www.aljazeera.com/opinions/2020/8/16/how-the-myth-of-black-hyper-fertility-harms-us> [https://perma.cc/8M3S-MHSE].

³⁵ See JENNIFER L. MORGAN, *LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY* 69–106 (2011).

³⁶ See, e.g., LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* 74 (2013) (discussing the implicit bias against Latinx women in a chapter titled “Latina Sexuality, Reproduction, and Fertility as Threats to the Nation”).

³⁷ 42 U.S.C. § 2000(e)(k).

³⁸ *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 229 (2015) (holding that an employer’s policy must be judged by whether it treats pregnant workers less satisfactorily than nonpregnant workers with similar work-related disabilities, such that if there are no legitimate reasons to differentiate, the employer must accommodate the pregnant worker under the PDA); see also Dina Bakst, *Peggy Young’s Victory Is Not Enough*, U.S. NEWS (Mar. 26, 2015, 1:00 PM), <https://www.usnews.com/opinion/economic-intelligence/2015/03/26/peggy-young-supreme-court-victory-is-not-enough-for-pregnant-workers> [https://perma.cc/R5AK-33Y2].

³⁹ Martin, *supra* note 14.

medical accommodations during a high-risk pregnancy, one worker was explicitly told, contrary to the law of the land: “You don’t get special treatment just for being pregnant.”⁴⁰ Many workers are not legally trained and would not recognize this for the blatant lie that it is.

Twenty-three percent of parents report that they have “considered leaving a job because of discrimination or lack of reasonable accommodations during a pregnancy.”⁴¹ For several decades, the limited rules of the PDA were the only federal antidiscrimination and accommodation protections available to pregnant workers.⁴² The PDA applies only to employers with fifteen or more employees,⁴³ and even in larger workplaces, it has often proven insufficient.⁴⁴ Asking for a stool, to lift less weight, to cut delivery routes, or to have access to water or a bathroom must be justified by pointing to analogous accommodations provided for nonpregnant workers.⁴⁵ This limits pregnant workers’ potential accommodations and also disincentivizes employers from offering *any* minor or major accommodations at all for any worker with a disability that is not mandated by law.

The negative effects resulting from avoiding compliance with these laws are especially severe for minimum-wage and temporary workers. Many of the jobs that hire on a temporally limited basis — such as secretaries, flight attendants, and clerical assistants — predominantly hire young women.⁴⁶ Among employed women, sixty percent of Latinx and fifty-four percent of Black women work in service or sales/office occupations, sectors that are more likely to retain minimum wage and temporary workers.⁴⁷ Nearly half of all women in the growing technology

⁴⁰ *Id.*

⁴¹ *Voter Opinions on the Pregnant Workers Fairness Act*, NAT’L WOMEN’S L. CTR. (Oct. 2022), <https://nwlc.org/wp-content/uploads/2022/10/NWLC-Pregnant-Workers-Fairness-Act-Morning-Consult-PPT-10.21.pdf> [<https://perma.cc/4KLQ-NR8Z>].

⁴² See Andrea Johnson, *40 Years After the Pregnancy Discrimination Act, An Opportunity for Congress to Get Its Common Sense Back*, NAT’L WOMEN’S L. CTR. (Oct. 31, 2018), <https://nwlc.org/40-years-after-the-pregnancy-discrimination-act-an-opportunity-for-congress-to-get-its-common-sense-back> [<https://perma.cc/T3BC-L9GP>].

⁴³ 42 U.S.C. § 2000e(k).

⁴⁴ See Bakst, *supra* note 38.

⁴⁵ See *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 229 (2015).

⁴⁶ See Brenda E. Chabot, *Discrimination Is Still Haunting the Flight Attendant Profession*, MS. MAG. (July 8, 2021, 9:45 AM), <https://msmagazine.com/2021/07/08/discrimination-sexism-flight-attendant-women> [<https://perma.cc/F7ZU-693A>]; Jessica Williams, “Secretaries Are Women, That’s How It’s Always Been” — How I Call Out “Acceptable” Sexism, THE GUARDIAN (Oct. 17, 2016, 3:17 AM), <https://www.theguardian.com/small-business-network/2016/oct/17/secretaries-acceptable-sexism-women-workplace> [<https://perma.cc/8B9B-92JS>].

⁴⁷ U.S. BUREAU OF LAB. STAT., LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2019, at 5 (2020), <https://www.bls.gov/opub/reports/race-and-ethnicity/2019/pdf/home.pdf> [<https://perma.cc/CD5E-GYET>]; see also Sonali Kolhatkar, *What About Work-Life Balance for Low-Wage Women of Color?*, YES! MAG. (Oct. 4, 2021), <https://www.yesmagazine.org/social-justice/2021/10/04/work-life-balance-low-wage-women-of-color> [<https://perma.cc/629S-NGJP>].

sector are on fixed-term contracts.⁴⁸ These contracts increase an overall sense of job insecurity, especially for women.⁴⁹ They make it easier to not renew a contract when a person becomes pregnant. They put pressure on family planning for workers who do wish to renew a contract.

Studies report stark differences in socioeconomic outcomes between women in the United States who received the abortion they sought and those who were denied access.⁵⁰ Women who were denied abortions due to state restrictions (such as gestational limits) had higher odds of poverty six months after denial than those who were able to access the necessary care.⁵¹ The same study measured long-term effects, finding that women denied abortions were also more likely to remain in subjective poverty and to receive public assistance for five years after being denied care.⁵² Extending the analysis beyond poverty, women who were denied abortions were also more likely to experience multiple years of “economic hardship and insecurity.”⁵³

Access to abortion also affects workers’ planning in a statistically significant way by enabling long-term educational and employment planning; by contrast, a lack of access abrogates even *imagined* possibilities.⁵⁴ In a study of the one-year plans of women seeking abortions, ensuring access to abortion enabled the women to articulate and execute their plans.⁵⁵ A positive future outlook and implementation of educational, employment, and residential plans were more feasible for women who were able to attain the abortion they sought than those who were not.⁵⁶ In a world where abortion will be significantly harder to access, regardless of a continued need for the procedure, these statistics merit close attention, especially when considering who will lose access most immediately. Some of the Black, Brown, and Indigenous people who will be affected in these ways are gender minorities, another

⁴⁸ *Close the Gap Research Finds that Fixed Term Contracts Are Amplifying the Inequalities and Disadvantage that Women Face in the Tech Industry*, CLOSE THE GAP: BLOG (Feb. 5, 2020), <https://www.closesthegap.org.uk/news/blog/close-the-gap-research-finds-that-fixed-term-contracts-are-amplifying-the-inequalities-and> [https://perma.cc/XYU6-QBYS] (reporting that forty-seven percent of women in the tech sector had been on a fixed-term contract and fifty percent of women on fixed-term contracts in tech had experienced unwanted gaps in employment).

⁴⁹ Nicolas Morgenroth et al., *Are Men or Women More Unsettled by Fixed-Term Contracts? Gender Differences in Affective Job Insecurity and the Role of Household Context and Labour Market Positions*, 38 EUR. SOCIO. REV. 560, 570 (2022) (“Women are substantially more unsettled by fixed-term contracts than men across all household types. . . . Fixed-term employment . . . seems to add to existing gender inequalities on the labour market.”).

⁵⁰ Foster et al., *supra* note 15, at 401–02.

⁵¹ *Id.* at 411.

⁵² *Id.* The authors of the study define “subjective poverty” as “not having enough money to cover basic living expenses” (in contrast to legal poverty, which is based on a monetary threshold). *Id.*

⁵³ *Id.*

⁵⁴ Ushma D. Upadhyay et al., *The Effect of Abortion on Having and Achieving Aspirational One-Year Plans*, 15 BMC WOMEN’S HEALTH, no. 102, 2015, at 1, 6, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4642756> [https://perma.cc/7L8W-732Q].

⁵⁵ *Id.*

⁵⁶ *Id.* at 6, 9.

compounding axis of identity-based marginalization that has restricted access to employment opportunities.

2. *Disproportionate Exclusion of Gender Minorities.* — A combination of gender and economic marginalization already places trans* and nonbinary workers in a difficult position when seeking jobs.⁵⁷ Antidiscrimination law lags with regard to gender minorities, especially trans* and nonbinary workers.⁵⁸ The law too often fails to protect trans* folks who suffer aggressions and lack of opportunities at work.⁵⁹ Now, for gender minorities who can get pregnant, a post-*Dobbs* landscape exacerbates exclusion from work. Further, lack of access to gender-affirming care, along with lack of abortion access, is another affront to bodily autonomy, gender definition, and long-term life planning for gender minorities. From the legislature or the bench, attacks on gender-affirming care tend to coincide, precede, or immediately follow restrictions on abortion access.⁶⁰ Coalitions that engage in legal battles for gender equity often overlap directly with alliances for reproductive rights.⁶¹

⁵⁷ Eleanor Greene, *Finding Jobs and Finding Justice for Trans Workers*, GREEN AM., <https://www.greenamerica.org/economic-action-against-hate/finding-jobs-and-finding-justice-trans-workers> [<https://perma.cc/8UFQ-F4G2>] (“The [U.S.] unemployment rate is three times for trans people what it is for the rest of the population — four times for trans women of color.”).

⁵⁸ See *Employment Nondiscrimination*, MOVEMENT ADVANCEMENT PROJECT (Oct. 4, 2022), https://www.lgbtmap.org/equality_maps/employment_non_discrimination_laws [<https://perma.cc/TUE9-EQ2P>] (showing that only twenty-four states have state laws explicitly prohibiting employment discrimination based on sexual orientation and/or gender identity, but also noting that, per Supreme Court precedent, gender identity discrimination is prohibited under Title VII for employers with over fifteen employees); TRANSGENDER L. CTR., TOOLS FOR TRANSGENDER PEOPLE TO ADDRESS DISCRIMINATION, <https://transgenderlawcenter.org/wp-content/uploads/2021/04/Tools-for-Transgender-People-to-Address-Discrimination.pdf> [<https://perma.cc/QN4D-9QVG>].

⁵⁹ Trans* rights have become a partisan issue and the work of the Department of Justice has reflected that shift, making antidiscrimination protection shaky ground to rely upon when faced with changing administrations. See Brief for the Fed. Respondent in Opposition at 11–13, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm’n, No. 18-107 (U.S. Oct. 24, 2018), *decided sub nom.* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

⁶⁰ See Juliana Kim, *How Gender-Affirming Care May Be Impacted When Clinics that Offer Abortions Close*, NPR (Aug. 14, 2022, 6:59 AM), <https://www.npr.org/2022/08/14/1115875421/gender-affirming-care-abortion-clinics> [<https://perma.cc/8PA2-LSSQ>]; *Our Bodies, Our Futures: Connecting Abortion Rights and Trans and Intersex Rights*, NAT’L WOMEN’S L. CTR. (Aug. 9, 2022), <https://nwlc.org/resource/our-bodies-our-futures-connecting-abortion-rights-and-trans-and-intersex-rights> [<https://perma.cc/S9X5-J7K6>].

⁶¹ See Sarah Cottrell, *This Organization Is Extending Services for Those Who Need Transport to Abortion and Gender-Affirming Care*, PARENTS (May 20, 2022), <https://www.parents.com/news/this-organization-is-extending-services-for-those-who-need-transport-to-abortion-and-gender-affirming-care> [<https://perma.cc/TY5U-ZMYL>]; Mackenzie Hawkins, *Chicago Offers Sanctuary for Abortions, Gender-Affirming Care*, BLOOMBERG (Sept. 21, 2022, 5:12 PM), <https://www.bloomberg.com/news/articles/2022-09-21/chicago-offers-sanctuary-for-abortions-gender-affirming-care> [<https://perma.cc/4LZ4-FDN7>].

B. Employer Action as a Stopgap Measure

1. *The Pro-Choice Corporation?* — In the weeks following *Dobbs*, some abortion providers closed up shop. Some refused to shutter their windows or doors. Some lawyers critiqued the interpretive methods and political origins of Justice Alito's majority opinion in *Dobbs*.⁶² Others marked the Court's aggressive disregard for its own legitimacy and for stare decisis, calling out the active harms of the decisions (and of the entire Term), especially to marginalized peoples.⁶³ Activists raised their voices and fists in the streets⁶⁴ or went underground, considering ways to provide nonsurgical abortions⁶⁵ or to move people in need of health care across state lines.⁶⁶ Into the breach also came an unexpected ally: several prominent corporations who pledged to offer employees seeking to terminate pregnancies a few thousand dollars in abortion-related travel assistance.⁶⁷

Corporate employers providing abortion-travel funds are making transparent the complex legal and financial navigation necessary to access reproductive care. What do the evolving promises of companies mean for the workers who will receive those benefits, and for the folks who provide the services that they will seek out? At the level of economic common sense, why would employers provide these benefits? Because *unwanted, unplanned pregnancies are bad for business*.

In addition to bodily indignity and psychological harms, people subjected to forced pregnancies must take leave and alter their work in ways that they did not plan for. Economic burdens fall on not just the

⁶² See, e.g., Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023) (manuscript at 4), <https://ssrn.com/abstract=4179622> [<https://perma.cc/HB36-QPPA>].

⁶³ See, e.g., Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23 (2022).

⁶⁴ Natasha Ishak, *In 48 Hours Of Protest, Thousands of Americans Cry Out for Abortion Rights*, VOX (June 26, 2022, 4:00 PM), <https://www.vox.com/2022/6/26/23183750/abortion-rights-scotus-roe-overturned-protests> [<https://perma.cc/96R2-ADMC>].

⁶⁵ See Lux Alptbaum, *What to Know About Stocking Up on the Abortion Pill*, THE CUT (June 24, 2022), <https://www.thecut.com/2022/06/stock-up-abortion-pill.html> [<https://perma.cc/zZW2-SXP6>].

⁶⁶ See James Politi, *White House Weighs Helping Women Cross State Lines to Access Abortions*, FIN. TIMES (June 27, 2022), <https://www.ft.com/content/11dc4b5b-015f-4710-babo-3ae9d1b99d90> [<https://perma.cc/GUS9-K4LM>]; see also Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022, 8:30 AM), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines> [<https://perma.cc/KS39-NGH7>]; Ava Sasani, *Is It Legal for Women to Travel out of State for an Abortion?*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/24/us/abortion-travel-bans.html> [<https://perma.cc/D6JV-687A>].

⁶⁷ For example, corporations such as Amazon, Lyft, Uber, Adobe, and Google instituted policies pre-*Dobbs* (but post-draft opinion leak in May) to support employees seeking to terminate pregnancies, with many offering \$4000 in abortion-related travel assistance. See Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/article/abortion-companies-travel-expenses.html> [<https://perma.cc/6AJ7-4U2H>]. Post-*Dobbs*, several more followed suit, including Disney, Meta, and the *New York Times*. *Id.*

state but also employers wishing to retain their workforce. Someone who has a child at a time when they did not intend could end up embarking on an entirely different career path — or an entirely different timeline.⁶⁸ A famous (or infamous, depending on one's political perspective) 2021 *New York Times Magazine* essay, *The Abortion I Didn't Have*, was subtitled: "I never thought about ending my pregnancy. Instead, at 19, I erased the future I had imagined for myself."⁶⁹ The sheer possibility of so many unpredictable contingencies discourages employers from hiring people who can get pregnant.

This section will explore the incentives for companies to retain their employees with the capacity to get pregnant. The contemporary corporate landscape is marked by (1) antidiscrimination law, (2) research on the economic upside of diverse cohorts of employees,⁷⁰ and (3) broad social pressure to hire a gender-diverse body of workers.⁷¹ Companies that assume that gender-diverse employees will exercise whatever reproductive choice is available to them are developing burgeoning abortion-travel policies to expand the range of choices for employees they hope to retain. These policies are *severely limited* to corporations that are highly visible and rely on a broad consumer base.⁷² This is where social consumer pressure and peer pressure from other corporations work. However, these benefits may be *limited* to only those persons who work for companies that are attending to public image, reading management consultant research, and hiring "top talent" from elite colleges and graduate schools (over seventy million American workers have a high school diploma but not a bachelor's degree, and thus are rarely considered for many in-demand jobs in management, technology, and health care⁷³).

2. *What Is Owed to Workers Who Can Become Pregnant?* — Antidiscrimination law suggests a corporate responsibility to workers who can become pregnant. The late Justice Ginsburg raised several

⁶⁸ See, e.g., Merritt Tierce, *The Abortion I Didn't Have*, N.Y. TIMES MAG. (Dec. 5, 2021) <https://www.nytimes.com/2021/12/02/magazine/abortion-parent-mother-child.html> [https://perma.cc/2U6Z-HV5Z].

⁶⁹ *Id.*

⁷⁰ See, e.g., VIVIAN HUNT ET AL., MCKINSEY & CO., DELIVERING THROUGH DIVERSITY 11 (2018), https://kimcenter.org/wp-content/uploads/2022/02/delivering-through-diversity_full-report.pdf [https://perma.cc/GJJ5-RA7D].

⁷¹ See Casey Herman et al., *Beyond Compliance: Consumers and Employees Want Business to Do More on ESG*, PWC, <https://www.pwc.com/us/en/services/consulting/library/consumer-intelligence-series/consumer-and-employee-esg-expectations.html> [https://perma.cc/N2YU-4CXH].

⁷² Many early pro-choice policy adopters (such as Starbucks, Netflix, Google, Uber, Sephora, and Lyft) rely on a broad consumer base. See Goldberg, *supra* note 67; Blake Morgan, *The Top 100 Most Customer-Centric Companies of 2022*, FORBES (May 1, 2022, 7:10 PM), <https://www.forbes.com/sites/blakemorgan/2022/05/01/the-top-100-most-customer-centric-companies-of-2022/?sh=23bfe8b72b38> [https://perma.cc/EW6M-CCXM].

⁷³ *Understanding How American Workers Progress to Higher-Wage Jobs*, MCKINSEY & CO. (Aug. 12, 2020), <https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/understanding-how-american-workers-progress-to-higher-wage-jobs> [https://perma.cc/FME8-GW8N].

early employment antidiscrimination cases to fame, including *Frontiero v. Richardson*⁷⁴ and *Weinberger v. Wiesenfeld*,⁷⁵ in which she argued on behalf of women and men that gender should not be a determinant in the denial of employment-related benefits.⁷⁶ Section C discusses the evolution of antidiscrimination law to identify lessons for reproductive concerns. The statutes that make up this body of law include the Fair Labor Standards Act of 1938,⁷⁷ the Equal Pay Act of 1963,⁷⁸ Title VII of the Civil Rights Act of 1964,⁷⁹ the Family and Medical Leave Act,⁸⁰ the PDA, the Affordable Care Act⁸¹ (ACA), and the Americans with Disabilities Act⁸² (ADA). This legal infrastructure weighs on corporations that, where possible, have incentives to continue to hire and retain gender-diverse workers (including cis women and gender minorities).

Further, the benefits of gender-diverse cohorts and culturally and ethnically diverse cohorts of employees have been touted in recent years.⁸³ Diversity research has been growing in the last decade, with robust numbers that illustrate how multi-identity teams directly lead to better business outcomes.⁸⁴ Despite the proven benefits of gender inclusivity in the workplace, massive barriers existed even before the looming threats to broad reproductive freedom. In 2015, McKinsey identified several important factors contributing to the lack of women in leadership in industry and the much lower pay brackets of gender minorities in the workforce: “blocked economic potential” (such as denied leadership opportunities and assignments), “time spent in unpaid care work,” fewer (and now diminishing) legal rights, “political

⁷⁴ 411 U.S. 677 (1973).

⁷⁵ 420 U.S. 636 (1975).

⁷⁶ David Kurlander, *One-Half Dependent: Frontiero v. Richardson and Ruth Bader Ginsburg's Long Quest for Equality*, CAFE (Sept. 24, 2020), <https://cafe.com/article/one-half-dependent-frontiero-v-richardson-and-ruth-bader-ginsburgs-long-quest-for-equality> [https://perma.cc/7JVV-K9E7].

⁷⁷ 29 U.S.C. §§ 201–219.

⁷⁸ *Id.* § 206(d).

⁷⁹ 42 U.S.C. § 2000e.

⁸⁰ 29 U.S.C. §§ 2601–2654.

⁸¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

⁸² 42 U.S.C. §§ 12101–12213.

⁸³ See HUNT ET AL., *supra* note 70, at 14; VIVIAN HUNT ET AL., MCKINSEY & CO., DIVERSITY MATTERS 9–13 (2015), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/why-diversity-matters> [https://perma.cc/U9B4-5DWW]; VIVIAN HUNT ET AL., MCKINSEY & CO., DIVERSITY WINS: HOW INCLUSION MATTERS 32–41 (2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters> [https://perma.cc/53U7-RPUM].

⁸⁴ MEKALA KRISHNAN ET AL., MCKINSEY GLOB. INST., TEN THINGS TO KNOW ABOUT GENDER EQUALITY 7 (2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/ten-things-to-know-about-gender-equality> [https://perma.cc/7TPR-4ZM5] (“[C]ompanies in the bottom quartile for both gender and ethnic diversity were 27 percent more likely to underperform the industry average than all other firms.”). Modern representations abound of how these concerns can be foregrounded in DEI materials and recruitment while simultaneously ignored in partnership or promotion decisions. See, e.g., PARTNER TRACK (Netflix television series 2022).

underrepresentation,” and “violence against women.”⁸⁵ The playing field has never been level for all gender minorities; race,⁸⁶ sexuality, and disability are vital factors in determining access to opportunities.⁸⁷ Increasing public awareness of these inequities is one factor driving greater social pressure to hire and retain a gender-diverse body of workers.⁸⁸

Broad social pressure on companies (stemming from robust new Environmental, Social, and Governance (ESG) policies, shareholder activism, and socially conscious purchasing by consumers) encourages employer support for workers who can become pregnant. Post-*Dobbs*, several companies have announced abortion-travel policies with a few thousand dollars in funding.⁸⁹ By all indications, companies will continue to institute similar policies and “benefits” for employees where possible.⁹⁰ Enabling employees to end unwanted pregnancies can be framed as an ESG matter — signaling virtue to workers and clients — and promotes more efficient and successful business.⁹¹ The field of ESG is a developing realm of business pressures. “The idea is that investors should evaluate firms based not just on their commercial performance but also on their environmental and social record and their governance, typically using numerical scores.”⁹² Investors use these scores to screen investments based on the policies that the corporations

⁸⁵ KRISHNAN ET AL., *supra* note 84, at 7.

⁸⁶ *Id.* at 8 (“Women of color are especially underrepresented in the North American workforce and face the steepest drop-offs [from entry-level to C-suite]. . . . These outcomes are mirrored in the day-to-day experiences [including microaggressions] of women of color in the workforce 40 percent of black women and 30 percent of Asian women say they needed to provide more evidence of their competence than others, compared with 28 percent of white women and 14 percent of men.”).

⁸⁷ JESS HUANG ET AL., MCKINSEY & CO., WOMEN IN THE WORKPLACE 2019, at 8 (2019) https://womenintheworkplace.com/Women_in_the_Workplace_2019.pdf [<https://perma.cc/R6K2-NKD5>] (“Black women and women with disabilities face more barriers to advancement, get less support from managers, and receive less sponsorship than other groups of women.”).

⁸⁸ Herman et al., *supra* note 71.

⁸⁹ See Goldberg, *supra* note 67. The benefit level for abortion-travel assistance has been set at a few thousand dollars by most companies. *Id.* This could be a reasonable travel budget, but it may be insufficient to address the legal uncertainties that abortion-related travel could raise.

⁹⁰ See DON’T BAN EQUALITY, <https://dontbanequality.com> [<https://perma.cc/X3TW-6YC9>] (listing over 750 companies and nonprofits that signed onto a statement condemning abortion restrictions as “bad for business”); #WhatAreYourReproBenefits, RHIA VENTURES, <https://rhiaventures.org/corporate-engagement/whatareyourreprobenefits> [<https://perma.cc/MHE5-LE67>] (logging all company-specific reproductive benefits into a central database and offering guidance on how companies can best support employees who can become pregnant).

⁹¹ See Barbara Ortutay & Dee-Ann Durbin, *Companies Could Face Hurdles Covering Abortion Travel Costs*, ASSOCIATED PRESS (July 5, 2022), <https://apnews.com/article/abortion-us-supreme-court-health-de9e1e2c764bf61b95aeef756a66f8a5> [<https://perma.cc/CRG4-2WUV>] (“It also makes some sense for companies to not have a bunch of employees that are highly distressed because they have unwanted pregnancies and have to carry the child to term.”).

⁹² ESG Should Be Boiled Down to One Simple Measure: Emissions, THE ECONOMIST (July 21, 2022), <https://www.economist.com/leaders/2022/07/21/esg-should-be-boiled-down-to-one-simple-measure-emissions> [<https://perma.cc/77KA-TV6T>].

put in place — often around climate change or social justice concerns.⁹³ Shareholder pressure has become a prominent avenue for pushing for reproductive rights. Spending proposals and plans for political involvement in reproductive rights have entered corporate boardrooms.⁹⁴ The rhetoric around corporate social responsibility evolves every day that more consumers trust corporations in ways that exceed their trust in the media and government, and every day that corporations are pushed to be “proactive[]” with social policy, as opposed to reactive.⁹⁵ Socially conscious consumers assert that they will be putting their money where their mouths are. This type of spending can influence how companies operate: many depend on clients who purchase according to the principle that one should buy only from companies that do good.⁹⁶

How will the inability to get an abortion affect whether women and gender-marginalized people will be able to find jobs? The unspoken pregnancy question has always existed: “Will this person get pregnant, thereby inconveniencing me and prompting a need to reshuffle?” But now it becomes an omnipresent threat: “Even if this person doesn’t seem to be planning to conceive, they could become pregnant by sheer virtue of having a uterus.” Due to social pressures, business benefits, and antidiscrimination law, companies cannot afford not to provide an abundance of reproductive health care options. But as a society, the United States cannot afford to rely primarily on corporate action as a solution for workers.

3. *Antichoice Legislators at Loggerheads with Big Business.* — These corporate allocations have prompted a strong reaction from anti-choice legislators. Fourteen state-level Texas lawmakers sent a letter to Lyft in May 2022 in response to their abortion-travel policy: “The state of Texas will take swift and decisive action if you do not immediately rescind your recently announced policy to pay for the travel expenses of

⁹³ *What Is Environmental, Social, and Governance (ESG) Investing?*, INVESTOPEDIA (Sept. 27, 2022), <https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp> [<https://perma.cc/UE7T-YY4N>].

⁹⁴ Erin Mulvaney, *Shareholder Activism Emerging as New Path to Abortion Rights* (1), BLOOMBERG L. (May 5, 2022, 4:45 PM), <https://news.bloomberglaw.com/us-law-week/shareholder-activism-emerging-as-path-to-protect-abortion-rights> [<https://perma.cc/8624-DSUZ>].

⁹⁵ Hongwei He, *Brand Activism: Why It's No Longer Sufficient for Businesses to Remain Reactive to Societal Issues*, FORBES (Feb. 9, 2022, 4:42 PM), <https://www.forbes.com/sites/alliancembs/2022/02/09/brand-activism-why-its-no-longer-sufficient-for-businesses-to-remain-reactive-to-societal-issues> [<https://perma.cc/AV2W-A253>].

⁹⁶ See Matthew Tilley, *The Increasingly Socially Conscious Consumer*, VERICAST, <https://www.vericast.com/insights/blog/the-increasingly-socially-conscious-consumer> [<https://perma.cc/QXE3-C7GJ>] (“Consumers expect authentic social and corporate responsibility from brands . . . [and are part of a culture that] demand[s] change on long-standing issues including diversity . . .”). Note that those who can afford to allocate their spending this way are often wealthier consumers, which increases the significance of retaining their patronage as morally driven clients.

women who abort their unborn children.”⁹⁷ The letter details potential mechanisms to punish corporate abortion-travel policies, including: (1) permitting Texan shareholders to sue executives of publicly traded companies that pay for abortion care and (2) allowing county district attorneys to pursue charges for abortion “crimes” anywhere in the state.⁹⁸

Federal antiabortion legislators are aiming to prevent existing corporate benefits from extending to pro-choice ESG policies. On May 3, 2022, following the actions of several companies in response to the leak of the *Dobbs* opinion, Senator Marco Rubio introduced a bill called the No Tax Breaks for Radical Corporate Activism Act.⁹⁹ The bill would amend the tax code provisions on deductible employee travel¹⁰⁰ to prohibit employers from deducting expenses related to their employees’ abortion-travel costs (and costs of employees’ families’ gender-affirming care).¹⁰¹

4. *Anticontraception Corporations: Forced Pregnancy Is Bad for Business — But Some Businesses Do Not Mind.* — Abortion care and funding is a new frontier for corporations. However, the ACA insurance mandate for contraceptive coverage has long been contested — largely by companies who wish to eliminate it. In 2014, the Court held in *Burwell v. Hobby Lobby Stores, Inc.*¹⁰² that for-profit corporations did not have to provide plans that included contraception if they contradicted employers’ religious beliefs (this exemption already existed for religious organizations and nonprofits).¹⁰³ Several companies at that time openly announced that they did not wish to provide birth control.¹⁰⁴ The government continues to address this issue in the administration of insurers’ plans. The ACA mandate has been the bulwark against this particular encroachment on workers’ rights to health

⁹⁷ Zach Despart, *Businesses that Help Employees Get Abortions Could Be Next Target of Texas Lawmakers if Roe v. Wade Is Overturned*, TEX. TRIB. (May 23, 2022, 6:00 AM), <https://www.texastribune.org/2022/05/23/texas-companies-pay-abortions> [https://perma.cc/ACH4-JPD6] (quoting Letter from Briscoe Cain et al., Tex. State Reps., to Logan Green, CEO, Lyft (May 6, 2022), <https://briscoecain.com/wp-content/uploads/2022/05/Briscoe-Cain-Lyft-Letter-With-Signatures-5.5.2022.pdf> [https://perma.cc/4GJ9-P3DQ]).

⁹⁸ *Id.*

⁹⁹ No Tax Breaks for Radical Corporate Activism Act, S. 4131, 117th Cong. (2022).

¹⁰⁰ *Id.* § 162.

¹⁰¹ See Press Release, Sen. Marco Rubio, Rubio Introduces Bill to Remove Tax Breaks for Woke Corporations (May 4, 2022). The bill was written with specific attention to policies like Amazon’s and Disney’s. It was republicized and discussed in June following the *Dobbs* decision. See Press Release, Sen. Marco Rubio, ICYMI: Rubio Introduces Bill to Remove Tax Breaks for Woke Corporations (June 27, 2022).

¹⁰² 573 U.S. 682 (2014).

¹⁰³ *Id.* at 690–91.

¹⁰⁴ Miriam Berg, *The 82 Employers Who Want to Deny Birth Control Coverage*, PLANNED PARENTHOOD (July 8, 2014, 3:32 PM), <https://www.plannedparenthoodaction.org/blog/82-employers-who-want-deny-birth-control-coverage> [https://perma.cc/2GKU-NZCU].

care, protecting the structure of these plans themselves by insisting that contraception be a part of covered goods.¹⁰⁵

Post-*Dobbs*, the Biden Administration's Secretaries of the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury prioritized protecting access to contraception as part of the ACA mandate.¹⁰⁶ Their joint statement asserted that contraception was essential health care and warned insurers against noncompliance.¹⁰⁷ These explicit directions to insurers help to protect against potential protestations of uncertainty. Keeping protections of health services clear and widely encompassing is the necessary work of the state.

5. *Corporate Care Packages Are Not the Answer.* — The simultaneous burgeoning corporate threat to contraception and pledging of abortion-related travel funding illustrate the variegation of help and options in the world of employers and insurers. Access to abortion should not depend on which corporation someone works for. Americans cannot rely on corporations to do the work of providing workarounds and options for reproductive care.¹⁰⁸

Corporations have multiple competing incentives in these situations. Social pressure to provide abortion operates only on a subset of employers. Some employers are explicitly antichoice.¹⁰⁹ Within businesses that do provide benefits, the benefits are not distributed equally. Marginalized, low-income groups are more likely to lack access (or face challenges taking advantage of benefits even if offered).¹¹⁰ Some

¹⁰⁵ See Daniel Wiessner, *U.S. Says Insurers Must Still Cover Birth Control After Supreme Court Abortion Ruling*, REUTERS (July 28, 2022, 7:55 PM), <https://www.reuters.com/business/healthcare-pharmaceuticals/us-says-insurers-must-still-cover-birth-control-after-supreme-court-abortion-2022-07-28> [https://perma.cc/KYU2-NNTA].

¹⁰⁶ See Press Release, U.S. Dep't of Health & Hum. Servs., HHS, DOL, and Treasury Issue Guidance Regarding Birth Control Coverage (July 28, 2022).

¹⁰⁷ See Shira Stein, *Insurers Pressed on Contraceptive Coverage After Roe's Demise*, BLOOMBERG L. (June 27, 2022, 3:02 PM), <https://news.bloomberglaw.com/health-law-and-business/insurers-pressed-on-contraceptive-coverage-after-roes-demise> [https://perma.cc/2TQ7-54LN].

¹⁰⁸ There are fundamental limitations to corporate action. In the broader scope of health care, where almost half of Americans get their general health insurance from their employer, the ACA had a strong salutary effect, illustrating how state action can provide broad relief in a way that employer action cannot. See SHERRY GLIED ET AL., COMMONWEALTH FUND, EFFECT OF THE AFFORDABLE CARE ACT ON HEALTH CARE ACCESS 4 (2017), <https://www.commonwealthfund.org/publications/issue-briefs/2017/may/effect-affordable-care-act-health-care-access> [https://perma.cc/CT9C-GZJT]. It bears further consideration that an abortion "benefit" may create tax consequences for the employee, which only the state can alleviate directly. See Jeff Green, *Women Are at Risk of Being Taxed on US Abortion Travel Benefits*, BLOOMBERG L. (July 29, 2022, 5:30 PM), <https://www.bloomberg.com/news/articles/2022-07-29/the-tax-man-cometh-for-americans-seeking-abortion-travel-benefits> [https://perma.cc/BR2C-MX3Z].

¹⁰⁹ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

¹¹⁰ See Meghan McCarty Carino, *Abortion Travel Benefit Unlikely to Reach Many Low-Wage Workers*, MARKETPLACE (June 27, 2022), <https://www.marketplace.org/2022/06/27/abortion->

employers may view this decision largely in economic terms (for example, as weighing the risk of employee departures and consumer losses against the litigation risk of providing abortion benefits), and that calculus can change,¹¹¹ especially with recent antichoice laws that mobilize citizen vigilantes.¹¹²

The state, by contrast, is perceived to be driven by a more singular set of incentives: to protect individuals citizens' bodies, rights, and property. At the state level, protecting rights to sexual and reproductive care can be achieved with referenda and state constitutional amendments and protections. At the federal level, such protections come from federal legislation and agency enforcement.

C. *The Necessity of State Protections and Rights*

Government-provided protections begin with the overarching question of *access*. A state or federal government *ensuring* broad access to reproductive care is the quickest and most direct path to a more level playing field in the context of employment. In the immediate aftermath of *Dobbs*, ballot referenda and state constitutional amendments are the main prospects for this development.¹¹³ Since the imperfect *Roe* decision, federal constitutional arguments have been raised to suggest that Equal Protection or the Thirteenth Amendment could serve as more capacious bases for reproductive rights;¹¹⁴ however, these positions are

travel-benefit-unlikely-to-reach-many-low-wage-workers [https://perma.cc/T3TB-A94K]; Adia Harvey Wingfield, *Do Your Company's Abortion Benefits Cover Your Most Vulnerable Workers?*, HARV. BUS. REV. (July 8, 2022), https://hbr.org/2022/07/do-your-companys-abortion-benefits-cover-your-most-vulnerable-workers [https://perma.cc/F3FY-TJYT] (“[C]orporate decisions to fund workers’ travel for abortion care or to include it as a benefit . . . won’t just replicate economic inequality, but it will have gendered and racial consequences, too.”).

¹¹¹ See Karl Evers-Hillstrom, *Why Companies Think Paying for Abortion Travel Is Worth It*, THE HILL (June 28, 2022, 5:18 AM), https://thehill.com/business-a-lobbying/3538922-why-companies-think-paying-for-abortion-travel-is-worth-it [https://perma.cc/8QPT-3XMJ].

¹¹² Izabela Tringali & Julia Kirschenbaum, *Texas's Abortion Bans and Voter Suppression Laws Let Citizens Do “Dirty Work” of Opposing Constitution*, BRENNAN CTR. FOR JUST. (Nov. 9, 2021), https://www.brennancenter.org/our-work/analysis-opinion/texas-abortion-bans-and-voter-suppression-laws-let-citizens-do-dirty [https://perma.cc/73MT-W684].

¹¹³ See Amna Nawaz, *Abortion Rights on the Ballot in Several States This Election*, PBS (Nov. 2, 2022, 6:40 PM), https://www.pbs.org/newshour/show/abortion-rights-on-the-ballot-in-several-states-this-election [https://perma.cc/C5QL-3NSJ] (noting four states had abortion-related ballot measures following *Dobbs*); *2022 Abortion-Related Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/2022_abortion-related_ballot_measures [https://perma.cc/R67M-FNXQ] (listing six states with ballot measures addressing abortion in 2022 — California, Kansas, Kentucky, Michigan, Montana, and Vermont).

¹¹⁴ See, e.g., Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN’S RTS. L. REP. 143, 143–44 (1978); Michele Goodwin, Opinion, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html [https://perma.cc/A4HV-RTCU] (“Ending the forced sexual and reproductive servitude of Black girls and women was a critical part of the passage of the 13th and 14th Amendments. . . . Mandated,

out of vogue given the current direction of a virulently antichoice Supreme Court¹¹⁵ and federal judiciary.¹¹⁶

I. Lessons from the Road: The Evolution of Anti-Gender Discrimination Employment Law. — As abortion access and gender equity are inextricably linked, the evolution of anti-gender discrimination employment law can offer helpful insights for understanding the future of reproductive justice. It takes multiple courses of legislation, litigation, and administrative enforcement for workforce participation to meaningfully improve. A multipronged, state-led campaign inevitably impacts governance at the individual employer level. In contrast, an employer taking individual steps to secure their workforce can deleteriously absolve the state of its vital role in taking protective action.

Employment antidiscrimination laws for women became a cause célèbre in part because of the work of the late Justice Ginsburg.¹¹⁷ Antidiscrimination opinions have not, however, been limited to the Court's "liberal" Justices. When the *Bostock v. Clayton County*¹¹⁸ opinion, authored by Justice Gorsuch and holding that Title VII prohibits employment discrimination based on sexual orientation or gender identity,¹¹⁹ hit the news, antidiscrimination law suddenly came under public (and nonlegal) scrutiny, garnering attention beyond the advocacy organizations that had been waging the fight for decades.¹²⁰ Though some scholars raised concerns about how nonbinary, gender-nonconforming, and bisexual folks, as well as other gender or sexual minorities, were cut out of the conversation,¹²¹ many communities celebrated the opinion as a step in the right direction. Preceding recent antidiscrimination fervor

forced or compulsory pregnancy contravenes enumerated rights in the Constitution, namely the 13th Amendment's prohibition against involuntary servitude and protection of bodily autonomy, as well as the 14th Amendment's defense of privacy and freedom."); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 483–84 (1990).

¹¹⁵ See Adam Liptak, *In 6-to-3 Ruling, Supreme Court Ends Nearly 50 Years of Abortion Rights*, N.Y. TIMES (Nov. 2, 2022), <https://www.nytimes.com/2022/06/24/us/roe-wade-overturned-supreme-court.html> [https://perma.cc/ES3V-YMUP].

¹¹⁶ See 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> [https://perma.cc/22A6-VMR8] (noting that President Trump appointed a large number of federal appeals court judges, thus increasing the share of conservative — and therefore likely antichoice — federal judges).

¹¹⁷ See *supra* notes 74–76 and accompanying text.

¹¹⁸ 140 S. Ct. 1731 (2020).

¹¹⁹ *Id.* at 1754.

¹²⁰ See, e.g., *Employment*, GLBTQ LEGAL ADVOCES. & DEFS., <https://www.glad.org/issues/employment> [https://perma.cc/T2SX-SPFR].

¹²¹ See Meredith Rolfs Severtson, *Let's Talk About Gender: Nonbinary Title VII Plaintiffs Post-Bostock*, 74 VAND. L. REV. 1507, 1508–09 (2021); A. Russell, Note, *Bostock v. Clayton County: The Implications of a Binary Bias*, 106 CORNELL L. REV. 1601, 1602–03 (2021).

came Myra Bradwell's fight for her right to be a lawyer,¹²² Pauli Murray's intersectional claims on the rights of people of color and women to freely seek and find work,¹²³ and Justice Ginsburg's benefits cases on behalf of men,¹²⁴ which established women's rights to be breadwinners and economically whole.¹²⁵ There are a number of antidiscrimination laws that built a rickety infrastructure for defending narrow causes rooted in gender and/or the capacity to get pregnant.¹²⁶ The Fair Labor Standards Act of 1938 set a minimum wage;¹²⁷ as more women work minimum wage jobs than men,¹²⁸ every increase in the minimum wage¹²⁹ has a gendered effect. While the Equal Pay Act of 1963 illegalized explicit pay differences on the basis of sex,¹³⁰ the dramatic pay gap persists.¹³¹ Title VII of the Civil Rights Act of 1964 is likely the most central of the statutory protections for women in the workplace and has been read to include proscriptions on discrimination regarding gender stereotyping and gay and lesbian relationships.¹³² The Family and Medical Leave Act and the PDA are often considered the most central to reproductive freedoms in the workplace, perhaps simply because the names call to mind the capacity to get pregnant. In practice, the ACA¹³³ and ADA¹³⁴ also do immense work to protect those freedoms on a broader scale. All these laws encourage corporations to, where possible, continue to hire and retain gender-diverse workers (including cis women and gender minorities). The upshot is that a broad legislative package with specific enforcement mechanisms is key to protecting reproductive rights. Following Title VII, between 1966 and 2013, women's workforce

¹²² See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872); *In Re Lady Lawyers: The Rise of Women Attorneys and the Supreme Court*, SUP. CT. U.S., <https://www.supremecourt.gov/visiting/exhibitions/LadyLawyers/section1.aspx> [<https://perma.cc/4DNB-EC8B>].

¹²³ See Brief for Appellant at 14–15, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 430) (brief written by Pauli Murray). See generally STATES' LAWS ON RACE AND COLOR (Pauli Murray ed., 1997).

¹²⁴ See generally GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK* (1st ed. 2016).

¹²⁵ See *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975).

¹²⁶ See generally TOM SPIGGLE, *YOU'RE PREGNANT? YOU'RE FIRED! PROTECTING MOTHERS, FATHERS, AND OTHER CAREGIVERS IN THE WORKPLACE* (2014).

¹²⁷ 29 U.S.C. § 206.

¹²⁸ Jens Manuel Krogstad, *More Women than Men Earn the Federal Minimum Wage*, PEW RSCH. CTR. (May 5, 2014), <https://www.pewresearch.org/fact-tank/2014/05/05/more-women-than-men-earn-the-federal-minimum-wage> [<https://perma.cc/496T-TTKZ>].

¹²⁹ See generally *Minimum Wage Tracker*, ECON. POL'Y INST., <https://www.epi.org/minimum-wage-tracker> [<https://perma.cc/WRF2-LM9S>] (listing real-time state minimum wages).

¹³⁰ 29 U.S.C. § 206(d).

¹³¹ Carolina Aragão, *Gender Pay Gap in U.S. Hasn't Changed Much in Two Decades*, PEW RSCH. CTR. (Mar. 1, 2023), <https://www.pewresearch.org/fact-tank/2023/03/01/gender-pay-gap-facts> [<https://perma.cc/FGR3-726F>].

¹³² *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

¹³³ See 29 U.S.C. § 207(r); 42 U.S.C. § 300gg-13 (including breastfeeding care and a malleable contraception mandate).

¹³⁴ 42 U.S.C. §§ 12101–12213 (including policies for leave, maternal injury, and others).

participation rate increased from 31.5% to 48.7%.¹³⁵ These results are primarily because Title VII was not toothless — Congress encouraged regular and effective action on discrimination claims by creating the robustly funded Equal Employment Opportunity Commission (EEOC) “to enforce Title VII and eliminate unlawful employment discrimination.”¹³⁶ Without the EEOC, even tracking these indicators of minority participation in the workforce would be infeasible.¹³⁷

2. *Solutions on the Table: Rights-Protective Direct Democracy Could Offer Workers Necessary Reproductive Justice.* — Though gerrymandering and voter suppression preempt many promises of democratic recourse for reproductive rights through the traditional voter mechanisms,¹³⁸ the 2022 midterm elections evinced mass political support for reproductive rights. Following a rights-supportive Kansas referendum in August 2022, five states introduced ballot measures designed to enshrine reproductive protections in their state constitutions or to definitively restrict abortion rights. Those protecting reproductive rights passed; those that were devised to restrict those rights were struck down.

The process of leveraging ballot measures for progressive goals appeared to reinvigorate the popular voice at a time when representative democracy was faltering. Historically, legal scholars have argued that ballot measures are underscrutinized by courts and that this form of direct democracy can result in the suppression of political speech and an imbalance in electoral outcomes in particular cases.¹³⁹ In the homophobic social climate of 1974–2012, anti-gay ballot measures regularly resulted in anti-gay outcomes at the ballot box.¹⁴⁰ The homophobic “tyranny of the majority” that advocates identified in these measures resounded through the LGBTQ+ community and left lasting negative psychological effects on individuals (even when anti-gay measures failed).¹⁴¹ Indeed, as Professor Barbara Gamble writes, the question that “persistently haunts the use of direct democracy” is majoritarian tyranny.¹⁴² Historians have pointed out that civil rights initiatives are

¹³⁵ *Women in the American Workforce*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/special-report/women-american-workforce> [<https://perma.cc/9V6R-BNQZ>].

¹³⁶ *Timeline of Important EEOC Events*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/youth/timeline-important-eeoc-events> [<https://perma.cc/5D8Q-EWD2>].

¹³⁷ For an example of the in-depth workforce data collection and analysis performed by the EEOC, see *Indicators (2013) with a Look at EEO-1 Data for the 50th Anniversary*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/data/indicators-2013-with-look-eeo-1-data-50th-anniversary> [<https://perma.cc/QLK7-QZKQ>].

¹³⁸ See generally Siegel, *supra* note 62.

¹³⁹ See J. Michael Connolly, Note, *Loading the Dice in Direct Democracy: The Constitutionality of Content- and Viewpoint-Based Regulations of Ballot Initiatives*, 64 N.Y.U. ANN. SURV. AM. L. 129, 144–51 (2008).

¹⁴⁰ See Amy L. Stone, *Rethinking the Tyranny of the Majority: The Extra-Legal Consequences of Anti-gay Ballot Measures*, 19 CHAP. L. REV. 219, 220 (2016).

¹⁴¹ See, e.g., *id.*

¹⁴² Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 245 (1997).

often profoundly vulnerable at the ballot box,¹⁴³ but 2022 evinced something unique and high unprecedented in the realm of direct democracy.

On August 2, 2022, Kansas — the first state to vote on the right to abortion since the Court’s overturning of *Roe* on June 24, 2022 — became the first win for abortion rights at the ballot box.¹⁴⁴ The ballot asked voters whether to remove state constitutional protections for abortion¹⁴⁵ — a provision upheld by the Kansas Supreme Court in 2019.¹⁴⁶ In the end, voters refused to remove the protections.¹⁴⁷

Amidst interjurisdictional challenges¹⁴⁸ and the threat of criminalization,¹⁴⁹ the Kansas referendum was the beginning of a wave of pro-choice referenda votes in Montana, Kentucky, Michigan, California, and Vermont in November 2022. In Montana, voters rejected LR-131, an abortion measure that would have imposed criminal penalties on health care providers.¹⁵⁰ If adopted, the measure would have required doctors to treat any fetus that presented breath or muscle movement after being extracted, including as part of an abortion procedure.¹⁵¹ Health care providers feared this would “compel [them] to intervene in futile and tragic circumstances, taking a dying infant away from their parents . . . in their final moments of life.”¹⁵² A violation would constitute a felony with a sentence of up to twenty years in state prison or a fine of up to \$50,000.¹⁵³ Crucial to the rejection of the referendum was the Montanan medical community — physicians, nurses, and community

¹⁴³ *Id.* at 248.

¹⁴⁴ Dylan Lysen et al., *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022, 2:18 AM), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment> [<https://perma.cc/96XG-M4U7>].

¹⁴⁵ Alvin Chang, *Why the Language on the Kansas Abortion Ballot Is So Confusing*, THE GUARDIAN (Aug. 2, 2022, 6:00 AM), <https://www.theguardian.com/us-news/ng-interactive/2022/aug/02/kansas-abortion-ballot-language> [<https://perma.cc/QFR7-4WWT>].

¹⁴⁶ *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 502 (Kan. 2019).

¹⁴⁷ Lysen et al., *supra* note 144.

¹⁴⁸ See David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023) (manuscript at 17–33), <https://ssrn.com/abstract=4032931> [<https://perma.cc/D5UL-Q84B>].

¹⁴⁹ See Madiba Dennie & Jackie Fielding, *Miscarriage of Justice: The Danger of Laws Criminalizing Pregnancy Outcomes*, BRENNAN CTR. FOR JUST. (Nov. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/miscarriage-justice-danger-laws-criminalizing-pregnancy-outcomes> [<https://perma.cc/8DUW-S2ZM>].

¹⁵⁰ *Montana Voters Reject Anti-Abortion Ballot Initiative*, CTR. FOR REPRODUCTIVE RTS. (Nov. 10, 2022), <https://reproductiverights.org/montana-voters-reject-anti-abortion-ballot-initiative> [<https://perma.cc/RV7G-TQDX>].

¹⁵¹ H.B. 167, 67th Leg., Reg. Sess. §§ 3–4 (Mont. 2022).

¹⁵² Mara Silvers, *How Montana’s LR-131 “Born-Alive” Referendum Failed*, NBC MONT. (Nov. 16, 2022), <https://nbcmontana.com/news/local/how-montanas-lr-131-born-alive-referendum-failed> [<https://perma.cc/393A-F5DU>].

¹⁵³ Mont. H.B. 167 § 5.

health workers — who helped to dispel misconceptions about “medically inaccurate and misguided legislation.”¹⁵⁴

In Kentucky, voters rejected Amendment 2 to the state constitution, a proposal that would have constitutionalized an antiabortion state politic.¹⁵⁵ The amendment proposed: “To protect human life, nothing in this Constitution shall be construed to secure or protect a right to abortion or require the funding of abortion.”¹⁵⁶ Kentucky already has a law banning most abortions at any stage of pregnancy,¹⁵⁷ as well as another law that bans any abortion after six weeks of pregnancy.¹⁵⁸ Both have been challenged in lawsuits but have been authorized as enforceable in the interim.¹⁵⁹ In a state with extreme restrictions, the amendment’s rejection stemmed the tide of further constrictive bans; it demonstrated popular will for ongoing engagement in the battle for reproductive rights.

In Michigan, voters passed Proposal 3, enshrining abortion rights at the constitutional level.¹⁶⁰ Article 1, section 28 of the Michigan Constitution now establishes, among other things, an individual’s right to “reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy.”¹⁶¹ The amendment will also prevent an obsolete 1931 abortion ban that criminalizes abortion without exceptions for rape or incest from going into effect.¹⁶²

¹⁵⁴ Denali Sagner, *Montanans Reject “Born-Alive” Measure Despite Broad Wins for Republicans*, FLATHEAD BEACON (Nov. 10, 2022), <https://flatheadbeacon.com/2022/11/10/montanans-reject-born-alive-measure-despite-broad-wins-for-republicans> [https://perma.cc/LLA5-KA8C]; see also *Montana State Abortion Ballot Initiative*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/advocacy/abortion-is-essential/advocate-in-your-state/ballot-initiatives/montana-lr-131> [https://perma.cc/3EE9-ZE6V].

¹⁵⁵ See Deborah Yetter, *Kentucky Voters Reject Amendment that Would Have Ended Right to an Abortion. What It Means for the Deep-Red State*, USA TODAY (Nov. 11, 2022, 9:03 AM), <https://www.usatoday.com/story/news/politics/elections/2022/11/09/midterm-election-2022-abortion-kentucky-amendment-2/8315146001> [https://perma.cc/S6XM-V6X7].

¹⁵⁶ H.B. 91, 2021 Leg., Reg. Sess. (Ky. 2021).

¹⁵⁷ KY. REV. STAT. ANN. § 311.772 (West 2019); see Bruce Schreiner & Beth Campbell, *Kentucky Voters Reject Constitutional Amendment on Abortion*, PBS (Nov. 9, 2022, 9:13 AM), <https://www.pbs.org/newshour/politics/kentucky-voters-reject-constitutional-amendment-on-abortion> [https://perma.cc/MZJ2-M8DD].

¹⁵⁸ See KY. REV. STAT. ANN. §§ 311.7701–7711 (West 2019) (banning abortions after a fetal heartbeat is detectable, which generally occurs around six weeks of gestation).

¹⁵⁹ Deborah Yetter, *Abortion Remains Banned in Kentucky While Supreme Court Reviews Disputes in Case*, COURIER J. (Aug. 18, 2022, 5:11 PM), <https://www.courier-journal.com/story/news/politics/2022/08/18/kentucky-abortion-ban-supreme-court-not-lifting-ban/65391842007> [https://perma.cc/SX7W-6ZXP].

¹⁶⁰ Ben Orner & Taylor DesOrmeau, *Proposal 3 Passes, Etching Abortion Rights into Michigan Constitution*, MLIVE (Nov. 10, 2022, 10:36 AM), <https://www.mlive.com/politics/2022/11/proposal-3-passes-etching-abortion-rights-into-michigan-constitution.html> [https://perma.cc/4JF2-KELD].

¹⁶¹ MICH. CONST. art. 1, § 28; see Abigail Abrams, *Michigan Is Fighting One of the Most Significant Abortion Battles in the Country*, TIME (Nov. 18, 2022, 3:50 PM), <https://time.com/6223955/michigan-abortion-ballot-initiative> [https://perma.cc/5T53-WPN5].

¹⁶² Alice Miranda Ollstein, *Michigan Votes to Put Abortion Rights into State Constitution*, POLITICO (Nov. 9, 2022, 3:43 AM), <https://www.politico.com/news/2022/11/09/michigan-abortion-amendment-results-2022-0064778> [https://perma.cc/Z8VX-KGWD].

Abortion advocates had been planning for this fight for years before *Roe* was overturned.¹⁶³ The geographic centrality of Michigan made this fight even more essential. The state is surrounded by Wisconsin, Ohio, and Indiana; Michigan providers are often the default abortion providers for patients in those states who cannot receive care in those states. Organizers submitted over 750,000 signatures — over 300,000 more than the necessary 425,000 — to put Proposal 3 on the ballot.¹⁶⁴ The success of such ballot initiatives¹⁶⁵ preserved a measure of voter control over reproductive policy, upholding a rights-based status quo.

During the 2022 midterms, California voters passed Proposition 1, which enshrined abortion rights in the state constitution.¹⁶⁶ While other states contend with looming closures of last clinics¹⁶⁷ or “pill fairies” crossing the border,¹⁶⁸ a broader reproductive justice framework might be a workable experiment in states where the popular voices of voters and legislators are as impassioned as those in California appear to be.

Voters in Vermont’s midterms passed Proposal 5, which amended the constitution to protect rights to pregnancy, abortion, and birth control.¹⁶⁹ The adopted amendment, article 22, reflects concern for the needs of people who can become pregnant.¹⁷⁰ The Vermont legislature first proposed this liberty-protective amendment in 2019,¹⁷¹ years before *Dobbs*, seeing the end of *Roe* on the horizon.

¹⁶³ Alice Miranda Ollstein, *Michigan Activists Submit Signatures to Put Abortion Rights on the Ballot in November*, POLITICO (July 11, 2022, 8:22 AM), <https://www.politico.com/news/2022/07/11/michigan-abortion-rights-voting-00044823> [<https://perma.cc/T84K-EZN3>].

¹⁶⁴ *Id.*

¹⁶⁵ See Rachel M. Cohen, *How Abortion Rights Advocates Won Every Ballot Measure This Year*, VOX (Nov. 9, 2022, 1:58 AM), <https://www.vox.com/policy-and-politics/23451074/abortion-ballot-measure-midterms-kentucky-montana-michigan> [<https://perma.cc/TMN2-VWXH>].

¹⁶⁶ Victoria Colliver, *California Voters Guarantee Abortion Rights in State Constitution*, POLITICO (Nov. 9, 2022, 1:58 AM), <https://www.politico.com/news/2022/11/09/california-abortion-rights-state-constitution-00065820> [<https://perma.cc/ST7L-3FL2>]. The inclusion of contraceptives in Proposition 1, *id.*, orients the amendment toward a broader concept of reproductive justice that unifies the right to choose an abortion with the rights to bodily autonomy, to parent, and to raise children in safe and sustainable communities. For background on this conception of reproductive justice, see generally *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice> [<https://perma.cc/WJ62-V2QT>].

¹⁶⁷ See Marielle Kirstein et al., *One Month Post-Roe: At Least 43 Abortion Clinics Across 11 States Have Stopped Offering Abortion Care*, GUTTMACHER INST. (July 28, 2022), <https://www.guttmacher.org/article/2022/07/one-month-post-roe-least-43-abortion-clinics-across-11-states-have-stopped-offering> [<https://perma.cc/7FQL-DP2P>].

¹⁶⁸ The New Yorker Radio Hour, *The New Abortion Underground*, NEW YORKER (Oct. 14, 2022), <https://www.newyorker.com/podcast/the-new-yorker-radio-hour/the-new-abortion-underground> [<https://perma.cc/E64V-E9ZJ>].

¹⁶⁹ Lola Duffort, *Vermont Becomes the 1st State to Enshrine Abortion Rights in Its Constitution*, VTDIGGER (Nov. 8, 2022), <https://vtdigger.org/2022/11/08/measure-to-enshrine-abortion-rights-in-vermont-constitution-poised-to-pass> [<https://perma.cc/V3QW-WGKZ>].

¹⁷⁰ See VT. CONST. ch. 1, art. 22.

¹⁷¹ Michelle Lou, *Vermont Lawmakers Are Trying to Pass a Constitutional Amendment to Protect the Right to an Abortion*, CNN (May 13, 2019, 4:21 PM), <https://edition.cnn.com/2019/05/09/us/vermont-reproductive-liberty-constitution-amendment-trnd> [<https://perma.cc/3BJE-6N53>].

In some ways, the evolution of these victories through direct democracy is a confounding phenomenon. In the last few decades of the twentieth century, voters approved over seventy-five percent of citizen initiatives that restricted civil rights in housing and public accommodations for racial minorities, school desegregation, gay rights, English-language laws, and AIDS policies.¹⁷² Considering only about thirty percent of all initiatives and popular referenda pass overall, this rate is shockingly high.¹⁷³ For years, critical race theorists had expressed concerns about the danger of direct democracy for minority rights. Professor Derrick Bell wrote that “direct democracy, carried out in the privacy of the voting booth, has diminished the ability of minority groups to participate in the democratic process.”¹⁷⁴ In the late 1970s, Bell noted that referenda “enable[] . . . voters’ racial beliefs and fears to be recorded and tabulated in their pure form,” facilitating “bias, discrimination, and prejudice.”¹⁷⁵ Minority rights and individual liberties are threatened by “a device that aggregates without filtering.”¹⁷⁶

The question of abortion is freighted with questions of racial, social, and class status. Voters of different social identities reacted differently to the possibility of abortion bans, perhaps because these are laws that address a marginalized population — but not one that is a numerical minority — or because the laws took the shape of revoking an existing right. In an exceptional turn of populism in this intersectional question, putting it to “the people” offered a rare win for people of color, people living below the poverty line, and gender and sexual minorities.

At the federal level, organizers have advocated for the Pregnant Workers Fairness Act,¹⁷⁷ which passed both the House and Senate in December 2022.¹⁷⁸ Analogous state-level legislation was introduced in New York in 2012.¹⁷⁹ Thirty states and the District of Columbia have added further protections, twenty-three of which have been passed in the last decade.¹⁸⁰ However, state-level advocacy is the priority for immediate action. A newborn chimera of rights-protecting direct democracy offers vital potential solutions.

¹⁷² Gamble, *supra* note 142, at 253.

¹⁷³ *Id.* at 254.

¹⁷⁴ Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 14 (1978).

¹⁷⁵ *Id.* at 14–15.

¹⁷⁶ Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1586 (1990).

¹⁷⁷ H.R. 1065, 117th Cong. (2021).

¹⁷⁸ Kim Elssesser, *Senate Passes Two Bills for Pregnant and Breastfeeding Moms at Work*, FORBES (Dec. 22, 2022, 11:33 PM), <https://www.forbes.com/sites/kimelsesser/2022/12/22/senate-passes-two-bills-for-pregnant-and-breastfeeding-moms-at-work> [<https://perma.cc/AH49-H75F>].

¹⁷⁹ See Dina Bakst, Opinion, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES (Jan. 30, 2012), <https://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html> [<https://perma.cc/L36H-NLL2>].

¹⁸⁰ NAT'L WOMEN'S L. CTR., PREGNANCY ACCOMMODATIONS IN THE STATES 1 (2021), <https://nwlc.org/resource/pregnancy-accommodations-states> [<https://perma.cc/T3CM-ZJHZ>].

Conclusion

For the sake of a well-functioning society that includes people of all genders and reproductive capacities, the United States must force courts and legislatures to face litigation and policy proposals that challenge the most restrictive or criminalizing provisions aimed at reproductive justice workers. The linkages between various segments of the working population who are able to get pregnant align with the concerns of people marginalized by race, gender, and other identity factors as they seek economic opportunities. If state action is deficient, the image of the situation unfolding is bleak: Lawyers with binders of ever-changing laws attempt research at the same time as doctors hesitate to treat a hemorrhaging patient. Criminal punishments for reproductive care apply not just to providers, but also to pregnant people¹⁸¹ and those who assist them.¹⁸² Prosecutions and complaints come from both the state and private citizens.¹⁸³ Advocates must fight for protections that are broader than the punishments newly available under a contemporary legal regime shaped by *Dobbs*.

¹⁸¹ See generally MICHELE GOODWIN, *POLICING THE WOMB* (2020).

¹⁸² See MARY ZIEGLER, *PERSONHOOD: THE NEW AMERICAN WAR OVER REPRODUCTION* (forthcoming) (manuscript at 43–108) (on file with the Harvard Law School Library).

¹⁸³ Legal regimes that derive private-cause-of-action structures from the example set by Texas's S.B. 8 are cropping up in many states; Oklahoma followed suit just before *Dobbs* went into effect. See Jordan Smith, *Oklahoma's Total Abortion Ban Will Mean Surveillance, Criminalization, and Chaos*, *THE INTERCEPT* (May 20, 2022, 12:15 PM), <https://theintercept.com/2022/05/20/oklahoma-abortion-ban-surveillance-criminalization> [<https://perma.cc/HX6X-FCTQ>].