

INTRODUCTION

Yeniifer Alvarez arrived in the United States from San Luis Potosí, Mexico, in 1998, when she was three years old.¹ Her family settled in Luling, Texas, about fifty miles south of Austin.² After her father was deported, her mother, Leticia, took on two jobs and Yeni, the eldest child, became “the nerve center of her extended-family operation”: Yeni helped raise her three siblings, one of whom was diagnosed with autism; she managed the family’s finances and helped a cousin file for disability benefits; she even kept her family up to date when politicians railed against undocumented immigrants.³

In December 2021, one month after she married, Yeni “announced with joy that she was pregnant.”⁴ That same month, the Supreme Court allowed the enforcement of the Texas Heartbeat Act,⁵ or S.B. 8, a private attorney general-style law allowing any person who is not a public official “to sue, for at least \$10,000 in damages, anyone who performs, induces, assists, or even intends to assist an abortion in violation of Texas’[s] [then-]unconstitutional 6-week ban.”⁶ The Court did this despite the fact that the law had “the effect of denying the exercise of what [the Supreme Court had] held is a right protected under the Federal Constitution.”⁷ After S.B. 8’s enactment, Luling’s only general hospital saw a surge in women giving birth in the emergency room (ER), many with “more varied and complex conditions” than before, leading the hospital into “uncontrolled chaos.”⁸ Uninsured, Yeni came to rely on the Luling ER for regular medical treatment, and the staff became familiar with her medical conditions — Yeni suffered from hypertension, diabetes, and obesity, and was hospitalized with pulmonary edema after a COVID-19 wave in Luling.⁹ Taken together, “when Yeni became pregnant she was a high-risk patient.”¹⁰

Less than two months into her pregnancy, Yeni began to have trouble breathing and experienced bleeding.¹¹ Though an ER ultrasound “showed normal fetal growth,” her blood pressure spiked to worrisome

¹ Stephania Taladrid, *Did an Abortion Ban Cost a Young Texas Woman Her Life?*, NEW YORKER (Jan. 8, 2024), <https://www.newyorker.com/magazine/2024/01/15/abortion-high-risk-pregnancy-yeni-glick> [https://perma.cc/5ZNW-ZX5W].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Texas Heartbeat Act, 2021 Tex. Gen. Laws ch. 62 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2023)).

⁶ *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 546 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part) (citing TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)).

⁷ *Id.* at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

⁸ Taladrid, *supra* note 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

levels.¹² For a patient with risk factors like Yeni’s who becomes sick early in the pregnancy, a medical professional may need to consider whether the patient will be able to continue the pregnancy safely — as one maternal health specialist put it, “one needs to assume that as pregnancy progresses things only will get worse.”¹³

But Yeni’s medical records show that no doctor mentioned the possibility of a therapeutic abortion to her.¹⁴ Though the Catholic hospital that housed the ER might direct a patient to another facility with fewer abortion restrictions when the pregnant person’s life is at risk, “that option effectively disappeared” after S.B. 8.¹⁵ The law made an exception for abortions performed after the six-week limit due to “medical emergenc[ies],”¹⁶ but a doctor seeking to invoke it could risk a civil lawsuit for “aid[ing] or abett[ing]” an abortion after six weeks and the possibility of a minimum \$10,000 fine,¹⁷ a threat that “effectively chill[ed] the provision of abortions in Texas.”¹⁸ When Yeni saw an ob-gyn at another Catholic hospital in nearby Kyle, Texas, who warned her that her hypertension was severe enough to require hospitalization — a cost she

¹² *Id.*

¹³ *Id.* (quoting Dr. Uri Elkayam).

¹⁴ *Id.*

¹⁵ *Id.* Even before S.B. 8, the abortion policies of Catholic hospitals had put the health of women and other pregnant people at risk. See, e.g., Molly Redden, *Abortion Ban Linked to Dangerous Miscarriages at Catholic Hospital, Report Claims*, THE GUARDIAN (Sept. 20, 2017, 2:31 PM), <https://www.theguardian.com/us-news/2016/feb/18/michigan-catholic-hospital-women-miscarriage-abortion-mercy-health-partners> [<https://perma.cc/X3E5-7JQ4>]. About one in seven hospital beds across the country are in Catholic hospitals, so these policies have a significant impact on reproductive care in the United States. Frances Stead Sellers & Meena Venkataramanan, *Spread of Catholic Hospitals Limits Reproductive Care Across the U.S.*, WASH. POST (Oct. 10, 2022, 6:00 AM), <https://www.washingtonpost.com/health/2022/10/10/abortion-catholic-hospitals-birth-control/> [<https://perma.cc/5JPL-28W7>].

¹⁶ TEX. HEALTH & SAFETY CODE ANN. § 171.0124 (West 2023).

¹⁷ *Id.* § 171.208(b). Indeed, the medical exception to Texas’s near-total abortion ban, which went into effect in 2021, appears almost impossible to invoke: the Texas Supreme Court recently reversed a trial court order allowing Kate Cox, a woman whose fetus was diagnosed with fatal trisomy 18, to receive an abortion, stating that “[o]nly a doctor can exercise ‘reasonable medical judgment’ to decide whether a pregnant woman ‘has a life-threatening physical condition,’ making an abortion necessary to save her life or to save her from ‘a serious risk of substantial impairment of a major bodily function.’” *In re State*, No. 23-0994, slip op. at 2 (Tex. Dec. 11, 2023) (per curiam) (footnote omitted) (quoting TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(2)); see also Eleanor Klibanoff, *Kate Cox’s Case Reveals How Far Texas Intends to Go to Enforce Abortion Laws*, TEX. TRIB. (Dec. 13, 2023, 5:00 AM), <https://www.texastribune.org/2023/12/13/texas-abortion-lawsuit/> [<https://perma.cc/L6AL-YJ3Y>]. “The courts cannot go further by entering into the medical-judgment arena.” *In re State*, slip op. at 6. In other words, a medical professional must make that determination themselves — without the protection of a court order — and risk prosecution for which they could face at least five years and up to life in prison, TEX. HEALTH & SAFETY CODE ANN. § 170A.004; TEX. PENAL CODE ANN. § 12.32 (West 2023), a civil penalty of at least \$100,000, TEX. HEALTH & SAFETY CODE ANN. § 170A.005, and loss of their medical license, *id.* § 170A.007, unless a Texas jury finds their “reasonable medical judgment” defense compelling, see *id.* § 170A.002. Such a determination is especially difficult since the Texas Medical Board has yet to issue guidance on these laws, leaving doctors without clarity for over a year and a half. See Klibanoff, *supra*.

¹⁸ *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 544 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part).

could not afford — and put her “at risk of having a heart attack, a stroke, or a miscarriage,” the possibility of an abortion to alleviate the strain on her heart never came up.¹⁹ According to Dr. Lorie Harper, the director of maternal-fetal medicine at the University of Texas at Austin, S.B. 8 had made it “much harder” to “recommend an abortion in order to prevent a maternal death.”²⁰ Though ob-gyns “have two patients” — the pregnant person and their fetus — who they care for throughout the pregnancy, those practicing in Texas had their “hands tied because the patient who [they] need[ed] to save is not the one that’s protected by law.”²¹

Of course, the right to an abortion *was* protected by the Constitution at the time: *Roe v. Wade*²² held as much in 1973, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*²³ reaffirmed that right in 1992 — “precedent on precedent,” as one Justice put it.²⁴ Nonetheless, in permitting S.B. 8’s enforcement, the Supreme Court allowed that protection to be sidestepped by “some geniuses [who] came up with a way to evade the commands” of the Court’s precedent and “the even broader principle that states are not to nullify federal constitutional rights.”²⁵ What is a federal court to do when a state, in effect, takes away a constitutional right? “[N]othing at all, [said the] Court.”²⁶ Many took the decision as a sign that the Court was ready to overturn *Roe* and *Casey* entirely in *Dobbs v. Jackson Women’s Health Organization*,²⁷ which involved Mississippi’s fifteen-week abortion ban and was argued just nine days earlier.²⁸

On May 9th, when Yeni was nearly twenty-three weeks pregnant, she arrived at the ER again struggling to breathe — she had been coughing for about a month, she couldn’t walk without experiencing shortness of breath, and her blood pressure once again spiked to “dangerously high” levels.²⁹ The doctors discovered she had redeveloped pulmonary edema and ordered her transferred to a hospital in Austin.³⁰

¹⁹ Taladrid, *supra* note 1.

²⁰ *Id.* (quoting Dr. Lorie Harper).

²¹ *Id.*

²² 410 U.S. 113 (1973).

²³ 505 U.S. 833 (1992).

²⁴ *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 128 (2018) (statement of Judge Brett M. Kavanaugh).

²⁵ Transcript of Oral Argument at 57–58, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463).

²⁶ *Jackson*, 142 S. Ct. at 551 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

²⁷ 142 S. Ct. 2228 (2022).

²⁸ Seema Mohapatra, *The Supreme Court Revealed a Lack of Respect for Precedent and Women’s Health — And It Won’t Stop There*, MS. MAG. (Dec. 15, 2021), <https://msmagazine.com/2021/12/15/supreme-court-texas-mississippi-abortion-womens-health> [<https://perma.cc/2CZ3-SGK8>].

²⁹ Taladrid, *supra* note 1.

³⁰ *Id.*

On arrival, Yeni was deemed at “high risk for clinical decompensation/death” and was transferred to an intensive-care unit.³¹ In a case like Yeni’s, doctors might consider an early delivery — which carries a less-than-fifty-percent chance of survival for the child and a significant chance of severe disabilities if the baby survives — or a late-term abortion, usually performed to protect the life of the mother.³² Once her condition stabilized, however, doctors never began a discussion with her about the stress the pregnancy was placing on her body and the continuing risk it might pose to her life.³³ She was discharged after four days.³⁴

Two months later, Yeni’s condition once again worsened, this time fatally.³⁵ When paramedics arrived at her house, Yeni’s blood pressure was “perilously high” and her “oxygen levels were falling.”³⁶ She was too far along into the pregnancy to be treated in Luling and was set to be taken to a hospital in Kyle by helicopter.³⁷ But by the time the ambulance got to the Luling ER, Yeni had no pulse.³⁸ The doctors performed CPR for four minutes before trying to save her baby, but when she “came to rest on the old baby warmer, she, too, was dead.”³⁹

Yeniifer Alvarez-Estrada Glick died on July 10, 2022, just two weeks after the Supreme Court removed constitutional protection for the procedure that could have saved her life.⁴⁰

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Since Yeni’s death, many of the doctors involved in treating her have asked whether her death was attributable to Texas’s new laws limiting abortion care — whether “fear of legal repercussions [had] trumped compassionate care.”⁴¹ Four experts who reviewed Yeni’s file all found that her death was preventable and that an abortion “would probably have saved her life.”⁴² As one plainly put it: “If she weren’t pregnant, she likely wouldn’t be dead.”⁴³ Another noted that the laws interfered with informed consent — Yeni had not “been made fully aware that she might die at twenty-seven” and “how an abortion might increase her chances of survival,” “crucial medical information that [she and her

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* (quoting Dr. Joanne Stone).

family] had a right to know.”⁴⁴ Instead, the chill of Texas’s abortion restrictions led to “a very preventable maternal death.”⁴⁵

Unfortunately, Yeni’s story is not unique. Since the Supreme Court’s decision in *Dobbs* overruling the constitutional right to an abortion, twenty-one states have banned the procedure or restricted it to earlier than the standard set by *Roe*, and courts in three other states are considering the legality of recently passed abortion bans.⁴⁶ Women and others with the capacity for pregnancy in abortion-banning states across the country have been forced to carry nonviable pregnancies to term,⁴⁷ nearly died as a result of not receiving abortion care,⁴⁸ and have even been criminally charged after experiencing a miscarriage.⁴⁹ It may be some time before we understand the full effects of *Dobbs* because maternal health data — including maternal mortality rates, which are already higher in the United States than in other high-income countries and are only rising — is difficult to track in the short term.⁵⁰ But in a recent nationally representative survey of 569 ob-gyns, 68% said *Dobbs* has “worsened their ability to manage pregnancy-related emergencies,” 64% believed the ruling has increased pregnancy-related mortality, and 70% said it has exacerbated existing racial inequities in maternal health.⁵¹ In states with abortion bans, about 60% of ob-gyns report feeling less autonomy and more concern about legal risks in patient care decisions, and half say they have had patients who sought abortions but were unable to get one.⁵² According to one report, just over half of the

⁴⁴ *Id.*

⁴⁵ *Id.* (quoting Dr. Thomas Traill).

⁴⁶ Allison McCann et al., *Tracking Abortion Bans Across the Country*, N.Y. TIMES (Jan. 8, 2024, 9:30 AM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [https://perma.cc/RC55-7YGS].

⁴⁷ See, e.g., Stephanie Emma Pfeffer, *Arizona Mom Forced to Carry Non-viable Pregnancy to Term Due to Abortion Law: “She Was Alive for 44 Hours,”* PEOPLE (May 12, 2023, 1:43 PM), <https://people.com/health/arizona-mom-forced-to-carry-non-viable-baby-to-term> [https://perma.cc/AM4Z-QW75].

⁴⁸ Jacqueline Howard & Tierney Sneed, *Texas Woman Denied an Abortion Tells Senators She “Nearly Died on Their Watch,”* CNN (Apr. 26, 2023, 8:24 PM), <https://www.cnn.com/2023/04/26/health/abortion-hearing-texas-senators-amanda-zurawski/index.html> [https://perma.cc/KDP5-KWBZ].

⁴⁹ Julie Carr Smyth, *A Black Woman Was Criminally Charged After a Miscarriage. It Shows the Perils of Pregnancy Post-Roe*, AP NEWS (Dec. 16, 2023, 1:01 PM), <https://apnews.com/article/ohio-miscarriage-prosecution-brittany-watts-b8090abfb5994b8a23457b80cf3f27ce> [https://perma.cc/75SX-KKGM].

⁵⁰ Kavitha Surana, *Maternal Deaths Are Expected to Rise Under Abortion Bans, But the Increase May Be Hard to Measure*, PROPUBLICA (July 27, 2023, 5:00 AM), <https://www.propublica.org/article/tracking-maternal-deaths-under-abortion-bans> [https://perma.cc/P6MM-K85H].

⁵¹ BRITNI FREDERIKSEN ET AL., KFF, *A NATIONAL SURVEY OF OBGYNs’ EXPERIENCES AFTER DOBBS* 3 (2023), <https://files.kff.org/attachment/Report-A-National-Survey-of-OBGYNs-Experiences-After-Dobbs.pdf> [https://perma.cc/ZU8V-VF6H]; see also *id.* at 14 (“[Pregnancy-related mortality] is 3–4 times higher among women who are Black, Native American, and [Native Hawaiian and Other Pacific Islander] compared to White women.”).

⁵² *Id.* at 3–4.

over 66,000 people estimated to have sought abortions in abortion-banning states were able to get one in another state — it’s unclear what happened to the other 31,180.⁵³

The negative impacts of *Dobbs* on maternal health and abortion access have in turn had an outsized influence on state and national politics. In the 2022 midterm elections, fewer than five months after *Roe*’s undoing, voters in key swing states like Michigan and Pennsylvania ranked abortion as the single most important issue to them, and Democrats overperformed across Senate, House, and gubernatorial races in a year that was forecasted to be a “red wave.”⁵⁴ Abortion-related ballot measures have now been considered in seven states, and abortion advocates have won in all seven.⁵⁵ Reproductive rights seem poised to play a central role in the 2024 presidential election as voters on both sides of the aisle consider the possibility of future federal action on abortion access.⁵⁶ Literally and figuratively, abortion has been, and seemingly will continue to be, “on the ballot.”⁵⁷

But organizing post-*Dobbs* has not stopped at the ballot box — ever since the Court “return[ed] the issue of abortion to the people and their elected representatives,”⁵⁸ many of those people and elected representatives are increasingly calling for reform of the Court itself.⁵⁹ Approval

⁵³ Maggie Koerth & Amelia Thomson-DeVeaux, *Over 66,000 People Couldn’t Get an Abortion in Their Home State After Dobbs*, FIVETHIRTYEIGHT (Apr. 11, 2023, 8:00 AM) <https://fivethirtyeight.com/features/post-dobbs-abortion-access-66000> [<https://perma.cc/G5B6-KA68>].

⁵⁴ Elena Schneider & Holly Otterbein, “*THE Central Issue*”: *How the Fall of Roe v. Wade Shook the 2022 Election*, POLITICO (Dec. 19, 2022, 4:30 AM), <https://www.politico.com/news/2022/12/19/dobbs-2022-election-abortion-00074426> [<https://perma.cc/C32X-X4AW>].

⁵⁵ Grace Panetta, *The States Where Abortion Could Be on the Ballot in 2024*, THE 19TH (Jan. 24, 2024, 2:34 PM), <https://19thnews.org/2023/12/abortion-states-election-2024-ballot-measures> [<https://perma.cc/PUL9-GX8Y>].

⁵⁶ Alice Miranda Ollstein, *Biden Leans into Abortion, Contraception as 2024 Campaign Strategy Takes Shape*, POLITICO (Jan. 22, 2024, 10:14 AM), <https://www.politico.com/news/2024/01/22/biden-abortion-contraception-campaign-2024-00136902> [<https://perma.cc/V8VH-M5NX>]; Caroline Kitchener et al., *Trump Wins Back Antiabortion Movement as Activists Plot 2025 Crackdowns*, WASH. POST (Jan. 5, 2024, 6:00 AM), <https://www.washingtonpost.com/politics/2024/01/05/trump-abortion> [<https://perma.cc/H45U-FQ7G>]; see also Mary Ziegler, *Opinion, How Trump Could Institute a Backdoor Federal Abortion Ban*, N.Y. TIMES (Jan. 29, 2024), <https://www.nytimes.com/2024/01/29/opinion/biden-trump-abortion-election.html> [<https://perma.cc/83SB-YCGC>].

⁵⁷ See *2022 Abortion-Related Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/2022_abortion-related_ballot_measures [<https://perma.cc/Y6CN-Q5U8>]; *2023 and 2024 Abortion-Related Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures [<https://perma.cc/PY7J-PT34>]; Elizabeth Crisp, *Warren Says Abortion Will Be on the Ballot in 2024*, THE HILL (Jan. 18, 2024, 10:05 AM), <https://thehill.com/home-news/4415386-elizabeth-warren-abortion-2024-election> [<https://perma.cc/P6UN-T56A>].

⁵⁸ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2279 (2022). For a discussion of the *Dobbs* Court’s “myopic” conception of democracy, see Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 760–76 (2024).

⁵⁹ See *Reform the Supreme Court*, DEMAND JUST., <https://demandjustice.org/priorities/supreme-court-reform> [<https://perma.cc/W7TD-Y4B8>]; Press Release, Off. of Rep. Ayanna Pressley,

of the Supreme Court reached a record low of 40% after the Court declined to block the enforcement of S.B. 8, and it has hovered around that historic low ever since.⁶⁰ That disapproval has extended to the rest of the judiciary — although Americans’ trust in the federal judiciary averaged 68% before 2022, since then it has dropped to just 49%.⁶¹ 75% of voters now support a binding ethics code for the Justices, 66% believe in imposing age limits on them, and 60% think the Court should be structurally balanced along ideological lines.⁶² Elected officials are taking note as well, as evidenced by the introduction of several bills in Congress,⁶³ mounting criticism from the President,⁶⁴ and recent congressional hearings exploring further action.⁶⁵

At first blush, the increasing popularity of court reform might be ascribed to the political unpopularity of the *Dobbs* decision. According to a May 2023 survey, a record 69% of Americans believe that abortion should be legal in the first three months of pregnancy — that number has remained at or above 60% since 1996 — and 61% believe that overturning *Roe* was a “bad thing.”⁶⁶ The *Dobbs* opinion seemed to foresee

ICYMI: Pressley, Markey, Warren, Advocates Call for Major Supreme Court Reforms (Apr. 24, 2023), <https://pressley.house.gov/2023/04/24/icymi-pressley-markey-warren-advocates-call-for-major-supreme-court-reforms> [<https://perma.cc/LB29-ZL32>].

⁶⁰ See Megan Brennan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), <https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx> [<https://perma.cc/6BSF-P5HD>].

⁶¹ *Id.*

⁶² See Steven Shepard, *Faith in the Supreme Court Is Down. Voters Now Say They Want Changes.*, POLITICO (Sept. 30, 2023, 7:00 AM), <https://www.politico.com/news/2023/09/30/supreme-court-ethics-poll-00119236> [<https://perma.cc/F68W-ME4W>]. Though the Court recently adopted a “Code of Conduct,” that Code is neither binding nor enforceable. See *infra* ch. III, pp. 1677–700.

⁶³ See Press Release, Off. of Sen. Sheldon Whitehouse, Whitehouse, Booker, Blumenthal, Padilla Introduce New Supreme Court Term Limits Bill (Oct. 19, 2023), <https://www.whitehouse.senate.gov/news/release/whitehouse-booker-blumenthal-padilla-introduce-new-supreme-court-term-limits-bill> [<https://perma.cc/4CM4-J9YJ>]; Press Release, U.S. Senate Comm. on the Judiciary, Durbin, Whitehouse Statement on Senate Judiciary Committee Advancing Supreme Court Ethics Reform Bill to Full Senate (July 20, 2023), <https://www.judiciary.senate.gov/press/releases/durbin-whitehouse-statement-on-senate-judiciary-committee-advancing-supreme-court-ethics-reform-bill-to-full-senate> [<https://perma.cc/R4AL-E9LP>]; Press Release, Sen. Edward J. Markey, Sen. Markey, Rep. Johnson Announce Legislation to Expand Supreme Court, Restore Its Legitimacy, Alongside Sen. Smith, Reps. Bush and Schiff (May 16, 2023), <https://www.markey.senate.gov/news/press-releases/05/16/2023/sen-markey-rep-johnson-announce-legislation-to-expand-supreme-court-restore-its-legitimacy-alongside-sen-smith-reps-bush-and-schiff> [<https://perma.cc/H58E-CX4K>].

⁶⁴ See Holly Otterbein & Zach Montellaro, *Biden Still Won’t Nuke the Court. But He Is Upping His Criticism of It.*, POLITICO (June 30, 2023, 4:40 PM), <https://www.politico.com/news/2023/06/30/biden-supreme-court-reform-00104484> [<https://perma.cc/NPU9-DS8S>]; Emma Kinery, *Biden Says Supreme Court “Misinterpreted the Constitution” in Rejecting Student Loan Relief*, CNBC (June 30, 2023, 5:32 PM), <https://www.cnbc.com/2023/06/30/supreme-court-student-loan-ruling-white-house-strongly-disagrees.html> [<https://perma.cc/P77Y-KWXF>].

⁶⁵ See *Supreme Court Ethics Reform*, U.S. SENATE COMM. ON THE JUDICIARY, <https://www.judiciary.senate.gov/supreme-court-ethics-reform> [<https://perma.cc/7F4G-CZXM>].

⁶⁶ Lydia Saad, *Broader Support for Abortion Rights Continues Post-Dobbs*, GALLUP (June 14, 2023), <https://news.gallup.com/poll/506759/broader-support-abortion-rights-continues-post-dobbs.aspx> [<https://perma.cc/2WXD-E8EA>].

its own political unpopularity, noting that it could not allow the Court's "decisions to be affected by any extraneous influences such as concern about the public's reaction to [the Court's] work"⁶⁷ — even while it pointed to *Roe*'s effects on national politics as reason for its overruling.⁶⁸ It is true that the Court issues unpopular opinions all the time — sometimes unpopularity is part and parcel of a principled decision;⁶⁹ other times the Court is rightly criticized for shameful pronouncements.⁷⁰ But not every unpopular decision precipitates widespread calls for institutional reform.

There is something unique about the Court, "for the first time in history," "[r]escinding an individual right in its entirety and conferring it on the State," a right that was "part of society's understanding of constitutional law and of how the Court has defined the liberty and equality that women are entitled to claim."⁷¹ That liberty stood for fifty years, forming the basis of several other core rights for marginalized groups that may now be in jeopardy.⁷² The *Dobbs* majority refused to acknowledge "the overwhelming reliance interests" *Roe* and *Casey* had created in that time and the effects of disrupting them, "reveal[ing] how little it knows or cares about women's lives or about the suffering its decision w[ould] cause."⁷³

Yet it is not only the substance of the *Dobbs* decision that is unique but also how it came to pass. Mississippi's fifteen-week abortion ban — well before fetal viability — was flatly unconstitutional under *Roe* and *Casey*, and there was no circuit split among lower courts for the Supreme Court to resolve.⁷⁴ Rather, the law seemed baldly designed

⁶⁷ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2278 (2022).

⁶⁸ *Id.* at 2265 ("Roe fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since." (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 995–96 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part)); see also Richard M. Re, *Should Gradualism Have Prevailed in Dobbs?*, in *ROE V. DOBBS* 140, 152–53 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024).

⁶⁹ See *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring) ("The hard fact is that sometimes we must make decisions we do not like.").

⁷⁰ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, [and] has been overruled in the court of history . . .").

⁷¹ *Dobbs*, 142 S. Ct. at 2347 (Breyer, Sotomayor & Kagan, JJ., dissenting).

⁷² John Hanna, *With Roe Over, Some Fear Rollback of LGBTQ and Other Rights*, AP NEWS (June 24, 2022, 6:25 PM), <https://apnews.com/article/abortion-us-supreme-court-health-government-and-politics-marriage-aoce537c6f9f10d29fa71f6e7a4d19d> [<https://perma.cc/RAS4-RLDG>]; see also *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) ("For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."). But see *id.* at 2309 (Kavanaugh, J., concurring) ("Overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.").

⁷³ *Dobbs*, 142 S. Ct. at 2343 (Breyer, Sotomayor & Kagan, JJ., dissenting). For a discussion of how this failure to recognize these reliance interests was inconsistent with the Court's stare decisis jurisprudence, see generally Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845 (2023).

⁷⁴ Mark Joseph Stern, *The Supreme Court Is Taking Direct Aim at Roe v. Wade*, SLATE (May 17, 2021, 12:24 PM), <https://slate.com/news-and-politics/2021/05/supreme-court-barrett-dobbs-ro.html> [<https://perma.cc/33UB-DV9F>].

as a vehicle for the Court to reconsider its abortion precedents,⁷⁵ and at least four Justices had no qualms about taking the bait: the Court rejected narrower questions in Mississippi’s petition that would have retained *Roe* and *Casey* and instead granted certiorari on the question of “[w]hether all pre-viability prohibitions on elective abortions are unconstitutional.”⁷⁶ The Court publicly voted to hear the case on May 17, 2021, just over six months after the death of Justice Ginsburg and subsequent appointment of Justice Barrett to the Court cemented a five-Justice majority hostile to *Roe*.⁷⁷ And just over six months earlier, a majority of the Court — the same five-Justice majority in *Dobbs* — had allowed S.B. 8 to stand, “let[ting] Texas defy th[e] Court’s constitutional rulings, nullifying *Roe* and *Casey* ahead of schedule.”⁷⁸ To cap off the procedural irregularities, a draft of Justice Alito’s majority opinion was leaked to *Politico* on May 2, 2022, which undercut any chance of a compromise decision and “helped lock in the result.”⁷⁹

The seeming inevitability of *Dobbs* leaves a sense that the system was gamed to arrive at this outcome, that “a new majority, adhering to a new ‘doctrinal school,’ could ‘by dint of numbers’ alone expunge [people’s] rights.”⁸⁰ It is, of course, true that there are plenty of people who agree with the Court that “*Roe* was egregiously wrong from the start,”⁸¹ nothing more than “an exercise of raw judicial power.”⁸² But it is also true that the modern conservative legal movement, galvanized by that belief and armed with a new theory of legal interpretation designed to roll back progressive rights,⁸³ systematically captured law schools, public discourse, and the federal bench to secure the five votes on the Court

⁷⁵ See *Dobbs*, 142 S. Ct. at 2349 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (“Mississippi — and other States too — knew exactly what they were doing in ginning up new legal challenges to *Roe* and *Casey*.”).

⁷⁶ Stern, *supra* note 74; see also Petition for Writ of Certiorari at i, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392); *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (mem.).

⁷⁷ Stern, *supra* note 74. Recent reporting has revealed that all five Justices in the *Dobbs* majority voted to hear the case as early as January 8, 2021, in Justice Barrett’s third month on the Court. Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of Roe v. Wade*, N.Y. TIMES (Dec. 15, 2023), <https://www.nytimes.com/2023/12/15/us/supreme-court-dobbs-roe-abortion.html> [<https://perma.cc/5FSE-LFD4>]. But at the behest of Justice Kavanaugh, the Justices decided to continue relisting the case on the public docket and wait several months to announce their decision, in part to “suggest the court was still debating whether to go forward” and “create the appearance of distance from Justice Ginsburg’s death.” *Id.* Justice Barrett ultimately switched her vote to a no, and Justices Thomas, Alito, Gorsuch, and Kavanaugh — none of whom, notably, are women — provided the four votes needed to grant the petition. *Id.*

⁷⁸ *Dobbs*, 142 S. Ct. at 2349 (Breyer, Sotomayor & Kagan, JJ., dissenting).

⁷⁹ Kantor & Liptak, *supra* note 77.

⁸⁰ *Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor & Kagan, JJ., dissenting) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.)).

⁸¹ *Id.* at 2243 (majority opinion).

⁸² *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

⁸³ See Mary Ziegler, *The History of Neutrality: Dobbs and the Social Movement Politics of History and Tradition*, 133 YALE L.J.F. 161, 173–84 (2023) (tracing the antiabortion origins and development of a unitary history-and-tradition test in the conservative legal movement).

needed to overturn *Roe*.⁸⁴ Indeed, “[i]t is hard to imagine something more like an exercise of raw judicial power than the Court’s removal of the right to abortion, which is precisely what these Justices were put on the Court to achieve.”⁸⁵ Rather than reform the Supreme Court, the conservative legal movement remade it.

This Introduction does not mean to offer sour grapes or shame effective political strategies — similar critiques could be and have been raised against proponents of court reform. It does mean to argue that context matters in framing any discussion of court reform, and the current movement must be understood in the following context: the Supreme Court, swiftly, brazenly, and expectedly took away a popular constitutional right that had protected the autonomy and safety of women and people who can become pregnant for over fifty years; the removal of that right was the result of a successful, calculated political movement motivated by that singular goal; and the effects of that decision on maternal healthcare and abortion access have meant suffering and even death for people like Yeni and countless others. Regardless of whether one believes *Dobbs* was rightly decided, the ruling’s impact on American life — from national elections to individual pregnancy decisions — is undeniable, and it has plunged the Court into a serious legitimacy crisis from which it has yet to emerge.⁸⁶

The Supreme Court broke something on June 24, 2022. This *Developments in the Law* Issue discusses one movement’s ideas of how to fix it.

* * *

To set the stage, Chapter I builds out a novel analytical framework to understand Supreme Court reform arguments of past and present. Arguments for Court reform often focus on neutral legal and policy arguments about the Court’s abstract form. However, these formal arguments are rarely conclusive, because persuasive arguments can be

⁸⁴ See Charlie Savage, *For Conservative Legal Movement, A Long-Sought Triumph Appears at Hand*, N.Y. TIMES (May 3, 2022), <https://www.nytimes.com/2022/05/03/us/conservative-legal-movement-roe-v-wade.html> [<https://perma.cc/7HF7-CS87>] (“*Roe* is the glue that held together the conservative legal movement . . .”); Jess Bravin, *The Conservative Legal Push to Overturn Roe v. Wade Was 50 Years in the Making*, WALL ST. J. (June 24, 2022, 6:54 PM), <https://www.wsj.com/articles/roe-v-wade-overturned-supreme-court-11656110804> [<https://perma.cc/Z3X2-UE2J>]; Emma Green, *How the Federalist Society Won*, NEW YORKER (July 24, 2022), <https://www.newyorker.com/news/annals-of-education/how-the-federalist-society-won> [<https://perma.cc/3NSG-EAGU>].

⁸⁵ Jeannie Suk Gersen, *When the Supreme Court Takes Away a Long-Held Constitutional Right*, NEW YORKER (June 24, 2022), <https://www.newyorker.com/news/daily-comment/when-the-supreme-court-takes-away-a-long-held-constitutional-right> [<https://perma.cc/5CMZ-M27S>].

⁸⁶ See *Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“[Justices O’Connor, Kennedy, and Souter] knew that ‘the legitimacy of the Court [is] earned over time.’ They also would have recognized that it can be destroyed much more quickly.” (second alteration in original) (citation omitted) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.)).

mustered on both sides of a given issue. Chapter I argues that formal arguments alone cannot answer the question of why, or how, the Court should be reformed. Looking to history, it argues that Court reform movements arise in response to moments of emergency when the Court is apparently engaged in harming a significant group of people — more familiar to legal scholars in the concepts of legitimacy and anticanon. Court reformers, then, are motivated by a commitment to justice that they believe is in peril because of actions of the Supreme Court. If we hope to properly understand and resolve Court reform debates, the normative roots of those arguments must be acknowledged and engaged with.

Powerful as it may be, the Court is but one of three coequal branches in our divided system of government, and Chapter II argues that reformers have got the wrong guy. When reformers take issue with the Court's actions, it's not because the Court has somehow departed from its role of interpreting the law. Rather, reformers simply disagree about *how* the law should be interpreted — specifically, about the age-old question of whether the law is as determinate as the Court says it is. Recent faltering approval ratings don't stem from the Court "making law," but rather from Congress's failure to do so: because Congress has not acted on many of today's most pressing societal problems, the Court's pronouncements end up as the last word on those issues, and the public wrongly perceives the Court to be engaging in politics. Structural reform of the Court, then, would not resolve disputes about determinacy or the Court's legitimacy crisis — it's Congress that should be reformed.

Chapter III dives into the pressing question of regulating the conduct of individual Justices. Recent reporting exposed how several Justices, both liberal and conservative, have failed to adhere to ethics and financial disclosure rules, and the resulting public pressure led the Court to adopt its first-ever Code of Conduct.⁸⁷ But the Code largely excused the Justices' problematic conduct and provided no enforcement mechanism, underscoring the need for congressional action.⁸⁸ Whether Congress can regulate the conduct of individual Justices is a constitutional question that has been left open, and Chapter III argues that the time has come to answer it. Using ethics laws already on the books, Congress has a variety of existing avenues it can and should take to rein in the conduct of the Justices. Constitutional challenges to Congress's power raised by Justices and scholars are vague and unavailing, and

⁸⁷ CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE U.S. (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [<https://perma.cc/HMV5-FP4H>].

⁸⁸ See Joshua Kaplan et al., *The Supreme Court Has Adopted a Conduct Code, But Who Will Enforce It?*, PROPUBLICA (Nov. 13, 2023, 4:47 PM), <http://www.propublica.org/article/supreme-court-adopts-ethics-code-scotus-thomas-alito-crow> [<https://perma.cc/L2SU-8C7N>].

there are several constitutional bases for Congress to act now to enforce ethics rules on the Justices.

The Supreme Court isn't the only part of the judiciary facing calls for change, and Chapter IV looks at one of the most prominent targets for reform in the lower courts: nationwide injunctions. Nationwide injunctions have been in the national spotlight since Judge Kacsmaryk of the United States District Court for the Northern District of Texas issued a nationwide stay of the FDA's twenty-year-old approval of mifepristone, one of the drugs used as part of a medication abortion.⁸⁹ Though scholars and jurists have debated the merits of nationwide injunctions for years, Chapter IV uses data from the Department of Justice to perform the first-ever empirical analysis of nationwide injunctions, definitively showing they have become significantly more common in recent years. This data provides three concerning takeaways: (1) nationwide injunctions impede the proper development of the law; (2) they are overwhelmingly issued by judges appointed by a president of a political party opposed to the policy in question; and (3) some judges are increasingly turning to vacatur to stop executive action. In light of the increase in policymaking through the executive and the polarization of the judiciary, the federal court system should be restructured to disincentivize forum shopping to reduce the negative policy implications of nationwide injunctions.

The American judiciary system may be in the midst of a legitimacy crisis, and Chapter V encourages us to seek counsel from our oft-neglected northern neighbor. Canada's constitutional bill of rights contains a clause allowing the federal and provincial legislatures to enact a law "notwithstanding" courts' constitutional interpretations to the contrary, a tool of popular constitutionalism that gives the people the right to decide the ultimate meaning of their constitution.⁹⁰ Though the Notwithstanding Clause has never been used by Canada's federal government, it has been invoked by provinces in service of largely discriminatory ends.⁹¹ Based on lessons from Canada's experience with the Notwithstanding Clause, Chapter V argues that the United States should adopt a "constrained override," which would give Congress a limited power to override Supreme Court decisions on constitutional questions. That power would be exclusive to Congress, not the states; could be used only for legislation that has already been declared unconstitutional; and would be subject to a "double override" by a consensus of the Supreme Court. Despite concerns about its effectiveness, the constrained override presents the best opportunity to combat the dangers

⁸⁹ All. for Hippocratic Med. v. FDA, No. 22-cv-223-Z, 2023 WL 2825871, at *41 (N.D. Tex. Apr. 7, 2023), *aff'd in part*, 78 F.4th 210 (5th Cir. 2023).

⁹⁰ Canadian Charter of Rights and Freedoms § 33, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

⁹¹ *See, e.g.*, Marriage Amendment Act, R.S.A. 2000, c M-5, § 5 (Can. Alta.); An Act Respecting the Laicity of the State, S.Q. 2019, c 12, § 34 (Can. Que.).

of granting the Court exclusive say over the Constitution and returns that power to the people.