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From Conciliation to Conflict: How Dobbs v. Jackson Women's Health Organization Reshapes the Supreme Court's Role in American Polarized Society

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From Conciliation to Conflict: How *Dobbs v. Jackson Women's Health Organization* Reshapes the Supreme Court's Role in American Polarized Society

Shai Stern[*]

Dobbs v. Jackson Women's Health Organization*, issued by the United States Supreme Court on June 24, 2022, overturned the groundbreaking cases of* Roe v. Wade *and* Planned Parenthood v. Casey. *In doing so, the Court sprinkled gasoline onto the fire of social polarization in America. In denying the constitutional status of a woman's right to bodily autonomy and—no less important—opening the door to the denial of other long-standing constitutional rights, the Court's decision emboldened conservatives, enraged liberals, and will roil American politics for years to come. However, as this Article argues, the significance of* Dobbs *goes well beyond constitutional or doctrinal questions: the decision undermines the status of the Court and the entire legal system as the last consensual arena for resolving complex and intractable disputes in American society.*

American society has been divided and polarized for decades over a host of fundamental issues, especially abortion. This social polarization has led to a decline in the legitimacy, perceived trustworthiness, and influence of the nation's social and political systems. As these systems lost their ability to serve as mechanisms for resolving disputes, the legal system became almost the only means in American culture for creating dialogue and building consensus. For decades, the Supreme Court has worked to preserve this status. When the Court is required to deal with rooted social disputes in American society, it has often chosen a strategy of conciliation—meaning that the victory of one side does not nullify the rights or delegitimize the worldview of the other. This pluralistic view adopted by the Court has elevated it above the storms of social polarization that have raged across the United States in recent decades.

The Dobbs *ruling, however, points to a change of strategy on the part of the Court in dealing with rooted disputes in American society. In* Dobbs*, the Court applied a "conflict strategy," in which a victory is granted to one party, at the cost of a declaratory violation of the values—and a practical violation of the rights—of the other. In this sense, the significance of* Dobbs

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goes beyond the discussion of a woman's right to her body, as crucial as that is. The change in the Court's strategy for resolving in-depth disputes in American society indicates a retreat from the pluralistic view it has adopted and, no less significant, the infiltration of social polarization into the legal system as well. Continued implementation of the conflict strategy will lead to further violation of the civil rights of racial, gender, and sexual minorities (including possibly those rights previously recognized by the Court). It will also lead to rapid deterioration in the Court's status as an institution above the partisan fray and a decline in the ability of American society to obey the rule of law. Moreover, pursuant to the conflict strategy, the Court loses its objectivity, and therefore, its ability to resolve disputes conclusively.

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INTRODUCTION

In *Dobbs*, the Court held that its rulings in *Roe v. Wade*[1] and *Planned Parenthood v. Casey*[2] should be reversed, and that states should be

1. *See generally* Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
2. *See generally* Planned Parenthood Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

permitted to prohibit or impose restrictions on abortions.[3] Specifically, the *Dobbs* Court held that the Constitution does not confer a fundamental right to abortion, overruling both *Roe* and *Casey*.[4] This ruling, a draft of which was leaked to the political press about a month and a half before it was officially published,[5] rekindled the public and legal debate on several fundamental issues. First, and due to the reversal of *Roe* and *Casey*, *Dobbs* returned the constitutional and social debate over women's rights to their bodies to state legislatures.[6] Second, and no less critical, *Dobbs* opened the door to a renewed discussion of the constitutional status of various other civil rights, which had previously been recognized by the Court under the Due Process Clause of the Fourteenth Amendment.[7] Among the rights suddenly open to question after *Dobbs* are the right to marry a person of a different race,[8] the right to obtain contraceptives,[9] the right to make decisions concerning the education of one's children,[10] and the right, only recently recognized by the Court, to same-sex marriage.[11] Without regard to the certainty that some state legislatures would move to ban or restrict abortion after *Dobbs*, the newly opened debate about the status of these other rights provoked both a public and legal backlash to the Court's decision.[12]

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3. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
4. See *id.* at 2283.
5. Maria Cramer, *Here Are Key Passages from the Leaked Supreme Court Draft Opinion.*, N.Y. TIMES (May 3, 2022), https://www.nytimes.com/2022/05/03/us/supreme-court-abortion-opinion-draft.html [https://perma.cc/BJW9-B5ZN].
6. Editorial Board, *The Ruling Overturning Roe Is an Insult to Women and the Judicial System*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/opinion/dobbs-ruling-roe-v-wade.html [https://perma.cc/7SMU-MCDS] (stating that state legislatures have the power to impose abortion restrictions after the Court's ruling in *Dobbs*).
7. *See Dobbs*, 142 S. Ct. at 2301(Thomas, J., concurring) (internal citations omitted) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents,"). *Cf. id.* at 2280 (majority opinion) ("[W]e have stated unequivocally that '[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.' We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed 'potential life.'").
8. *See generally* Loving v. Virginia, 388 U.S. 1 (1967).
9. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).
10. *See generally* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
11. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).
12. *See* Erik Larson & Emma Kinery, *Same-Sex Marriage, Contraception at Risk after Roe Ruling (3)*, BLOOMBERG LAW (June 24, 2022, 2:54 PM), https://news.bloomberglaw.com/us-law-week/supreme-court-justices-disagree-on-scope-of-dobbs-ruling [https://perma.cc/63QW-64A5] (describing the new political debates that have arisen in the aftermath of the *Dobbs* ruling); *see also*

Dobbs was released in an American society already at a nadir of social polarization.[13] Studies show that polarization in American society is intensifying not only when it comes to policy positions, but also when it comes to the negative attitude of citizens toward other parties and their voters.[14] This social and political polarization led to the impoverishment of the nation's socio-political systems and the loss of their legitimacy, people's ability to trust that these systems will protect their interests, and the influence over people's conduct that these systems historically had.[15] As part of this trend, social and political systems have lost their ability to deal with deep disagreements in American society.[16] The decline of American social and political systems has left the legal system, particularly the Court, as nearly the exclusive arena for resolving value disputes in American society.[17]

The Court has tried for decades to maintain its status as a legitimate

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Nikki McCann Ramirez, *Same-Sex Marriage and Contraception Should Be Next on Chopping Block: Clarence Thomas*, ROLLING STONE (June 24, 2022), https://www.rollingstone.com/politics/politics-news/same-sex-marriage-contraception-roe-v-wade-decision-1373759/ [https://perma.cc/DR7B-HKU4] (emphasizing the impact that *Dobbs* will have with regard to the status of other civil rights).

13. *See, e.g.*, Eli J. Finkel et al., *Political Sectarianism in America*, 370 SCI. 533, 533 (2020) ("Political polarization, a concern in many countries, is especially acrimonious in the United States . . . ."); Michael W. Macy et al., *Polarization and Tipping Points*, 118 PROC. NAT'L ACAD. SCI. 1, 9 ("[I]n the 1960s, party identification was relatively low in the United States, and some of the most intense conflicts happened within parties (e.g., divisions over civil rights, Vietnam, and environmental protection). More recently, intense partisanship has been accompanied by intolerance of disagreement, especially disagreement from within one's own party."); INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, GLOBAL STATE OF DEMOCRACY 2021: BUILDING RESILIENCE IN A PANDEMIC ERA vii (2021), https://www.idea.int/gsod/global-report (last visited Jun 27, 2022) [https://perma.cc/HA6P-A4LH] ("The *Global State of Democracy 2021* shows that more countries than ever are suffering from 'democratic erosion' (decline in democratic quality), including in established democracies. The number of countries undergoing 'democratic backsliding' (a more severe and deliberate kind of democratic erosion) has never been as high as in the last decade, and includes regional geopolitical and economic powers such as Brazil, India and the United States.").

14. Shanto Iyengar et al., *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129 (2019) (explaining attitudes towards political parties, voters, and policies).

15. *See* Shanto Iyengar, *Fear and Loathing in American Politics: A Review of Affective Polarisation*, CAMBRIDGE HANDBOOK OF POL. PSYCH. 399–413 (Danny Osborne & Chris G. Sibley eds., 1 ed. 2022).

16. *See* Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction*, 115 COLUM. L. REV. 1689, 1690–91 (2015) (discussing the rise of party polarization); Seth J. Hill & Chris Tausanovitch, *A Disconnect in Representation? Comparison of Trends in Congressional and Public Polarization*, 77 J. POL. 1058 (2015) (reporting trends in polarization).

17. Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 208 (2013) ("Polarization is already leading to an increase in the power of the Court against Congress, whether or not the Justices affirmatively seek that additional power.").

arena for resolving disputes and controversies, even those that pertain to the starkly disparate ways of viewing the world that abound in the United States. This task was not easy. The high social polarization in American society has led petitioners with different worldviews to challenge the Court for an unequivocal decision between competing value perceptions and worldviews. The Court had a choice of two strategies for dealing with value disputes: conciliation and conflict. The conciliation strategy is designed to allow the Court to resolve these disputes while preserving the losing party's dignity, identity, and values. This strategy, while recognizing the rights of the winning party, nonetheless avoids imposing obligations that will reduce the losing party's ability to advocate for their worldview. The conciliation strategy allows for a legal decision without delegitimizing, or rejecting as out of bounds, the felt convictions of the losing party. It thus implements a pluralistic conception designed to enable every individual and community in American society to live according to their religious, cultural, economic, and social worldviews.[18]

By contrast, the conflict strategy is designed to allow for an unequivocal decision in favor of one party. This strategy is mainly concerned with granting rights to the winning party and does not bother to acknowledge the implications of the ruling on the losing party. The conflict strategy not only declares the superiority of one value over another, or of one worldview over the other, but also imposes practical restrictions on the rights of the losing party. This strategy implements a socially polarized conception which favors a particular worldview or views over another.

For decades, the Court has carefully adopted a conciliation strategy. In the cases brought before it, including cases where there has been a value conflict between opposing worldviews in American society (such as the fundamental conflict in *Dobbs*), the Court has crafted its decisions in ways that recognize the losing party's right to preserve its values. For example, the *Roe* Court opened its opinion by acknowledging the legitimacy of worldviews that deny abortion and clarifying that the result of the judgment does not force moral acceptance of abortion on those who

18. *See* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 149 (Harvard Univ. Press 1995) ("[The state's] proper aim in funding projects is not to serve the political interests of the state, the self-interest of its officials, or even the tastes of the majority, but to expand the range of significant opportunities open to its citizens . . . .").

are opposed to it.[19] Similarly, in *Pierce v. Society of Sisters*,[20] the Court explained that any parent can choose the education they prefer for their children and that no educational method, or educational institution, can be prohibited merely because of its religious foundation or affiliation.[21] The conciliation strategy was also implemented in *Obergefell v. Hodges*, where the Court clarified that opposition to homosexuality for religious or other reasons is legitimate.[22] The Court in *Obergefell* also provided that the decision had no practical implications for those who oppose same-sex marriage (e.g., by forcing religious institutions or religious officials to marry same-sex couples or refrain from endorsing same-sex marriage).[23]

As in any dispute, the Court issued a judgment ruling in favor of one of the parties. But the Court was careful to acknowledge the legitimacy of the opposing worldview and the sincere commitment of those who held it.

Dobbs marked a change in the Court's approach. In *Dobbs*, the Court early on adopts the narrative of abortion opponents, consistently describing abortion as a crime.[24] The logic of this narrative is clear; abortion was a criminal activity in the past and there is no justification for it to not be criminal today.[25] But the Court ignores the reasons

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19. *See* Roe v. Wade, 410 U.S. 113, 116 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 228 (2022) ("We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.").

20. *See generally* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

21. *See id.*

22. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).

23. *See id.* at 679–80 ("Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.").

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

25. *See id.* at 2248–49 ("Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a crime in every single State. At common law, abortion

underlying the indictment of abortions in the past and the social changes that have taken place in American society over the past century. In doing so, the Court declares that the values of those who oppose abortions are superior to those who support the preservation of a woman's right to her body.

Moreover, the change in the Court's approach to hot button issues—from a conciliation to a conflict strategy—did not stop at the declaratory. Among its many implications, *Dobbs* dictates that many women across the country, especially underprivileged women, will be forced to continue their pregnancies despite their desire to have an abortion.[26] Underprivileged women may, among many other implications, be put to significant economic hardship to travel to states where abortion is legal, preventing them from obtaining an abortion.[27] Currently, no less than eight states have already banned abortions entirely (without exceptions for pregnancies due to rape or incest), and another eight are expected to ban it soon.[28] Accordingly, the right to bodily autonomy for women, especially underprivileged women, in these states are likely to be significantly violated by the ruling. In effect, *Dobbs* denies the

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was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow. *Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis. It is therefore important to set the record straight.").

26. *See* Christine M. Slaughter & Chelsea N. Jones, *How Black Women Will Be Especially Affected by the Loss of Roe*, WASH. POST (June 25, 2022, 7:00 AM), https://www.washingtonpost.com/politics/2022/06/25/dobbs-roe-black-racism-disparate-maternal-health/ [https://perma.cc/3SJE-2D9X] (stating that the decision will disparately impact access to abortion for Black women); Keon L. Gilbert, Gabriel R. Sanchez, & Camille Busette, *Dobbs, Another Frontline for Health Equity*, BROOKINGS (June 30, 2022), https://www.brookings.edu/blog/how-we-rise/2022/06/30/dobbs-another-frontline-for-health-equity/ [https://perma.cc/VE3T-GCHX] ("In states restricting access to abortions, the women most likely to face immediate negative health and socioeconomic consequences are low-income women and/or women of color.").

27. *See, e.g.*, Melissa Jeltsen, *When a Right Becomes a Privilege*, ATLANTIC (May 15, 2022), https://www.theatlantic.com/family/archive/2022/05/roe-v-wade-abortion-access-poor-women/629858/ [https://perma.cc/KLE4-B4L4] ("In much of the South and Midwest, state legislatures have spent decades passing regulations on abortion with the express intent of suppressing access. Patients in these states are forced to spend more money, take more time off work, and travel farther distances to get to an abortion clinic. Given that nearly half of U.S. abortion patients live below the poverty line, and about another quarter are low-income, it follows that these obstacles have proved insurmountable for some.").

28. *See State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions (last visited Mar. 24, 2023) [https://perma.cc/K4T7-K5TP] (showing abortion policies in each state).

legitimacy of the worldview—shared by tens of millions of Americans—that abortion is a legitimate exercise of a woman's autonomy.[29]

Thus, *Dobbs* appears to inaugurate a strategic shift in the Court's approach to resolving cases that turn on value disputes in American society. The Court's transition from a conciliation strategy to a conflict strategy is also a transition from a pluralistic vision of American society to a polarized vision, one marked by constant struggle between worldviews for hegemony. In doing so, the Court is exposed to the harms of American social polarization. This shift also deprives the Court of its unique status as a neutral arena for resolving fundamental disputes in American society. Adopting the conflict strategy condemns the Court to delegitimization and public mistrust, making it—in the popular imagination—just one more partisan actor in polarized disputes.[30] This infiltration of social polarization into the last neutral arena in which citizens of the United States trusted that bitter disputes could be resolved warrants a pause to consider whether the Court is fully aware of the implications of this new strategy.

This Article proceeds in five parts. Part I addresses the history and the legal development of abortion rights in America. This Part describes the history of abortion in the United States, which served as the background to *Roe*, and analyzes the legal change entailed in both the *Roe* and *Casey* decisions. Part II considers *Dobbs* and the methods employed in that case to overturn *Roe* and *Casey*. Along with the facts of the case, this Part discusses the differences in Justices' positions and the justifications they put forward. Part III discusses the strategies available to the Court when resolving fundamental value disputes in American society. This Part presents two strategies, conciliation and conflict, and clarifies the conditions for choosing one strategy over the other when resolving value disputes and the consequences of doing so. Part IV describes the change the Court has undergone in terms of the strategy it adopts to resolve value disputes in American society. This Part illustrates this change by comparing two judgments that have stood, and still stand, at the center of public and legal controversy in America: *Obergefell,* which granted

29. *America's Abortion Quandary*, PEW RSCH. CTR. (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/ [https://perma.cc/ULA5-LUHG] ("Among Americans overall, most people (72%) say that 'the decision about whether to have an abortion should belong solely to the pregnant woman' describes their views at least somewhat well . . . .").

30. The first indications of the *Dobbs* ruling effect on the Supreme Court's legitimacy can be seen in the June 2022 Gallup poll. Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/5XML-9BTG].

constitutional status to same-sex marriage, and *Dobbs*, which denied the constitutional protection to the right to abortion. This comparison illustrates the intensity of the strategic change the Court has adopted in *Dobbs*—from a conciliation strategy to a strategy of conflict. Part V describes the implications of the strategic change the Court has adopted in *Dobbs* for the Court's status as an arena for resolving deep disputes in American society, and on the Court's ability to continue to do so.

I. THE RIGHT TO ABORTION IN AMERICA BEFORE *DOBBS*

A. The Right to Abortion in America before Roe v. Wade

The United States is radically divided over the right to abortion and the potential consequences to doctors and others who participate in providing or procuring abortions.[31] This controversy, which is usually reduced to the tension between "pro-life" and "pro-choice," has a long history shrouded in religious, cultural, and social motivations.[32]

Historically, there were cultures where abortion was not only legitimate but functioned as a "common form of birth control."[33] Hull and Hoffer argue that in Egypt, Greece, and Rome, those who belonged to the upper class used abortion to limit family size and accommodate family resources.[34] Early modern English law and American colonial law criminalized abortion in part to protect women from abortionists.[35] The rationale was that women who seek abortions are victims of quack or nefarious practitioners and needed the protections of the law.[36] In this era, the law criminalized abortions that were held after "quickening"—the first felt movement of the fetus in the womb.[37]

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31. *See, e.g.*, PEW RSCH. CTR., *supra* note 29 (finding that 61 percent of American adults "say abortion should be legal in all or most cases," while 37 percent think abortion should be "illegal in all or most cases").

32. *See generally* ROBERT N. WENNBERG, LIFE IN THE BALANCE: EXPLORING THE ABORTION CONTROVERSY (1985) (analyzing abortion arguments); Joseph B. Tamney et al., *The Abortion Controversy: Conflicting Beliefs and Values in American Society*, 31 J. FOR SCI. STUDY RELIGION 32 (1992) (exploring bases for abortion rights).

33. N.E.H. HULL & PETER CHARLES HOFFER, *ROE V. WADE*: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY 12 (2d rev. expanded ed. 2010).

34. *Id.*

35. *See* HORATIO ROBINSON STORER, ON CRIMINAL ABORTION IN AMERICA 1 (1860) ("By the Common Law and by many of our State Codes, fetal life, per se, is almost wholly ignored and its destruction unpunished; abortion in every case being considered an offence mainly against the mother, and as such, unless fatal to her, a mere misdemeanor, or wholly disregarded."); R. Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 POPULATION STUD. 53 (1974).

36. *See* HULL & HOFFER, *supra* note 33, at 17.

37. *See* Charles I. Lugosi, *When Abortion Was a Crime: A Historical Perspective*, 83 U. DET. MERCY L. REV. 51, 52 (2006).

But quickening was hard to prove and therefore, there is little evidence of criminal proceedings against abortionists or woman until the nineteenth century.[38] During that century, however, the vast majority of the states enacted statutes criminalizing abortion at all stages of pregnancy.[39] Fueled by both national and religious motives, state legislators embraced anti-abortions laws that were not only designed to protect women, but also to protect the potential life of the fetus.[40] The first state to explicitly criminalize abortion was Connecticut in 1821.[41] From 1828 to 1829, three other states—Missouri, Illinois, and New York—enacted similar statues.[42] By 1868, when the Fourteenth Amendment was ratified, thirty states had enacted statutes making abortion a crime, even if performed before quickening.[43] By the end of the 1950s, statutes in all but four states and the District of Columbia prohibited abortion however and whenever performed, unless done to save or "preserve the life of the mother."[44]

B. Roe v. Wade*: Constitutional Protection of a Woman's Right to Her Body*

The significant change in the attitude of American law for the right to abortion came about in 1973. Norma McCorvey—known by the legal pseudonym "Jane Roe"—was a single woman living in Dallas County, Texas.[45] In 1969, McCorvey became pregnant with her third child.[46] She wanted an abortion, which was illegal in Texas at that time except to save

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38. *See* HULL & HOFFER, *supra* note 33, at 17.

39. *See, e.g.*, Sauer, *supra* note 35 (stating that states began criminalizing abortion at all stages); Zoila Acevedo, *Abortion in Early America*, 4 WOMEN & HEALTH 159–67 (1979) (explaining the progression towards criminalizing all stages of abortion); Samuel W. Buell, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774 (1991) (noting the criminal history of abortion).

40. *See* Sauer, *supra* note 35, at 56 ("[A] substantial segment of the population, which included many persons who held influential positions in society, opposed abortion in the strongest terms. The medical profession was the most vociferous of all in its opposition to abortion . . . . Doctors were not the only group strongly to oppose abortion. As would be expected, some religious leaders, both Catholic and Protestant, were highly vocal in their opposition.").

41. CONN. GEN. STAT., Tit. 20, §§ 14, 16 (1821).

42. Act of Feb. 12, 1825. MO. Rev. Laws, vol. 1, sec. 12; ILL. REV. CRIMINAL CODE §§ 40, 41, 46, pp. 130, 131 (1827); N.Y. Rev. Stat., pt. 4, c. 1, Tit. 2, §§ 8, 9, pp. 12–13 (1828).

43. *See* James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 33 (1985) (listing relevant statues in the different states); Paul Benjamin Linton, Roe v. Wade *and the History of Abortion Regulation*, 15 AM. J.L. & MED. 227, 230 (1989).

44. Witherspoon, *supra* note 43, at 45.

45. Jacqulyne Anton, *The Life and Legacy of Norma McCorvey*, 11 HIST. MAKING 164 (2018).

46. Joshua Prager, *The* Roe *Baby*, ATLANTIC (Sept. 9, 2021), https://www.theatlantic.com/politics/archive/2021/09/jane-roe-v-wade-baby-norma-mccorvey/620009/ [https://perma.cc/558S-FF5M].

the mother's life.[47] McCorvey filed a lawsuit in U.S. federal court against her local district attorney, Henry Wade, alleging that Texas's abortion laws were unconstitutional.[48] The district court ruled in her favor and struck down Texas' anti-abortion law as unconstitutional.[49] The case eventually went to the Supreme Court, which—in one of its most significant twentieth century rulings—declared that the Constitution of the United States generally protects a pregnant woman's liberty to choose to have an abortion.[50]

The Court came to this conclusion by adopting several assumptions. First, the Court held that the right to privacy is protected by the Due Process Clause of the Fourteenth Amendment.[51] Second, the Court ruled that a woman's right to choose whether to continue or terminate a pregnancy is included in her constitutional right to privacy.[52] Third, and flowing from the recognition of a woman's fundamental constitutional right to abortion, the Court ruled that the procedure could be regulated only because of a "compelling" state interest.[53] Fourth, the Court identified two "important and legitimate" interests in the regulation of abortions: protecting maternal health, and protecting the fetus's life (or potential life).[54]

Finally, the Court established rules regarding the stages in which the state's interests become compelling enough to allow the regulation or prohibition of abortions.[55] Thus, in the first trimester, the Court ruled that neither of the state's interests—protecting maternal health or protecting the fetus's life (or potential life)—are compelling, as the risk to the mother at this stage is low and the fetus is not viable.[56] In the second trimester, the Court ruled that the interest in protecting the life of the fetus is still not compelling since it is not yet viable.[57] On the other

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47. TEX. PENAL CODE. ANN. art. 1191 (1961).

48. Roe v. Wade, 314 F. Supp. 1217, 1221 (N.D. Tex. 1970).

49. *Id.*

50. Roe v. Wade, 410 U.S. 113, 165–66 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

51. *Roe*, 314 F. Supp at 116. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 920 (1973).

52. *See Roe*, 410 U.S. at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

53. *Id*. at 156.

54. *Id.* at 162–63

55. *Id*. at 162–63.

56. *Id.* at 164.

57. *Id.*

hand, the interest in protecting maternal health increases as the health risks of abortion begin to exceed those of childbirth.[58] Accordingly, the Court ruled that "[i]t follows that, from and after this point [the second trimester], a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.[59] At the same time, even in the second trimester, the state is prohibited from outright banning abortions.[60] In the third trimester, the Court ruled that the fetus becomes viable, so the interest in protecting the fetus becomes compelling.[61] Therefore, beginning with the third trimester, the state can prohibit abortions except when necessary to protect maternal life or health.[62]

Reactions to *Roe* varied.[63] Naturally, proponents of the right to abortion supported the ruling, and abortion opponents decried it. But even among proponents of the right to abortion, some criticized the way the Court supported its ruling,[64] as well as its limited scope.[65]

Roe did not squelch the controversy over abortions in American society. In some ways it even rekindled a public and legal debate on the

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58. *Roe*, 410 U.S. at 164.

59. *Id.* at 163.

60. *Id.* at 164 ("[T]he State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.").

61. *Id.* at 164–65. ("For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.").

62. *Id.*

63. *See*, *e.g.*, Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and* Roe v. Wade, 71 WASH. & LEE L. REV. 969, 971 (2014) ("Scholars from Robin West to Jeffrey Rosen argue that *Roe* helped to entrench the ideological positions held by those on either side of the issue, precluding any form of productive compromise. The polarization produced by *Roe* spilled over into other legal conflicts about gender, helping to doom the Equal Rights Amendment (ERA), to energize the New Right and the Religious Right, and to put off potentially promising alliances in support of caretaking.").

64. *See, e.g.*, Ely, *supra* note 51, at 947 (footnotes omitted) ("It is, nevertheless, a very bad decision. Not because it will perceptibly weaken the Court—it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's —it doesn't. It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.").

65. *See*, *e.g.*, Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1394 (2009) (arguing that the right to abortion recognized in *Roe* fails to meet the broader understanding of reproductive justice); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (arguing that courts fail to bring progressive social change, using *Roe* as an example); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381 (1985) ("I earlier observed that, in my judgment, *Roe* ventured too far in the change it ordered.").

issue.[66] But it served as a significant milestone in the right of women, especially underprivileged women, to their bodies. This exclusive right to their bodies was premised upon the Court's conclusion that although "[t]he Constitution does not explicitly mention any right of privacy. . . . the Court has recognized that a right of privacy, or guarantee of certain areas or zones of privacy, does exist under the Constitution."[67] This right of privacy, per *Roe*, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[68]

C. Planned Parenthood v. Casey*: Reshaping* Roe v. Wade

Nineteen years after *Roe* established a fundamental right to abortion, the issue returned to the Court in a case involving the Pennsylvania Abortion Control Act of 1982.[69] This Act contained five constitutionally questionable provisions: first, that doctors were required to inform women considering abortion about its potential negative health impacts; second, that women were required to notify husbands before obtaining an abortion; third, that children were required to get consent from a parent or guardian before obtaining an abortion; fourth, that a waiting period of twenty-four hours is required between the decision to have an abortion and undergoing the procedure; and fifth, that abortion clinics had to meet certain reporting requirements.[70]

A group of physicians providing abortion services and five abortion clinics in Pennsylvania sought to enjoin enforcement of these provisions as unconstitutional.[71] The district court agreed and issued the injunction, but the Third Circuit upheld all provisions except the one requiring women to notify their husbands.[72]

At the Supreme Court, a plurality of Justices Sandra Day O'Connor, Anthony M. Kennedy, and David H. Souter rejected the call to overturn *Roe*, although they reshaped some of *Roe*'s guidelines.[73] The plurality emphasized the importance of adhering to precedents unless a dramatic

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66. Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2030 (2011).
67. Roe v. Wade, 410 U.S. 113, 151 (1973) (citation omitted).
68. *Id.*
69. Planned Parenthood of Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
70. *Id.* at 844.
71. *Id.* at 845.
72. *Id.*
73. *Casey*, 505 U.S. at 845–46.

change has undermined the underpinnings of the previous decision, and it reaffirmed the existence of a constitutional right to abortion.[74] Yet, it jettisoned the trimester formula of *Roe*, replacing it with an emphasis on viability.[75] In conflict with the *Roe* Court, the plurality found that a fetus could become viable earlier than the third trimester and therefore, a state could ban abortion once a fetus becomes viable unless the mother's health was at risk.[76] The plurality also replaced the strict scrutiny standard with an undue burden standard that was more lenient to the state.[77] As a result, the plurality affirmed the Third Circuit's invalidation of the requirement that husbands be notified but upheld the law's other provisions.[78]

Justices Stevens[79] and Blackmun[80] agreed with the part of the plurality opinion upholding *Roe* but would have overruled all of the challenged provisions of the law. Justice Stevens argued that "*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women,"[81] and that "it is not a 'contradiction' to recognize that the state may have a legitimate interest in potential human life and, at the same time, to conclude that that interest does not justify the regulation of abortion before viability (although other interests, such as maternal health, may)."[82] Accordingly, he would have overruled all of the challenged provisions of the Pennsylvania Abortion Control Act.[83] Justice Blackmun joined Stevens, but emphasized that he saw the Court's decision as a confirmation of *Roe*.[84] He argued that "the authors of the joint opinion today join Justice Stevens and me in concluding that 'the essential holding of *Roe v. Wade* should be retained and once again

74. *Id.* ("After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

75. *Id.* at 870 ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy.").

76. *Id.* at 872–73.

77. *Id.* at 876.

78. *Casey*, 505 U.S. at 876 ("The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

79. *Id.* at 912–22 (Stevens, J., concurring).

80. *Id.* at 923 (Blackmun, J., concurring) (citation omitted) ("[T]he authors of the joint opinion today join Justice Stevens and me in concluding that 'the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.' In brief, five Members of this Court today recognize that 'the Constitution protects a woman's right to terminate her pregnancy in its early stages.'").

81. *Id.* at 912 (Stevens, J., concurring).

82. *Id.* at 914.

83. *Casey*, 505 U.S. at 922.

84. *Id.* at 923 (Blackmun, J., concurring).

reaffirmed.' In brief, five Members of this Court today recognize that 'the Constitution protects a woman's right to terminate her pregnancy in its early stages.'"[85]

Four other Justices—Chief Justice Rehnquist, Justices Scalia, White, and Thomas—argued that *Roe* should be scrapped entirely, and the entire law upheld.[86] Rehnquist argued in his dissent opinion, that:

> We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases. We would adopt the approach of the plurality in *Webster v. Reproductive Health Services*, 492 U. S. 490 (1989), and uphold the challenged provisions of the Pennsylvania statute in their entirety.[87]

Justice Scalia rejected the assertion in *Roe*, and of the plurality opinion in *Casey*, that the Constitution denies the states the ability to restrict abortion.

> [T]he States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.[88]

All four of the dissenting justices suggested that every challenged provision of the Pennsylvania Abortion Control Act should be upheld.

Casey, therefore, upheld the ruling in *Roe* regarding the anchoring of a woman's right to obtain an abortion in the Fourteenth Amendment, even though it reduced the restrictions imposed on states concerning legislation that regulates abortions and scrapped the *Roe* trimester framework.[89] In this view, the *Casey* Court held that:

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85. *Id.* (citation omitted).
86. *Id.* at 944 (Rehnquist, J., concurring in part).
87. *Id.*
88. *Casey*, 505 U.S. at at 979.
89. *See, e.g.*, Chris Whitman, *Looking Back on* Planned Parenthood v. Casey, 100 MICH. L. REV. 1980, 1982 (2002) ("It reaffirmed *Roe* in language sensitive to *Roe*'s importance to women generally and, simultaneously, limited constitutional protections severely, with an almost callous disregard for the women most in need of protection."); Linda J. Wharton, Susan Frietsche & Kathryn Kolbert, *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 319 (2006) (footnote omitted) ("While the Supreme Court discarded the highly protective strict scrutiny standard of *Roe*, the *Casey* joint opinion nevertheless preserved the core of *Roe* by adopting the undue burden test to measure the constitutionality of restrictions on abortion."); Neal Devins, *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1322 (2009) ("*Planned Parenthood v. Casey* significantly settled the abortion dispute, both by establishing a majoritarian split-the-difference standard and, perhaps more importantly, by providing a template that helps states determine what types of abortion regulations can be constitutionally pursued.").

> "[C]onsideration of the fundamental constitutional question imposed by *Roe*, principles of institutional integrity, and the rule of *stare decisis* require that *Roe*'s essential holding be retained and reaffirmed as to its three parts: (1) a recognition of a woman's right to choose to have an abortion before fetal viability and obtain it without undue interference from the state, whose previability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the women's effective right to elect the procedure; (2) a confirmation of the State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health; and (3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.[90]

In response to *Roe* and *Casey*, most states constructed a latticework of abortion law, codifying, regulating, and limiting whether, when, and under what circumstances a woman may obtain an abortion.[91] According to the Guttmacher Institute, under the *Casey* framework, thirty-two states required an abortion to be performed by a licensed physician, and some required that abortions be performed in a hospital.[92] Thirty-three states and the District of Columbia prohibit using state funds except in the narrow instances when federal funds are available: where the patient's life is in danger or the pregnancy results from rape or incest.[93] Forty-five states allow individual health care providers to refuse to participate in abortions.[94] Forty-four states allow institutions to refuse to perform abortions, though fourteen limit that right of refusal to private or religious institutions.[95] Twenty-seven states require a person seeking an abortion to wait a specified period, usually twenty-four hours, between receiving counseling and performing the procedure.[96] Twelve of these states have

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90. Planned Parenthood, *supra* note 2, at 833–34 (citation omitted).

91. *See*, *e.g*., Michael F. Moses, Casey *and Its Impact on Abortion Regulation*, 31 FORDHAM URB. L.J. 805 (2004) (discussing different abortion laws in Montana, Texas, Indiana, Arizona, etc.).

92. *An Overview of Abortion Laws*, GUTTMACHER INST. (Mar. 1, 2023), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/Q5MP-ATMM].

93. *Id.*

94. *Id.*

95. *Refusing to Provide Health Services*, GUTTMACHER INST. (Mar. 2, 2023), https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services [https://perma.cc/5PD7-5A5Z].

96. *Mandatory Waiting Periods for Women Seeking Abortions*, KAISER FAM. FOUND. (May 1, 2022), https://www.kff.org/womens-health-policy/state-indicator/mandatory-waiting-periods/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/5P9W-P93L]; *Counseling and Waiting Periods for Abortion*,

laws that effectively require the patient to make two separate trips to the clinic to obtain the procedure.[97] Thirty-six states require parental involvement in a minor's decision to have an abortion[98]—twenty states require one or both parents of a minor to consent to the procedure, while ten require that one or both parents of a minor be notified.[99]

The outraged public reaction of abortion opponents and the regulations enacted by various states are testimony to tensions in American society concerning religious and cultural questions in general and abortion in particular. The question of abortion has served and still serves as a major cause for the ever-expanding polarization in American society. It is not surprising, therefore, that every candidate for the Court has been repeatedly asked about their position on the precedent set by the Court in *Roe*.[100] Especially after *Casey* revised the *Roe* framework and permitted more extensive regulation of the procedure, liberals fretted that the fundamental right to abortion was fragile and subject to change.[101] *Dobbs* proved that this concern was well-founded.

II. *DOBBS*: OVERTURNING *ROE* AND *CASEY*

The ruling in *Roe* and the various adjustments made in *Casey* did not end state efforts to regulate or even prohibit abortion.[102] In March 2018,

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GUTTMACHER INST. (Mar. 1, 2023), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion [https://perma.cc/9TBF-FMGD].

97. GUTTMACHER INST., *supra* note 92.

98. *Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (Mar. 1, 2023), https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions [https://perma.cc/8WZA-AZ67].

99. *An Overview of Consent to Reproductive Health Services by Young People*, GUTTMACHER INST. (Mar. 1, 2023), https://www.guttmacher.org/state-policy/explore/overview-minors-consent-law [https://perma.cc/4WWD-8GN9].

100. *See generally* Jane C. Timm, *What Supreme Court Justices Said About* Roe *and Abortion in Their Confirmations*, NBC NEWS (June 24, 2022, 2:13 PM), https://www.nbcnews.com/politics/supreme-court/supreme-court-justices-said-roe-abortion-confirmations-rcna35246 [https://perma.cc/372L-4ZSM].

101. *See, e.g.*, Mark H. Woltz, *A Bold Reaffirmation*—Planned Parenthood v. Casey *Opens the Door for States to Enact New Laws to Discourage Abortion*, 71 N.C. L. REV. 1787, 1788–89 (1993) ("[T]he *Casey* court cast further doubt on the future of the right to abortion . . . further erosion of *Roe* is likely . . . ."); *see, e.g.*, C. Elaine Howard, *The* Roe*'d to Confusion:* Planned Parenthood v. Casey, 30 HOUS. L. REV. 1457 (1993) (describing *Casey* as a flawed, impractical opinion that created confusion and would be easily manipulated); *see, e.g.*, Kelly Sue Henry, Planned Parenthood of Southeastern Pennsylvania v. Casey*: The Reaffirmation of* Roe *or the Beginning of the End*, 32 U. LOUISVILLE J. FAM. L. 93, 93 (1993) (noting that after *Casey*, *Roe* may be "quivering on the edge of demise").

102. *See generally* Moses, *supra* note 91 (detailing *Casey*'s impact on abortion regulation across the states); *see generally* Janet Benshoof, *Beyond* Roe*, After* Casey*: The Present and Future of a "Fundamental" Right*, 3 WOMEN'S HEALTH ISSUES 162 (1993) (describing the varying restrictions on abortion across the states implemented after *Casey*).

the state of Mississippi passed the Gestational Age Act, which prohibited abortions after "fifteen (15) weeks gestation except in a medical emergency and in cases of severe fetal abnormality."[103] The Act did not provide exceptions for rape or incest.[104] The Mississippi legislature justified this broad prohibition by asserting that most abortion procedures performed after fifteen weeks' gestation are dilation and evacuation procedures involving "surgical instruments to crush and tear the unborn child apart before removing the pieces of the dead child from the womb."[105] Accordingly, the state found that "the intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession."[106]

Then Governor Phil Bryant signed the bill into law, saying he was "committed to making Mississippi the safest place in America for an unborn child, and this bill will help us achieve that goal."[107] Bryant predicted that the law would be taken to court but insisted the law was worth fighting over.[108] As the governor predicted, abortion providers and supporters immediately challenged the law. Judge Carlton W. Reeves of the U.S. District Court for the Southern District of Mississippi heard the case and, in November 2018, ruled in favor of the clinic and enjoined Mississippi from enforcing the Act.[109] Basing his ruling on evidence that a fetus is not viable until twenty-three or twenty-four weeks, Mississippi

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103. MISS. CODE ANN. § 41-41-191 (2018).

104. *See* Maureen Breslin, *Mississippi House Speaker Says 12-Year-Old Incest Victims Should Continue Pregnancies to Term*, HILL (June 29, 2022, 5:30 PM), https://thehill.com/policy/3541783-mississippi-house-speaker-says-12-year-old-incest-victims-should-continue-pregnancies-to-term/ [https://perma.cc/L2FC-PJP6]; *see also* MISS. CODE ANN. § 41-41-191.

105. MISS. CODE ANN. § 41-41-191(2)(b)(i)(8) (2018) ("The majority of abortion procedures performed after fifteen (15) weeks' gestation are dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child apart before removing the pieces of the dead child from the womb. The Legislature finds that the intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession.").

106. *Id.*

107. Phil Bryant, *Mississippi Governor: Legal Fight for Unborn Children Will Head to Supreme Court*, CATH. NEWS AGENCY (Dec. 16, 2019, 2:55 PM), https://www.catholicnewsagency.com/news/43101/mississippi-governor-legal-fight-for-unborn-children-will-head-to-supreme-court [https://perma.cc/JJ6X-9BYG].

108. *Id.*

109. Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 536 (S.D. Miss. 2018) ("H.B. 1510 is permanently enjoined because it is a facially unconstitutional ban on abortions prior to viability. The defendants; their officers, agents, servants, employees, and attorneys; and all other persons who are in active concert or participation with them; shall not enforce H.B. 1510 at any point, ever.").

had "no legitimate state interest strong enough, prior to viability, to justify a ban on abortions."[110]

The state appealed to the Fifth Circuit Court of Appeals, which upheld Reeves's ruling in a 3–0 decision in December 2019.[111] Senior Circuit Judge Patrick Higginbotham (a Reagan appointee) wrote for the appeals court:

> In an unbroken line dating to *Roe v. Wade*, the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability. States may *regulate* abortion procedures prior to viability so long as they do not impose an undue burden on the woman's right, but they may not ban abortions.[112]

In May 2019, the Mississippi district court issued a further injunction, this time against a "heartbeat bill" that prohibited most abortions when a fetus's heartbeat could be detected, usually from six to twelve weeks into pregnancy.[113] This injunction was also upheld by the Fifth Circuit.[114] Mississippi then appealed to the Supreme Court in June 2020.[115]

On May 2, 2022, POLITICO released a draft majority opinion by Justice Samuel Alito that had been circulated among the justices in February 2022.[116] The leaked draft suggested that a majority of the Court's Justices had voted to overturn both *Roe* and *Casey* and restore

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110. *Id.* at 541.

111. Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 276–77 (5th Cir. 2019) ("It might be plainer still simply to say what other courts have said in similar cases: This law is facially unconstitutional because it directly conflicts with *Casey*.").

112. *Id.* at 267.

113. Jackson Women's Health Org. v. Dobbs, 379 F. Supp. 3d 549, 553 (S.D. Miss. 2019) (footnotes omitted) ("S.B. 2116 threatens immediate harm to women's rights, especially considering most women do not seek abortion services until after 6 weeks. Allowing the law to take effect would force the clinic to stop providing most abortion care. By banning abortions after the detection of a fetal heartbeat, S.B. 2116 prevents a woman's free choice, which is central to personal dignity and autonomy. This injury outweighs any interest the State might have in banning abortions after the detection of a fetal heartbeat. Any delay in the enforcement of S.B. 2116 will serve the public interest by protecting this established right and the rule of law.").

114. Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 248 (5th Cir. 2020) ("[A]ll agree that cardiac activity can be detected well before the fetus is viable. That dooms the law. If a ban on abortion after 15 weeks is unconstitutional, then it follows that a ban on abortion at an earlier stage of pregnancy is also unconstitutional. Indeed, after we held that the 15-week ban is unconstitutional, Mississippi conceded that the fetal heartbeat law must also be.").

115. *See* Petition for Writ of Certiorari, Jackson Women's Health Org. v. Dobbs, 379 F. Supp. 3d 549 (S.D. Miss. 2019) (No. 19-1392).

116. Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/YF4M-MXUU].

states' power to impose prohibitions or restrictions on abortions.[117] A month and a half after the draft was leaked, the Court issued its final opinion, which was little changed from the leaked draft, and officially reversed nearly fifty years of precedent since *Roe*.[118] In a 6–3 judgment, the Court reversed the Fifth Circuit's decision and remanded the case for further review.[119] The majority opinion, joined by five of the justices, held that abortion was not a protected right under the Constitution, overturning both *Roe* and *Casey* and returning the decision regarding abortion regulations to the states and their legislatures.[120]

Justice Alito, who delivered the opinion of the Court, was joined by Justices Thomas, Gorsuch, Kavanaugh, and Coney Barrett, who stated directly that "*Roe* and *Casey* must be overruled."[121] Alito wrote that the constitutional basis on which *Roe* relied was weak in the first place.[122] In the Court's opinion, the right to abortion has no basis in the Constitution.[123] The Due Process Clause of the Fourteenth Amendment, which has repeatedly been held to guarantee rights not mentioned in the Constitution, should protect unenumerated rights only in cases where the right is "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[124] The right to abortion, per the *Dobbs* Court, was not such a right. According to Justice Alito, not only did *Roe* and *Casey* not promote "national settlement of the abortion issue," they "have enflamed debate and deepened division" in American society.[125]

Justice Alito's opinion, however, was not content merely to deny the historical status of the right to abortion. He presented a narrative anchored in the criminalization of abortion, both in common law and in American legal history. As he wrote:

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117. *Id.* ("The Supreme Court has voted to strike down the landmark *Roe v. Wade* decision, according to an initial draft majority opinion written by Justice Samuel Alito circulated inside the court and obtained by POLITICO.").

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

119. *Id.* at 2239.

120. *Id.* at 2284–85. ("We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives. The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.").

121. *Id.* at 2239, 2242.

122. *Id.* at 2270.

123. *Dobbs*, 142. S. Ct. at 2279 ("We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.").

124. *Id.* at 2242.

125. *Id.* at 2243.

> Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a crime in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.[126]

Through the frequent use of terms such as "murder," "manslaughter," or "homicide," the Court's opinion worked to embed the narrative regarding the nature of abortion, and the manner in which the Court should address it. The construction of the narrative criminalizing abortion served as the Court's foundation for denying the constitutional basis of the right to abortion.

Justice Alito sought to allay liberals' concerns that the fall of *Roe* and *Casey* portended the fall of other unenumerated rights secured by the Fourteenth Amendment, such as the rights to same-sex marriage or contraception. "What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely," wrote Justice Alito, "is something that both those decisions acknowledged: abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.'"[127] However, the attempt to distinguish the right to abortion from the other unenumerated rights protected by the Due Process Clause was not agreed upon by all.[128] Justice Thomas, in his concurring opinion, called for reconsideration of other Court cases that recognized rights based on substantive due process, such as *Griswold v. Connecticut*[129] (the right to contraception), *Obergefell*[130] (same-sex marriage), and *Lawrence v. Texas*[131] (consensual, same-sex sexual conduct).[132] Justice Thomas argued that "[b]ecause any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error'

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126. *Id.* at 2248–49.
127. *Id.* at 2236.
128. *See 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*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents.").
129. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).
130. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).
131. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).
132. *Dobbs*, 142 S. Ct. 228 at 2261.

established in those precedents."[133]

Chief Justice Roberts wrote separately concurring in the judgment, agreeing that the Court should reverse the Fifth Circuit's opinion on the Mississippi law and that "the viability line established by *Roe* and *Casey* should be discarded . . . ."[134] Roberts disagreed with the majority's ruling to overturn *Roe* and *Casey* in their entirety, finding it "unnecessary to decide the case before us."[135]

Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan dissented all together. The three dissenting justices wrote that:

> [t]he majority would allow States to ban abortion from conception onward because it does not think forced childbirth at all implies a woman's rights to equality and freedom. Today's Court, that is, does not think there is anything of constitutional significance attached to a woman's control of her body and the path of her life. . . . A state can force her to bring a pregnancy to term, even at the steepest personal and familial costs.[136]

They concluded, "[w]ith sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent."[137]

III. CONFLICT OR CONCILIATION: THE COURT'S STRATEGIES TO TACKLE VALUE-BASED CONTROVERSIES

Dobbs seems destined to be another of the many contributing causes to the partisan animosity and polarization that is poisoning American politics and culture.[138] A 2022 Pew survey of American public attitudes toward abortion reveals that more than 60 percent of the American public supports legal abortions in all or most cases.[139] The survey indicates that after years of decline, support for legal abortion among the American

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133. *Dobbs*, 142. S. Ct. at 2301 (Thomas, J., concurring) (citation omitted).
134. *Id.* at 2310 (Roberts, C.J., concurring).
135. *Id.* at 2311.
136. *Id.* at 2323 (Breyer, Sotomayor, & Kagan, JJ., dissenting).
137. *Id.* at 2350.
138. *See, e.g.*, *Partisan Antipathy: More Intense, More Personal*, PEW RSCH. CENTER (Oct. 10, 2019), https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal/ [http://perma.cc/R2BV-3CZD] ("Three years ago, Pew Research Center found that the 2016 presidential campaign was 'unfolding against a backdrop of intense partisan division and animosity.' Today, the level of division and animosity—including negative sentiments among partisans toward the members of the opposing party—has only deepened.").
139. *America's Abortion Quandary*, PEW RSCH. CENTER (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/ [http://perma.cc/2NGJ-SX8K]. *See also* Jones, *supra* note 31 (highlighting the public's negative reaction toward the Supreme Court following the decision in *Dobbs*).

public has returned to numbers not seen since 1995.[140] The survey further reveals that except for one religious group—white evangelical Protestants, who oppose legal abortion by more than 70 percent—support for legal abortion is nearly 60 percent or greater among all other religious groups in America, including non-evangelical Protestants and Catholics.[141] The approval rate rises to 84 percent among the religiously unaffiliated.[142] Among political partisans, 60 percent of Republicans oppose legal abortion, while 80 percent of Democrats support legal abortion.[143] Both men and women support legal abortion at about equal rates—nearly 60 percent.[144] Support for legal abortion is also consistent among different racial and ethnic groups.[145]

One would think these substantial majorities would settle the question of abortion's legality definitively. At the same time, not only have disputes over abortion remained central to American politics, but studies have found that over the past few decades, there has been an increase in hostility from various states in the United States over abortion rights.[146] For example, a study by the Guttmacher Institute shows that in 2000 no state was defined as "very hostile" to abortion rights, four states were defined as "hostile," and twenty-three states were defined as "lean hostile."[147] In 2020, no less than six states were defined as "very hostile," fifteen states were defined as "hostile," and eight more states were defined as "lean hostile."[148]

Attempts to explain these contradictory findings can start with the realities of American law, the structure of the political system, or the relationship between the federal government and the states. However, it is essential to note that the right to abortion—however significant it may be to women's rights in America—does not stand alone at the core of

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140. PEW RSCH. CENTER, *supra* note 139 (adding that public sentiment toward abortion has remained stable in recent years).

141. *Id*.

142. *Id*.

143. *Id*.

144. *Id*.

145. *Id*.

146. *See e.g.*, Moses, *supra* note 91, at 808 (footnote omitted) ("*Casey* said states should be freer to regulate abortion, but courts are continuing to scrutinize abortion laws closely, and in many cases striking down what appear to be reasonable regulations."); Benshoof, *supra* note 102, at 162 (showing how states curtailed access to abortion in spite of the Court's decisions in *Roe* and *Casey*).

147. *See* Elizabeth Nash, *State Abortion Policy Landscape: From Hostile to Supportive*, GUTTMACHER INST. (Aug. 29, 2020), https://www.guttmacher.org/article/2019/08/state-abortion-policy-landscape-hostile-supportive, [http://perma.cc/LKE-3928] (showing the variation of state support toward abortion rights over time).

148. *Id.*

social polarization in the United States. The right to abortion, as Justice Thomas noted in his concurring opinion in *Dobbs*, is just one of many rights recognized by courts, one that confers constitutional protection on individuals seeking to live their lives without the coercion of worldviews they reject.[149] The right to contraception, the right to marry a person of a different race, the right to same-sex marriage, and the right to make decisions about the education of one's children are all recognized as constitutional rights by the Court; all are endangered by *Dobbs*.[150] Although the majority opinion in *Dobbs* rejected the attempt to compare the right to abortion with these other rights recognized as constitutional by the Court under the Due Process Clause of the Fourteenth Amendment,[151] Justice Thomas's concurrence suggests that assurance may be hollow.

Human rights organizations and LGBTQ+ organizations across the country have expressed outrage not only at *Dobbs*'s immediate effect, but also at the way the decision throws other rights into doubt.[152] *Dobbs*

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149. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (noting Justice Thomas's belief that the Supreme Court should review all the rights protected by substantive due process).

150. *See id*. (citation omitted) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents.").

151. *See id.* at 2236 ("What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.'"); *see* Roe v. Wade, 410 U.S. 159, 159 (stating that abortion is "inherently different"); Casey, 505 U. S. 833, 852 (stating that abortion is "a unique act"). None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.

152. *See e.g.*, Aryn Fields, *Hum. Rights. Campaign Outraged, Condemns Supreme Court. Decision to Overturn* Roe v. Wade, HUM. RTS. CAMPAIGN (June 24, 2022), https://www.hrc.org/press-releases/human-rights-campaign-outraged-condemns-supreme-court-decision-to-overturn-roe-v-wade, [http://perma.cc/J6PP-3AFU] ("When the Supreme Court is willing to throw 50 years of precedent out the window, it proves that we are at an exceedingly dangerous, unprecedented moment. The Court's majority opinion does not reflect the will of our nation—two thirds of whom support *Roe v. Wade*—but instead fulfills an extreme, out of step, ideological agenda. And it shows that all of our rights are on the line right now, as state lawmakers will be further emboldened to test the limits of our hard-won civil rights. Women are under attack, LGBTQ+ people are under attack, BIPOC people are under attack, and we are justifiably outraged. We cannot relent—we must fight back."); *see GLAAD Responds to Supreme Court Decision Upending Constitutional Right to Abortion and Thomas Threat to* Obergefell, Lawrence, GLAAD (June 24, 2022), https://www.glaad.org/releases/glaad-responds-supreme-court-decision-upending-constitutional-right-abortion-and-thomas, [http://perma.cc/6PWA-QQHR] ("The

challenges us to try and extract the common denominator for all those constitutional rights. The immediate common denominator is that their constitutional status is based on the Due Process Clause in the Fourteenth Amendment. A closer look reveals that common to all those constitutional rights, which the *Dobbs* ruling returned to the center of public discourse, deal with matters where the intense public controversy stems from religious, cultural, or economic disparities. For example, the *Pierce* case, which dealt with the Oregon Compulsory Education Act that required parents to send their children to public schools, focused on the tension between public and religious education and parents' ability to choose the education their children would receive.[153] Justice McReynolds, delivering the Court's opinion, argued that as between the desire to provide children with an adequate public education, and the parents' right to determine the education their children will receive, the parents' right prevails. "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only," wrote McReynolds.[154] "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[155] Similarly, the judgment in *Griswold*, dealing with a Connecticut statute that made it a crime for anyone to use any drug or instrument to prevent conception, also required the Court to deal with the prevailing social, moral, and religious tensions in American society concerning the use of contraception.[156] Justice Douglas, who wrote for

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message here is clear and distressing: Americans are losing protected access to abortion, a constitutional right they have valued for nearly fifty years, and other rights to personal liberty are at risk too. The anti-abortion playbook and the anti-LGBTQ playbook are one and the same. Both are about denying control over our bodies and making it more dangerous for us to live as we are."); *see* Trudy Ring, *LGBTQ+ Groups Voice Outrage Over Dobbs Ruling Overturning Roe*, ADVOCATE, (June 24, 2022), https://www.advocate.com/law/2022/6/24/lgbtq-groups-voice-outrage-over-dobbs-ruling-overturning-roe-v-wade, [http://perma.cc/HX5R-DMM4] (reporting the LGBTQ+ community's stance toward the *Dobbs* decision); *see* Brandon Lowrey, *Dobbs Casts Shadow On Gay Rights, Birth Control*, LAW360, June 24, 2022, 4:53 p.m.) https://www.law360.com/articles/1505907/dobbs-casts-shadow-on-gay-rights-birth-control, [http://perma.cc/798E-QYNG] (providing legal analysis on the implications of the Court's opinion).

153. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 531 (1925) ("And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly dimmish the value of their property.").

154. *Id.* at 535.

155. *Id*.

156. Griswold v. Connecticut, 381 U.S. 479, 480 (1965) (providing that a pair of Connecticut statutes prohibited individuals from using contraception and assisting a person in such conduct).

the Court, wanted to set aside the assumption that the very use of contraceptives is a matter of public controversy, or alternatively, was the basis of the law's enactment.[157] The purpose of the law, according to Justice Douglas, is "to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital . . . ."[158] The understanding that the Connecticut law deals with inherent social, moral, and religious tensions in the American society was further acknowledged by dissenting Justice Stewart, who wrote:

> As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.[159]

Lawrence v. Texas is another case where a deep value dispute was before the Court.[160] In *Lawrence*, the constitutionality of a Texas law criminalizing consensual, sexual conduct between individuals of the same sex was examined. The Court ruled that the law was unconstitutional, and Justice Kennedy, who delivered the opinion, relied on the judgment in *Casey* and claimed that although the dispute reflects "ethical and moral principles" and includes "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family"—the Court's obligation is to "define the liberty of all, not to mandate our own moral code."[161]

These rulings, alongside *Roe* and *Casey*, are an attempt by the Court to deal with a fierce and fundamental dispute in American society.[162]

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157. *See id*. at 505 (White, J., concurring) ("There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded upon any policy of promoting population expansion.").

158. *Id*.

159. *Id*. at 527.

160. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

161. *Id.* at 571.

162. In *Griswold*, the Court dealt with different social and religious perceptions regarding the possibility of contraception by married couples, while in *Pierce*, the Court dealt with religious perceptions regarding the educational characteristics that parents are entitled to choose for their children. *Griswold*, 381 U.S. at 485–86 (emphasis added) ("[The present case] concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks

Religious, cultural, and economic disputes are the bread and butter of multicultural societies, and law often plays a central role in resolving them.[163] As a rule, the law deals with significant social disputes with respect to certain issues such as abortion using two different strategies: conciliation or conflict. Until the *Dobbs* decision, the Court seemed to prefer the conciliation strategy. *Dobbs*, however, tells a different story, as noted further herein.

In multicultural and pluralistic societies, such as the United States, people necessarily hold different and varied worldviews.[164] These perceptions stem from religious, cultural, gender, and economic values, and the differences (and, often, conflicts) between these values naturally produce controversy.[165] They often deal with issues that relate to fundamental questions of human personhood, autonomy, and dignity: in choosing a method of education for children,[166] the importance of the protection and financing of religious institutions,[167] allowing same-sex couples to marry,[168] and allowing each person to control his or her

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to achieve its goals by means having a maximum destructive impact upon [marriage]."); *contra* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (citation omitted) ("Under the doctrine *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."). Common to these cases is the deep controversies they place at the Court's door.

163. For a comprehensive review of these disputes in the American context, see generally JAMES W. FRASER, BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA (Johns Hopkins Univ. Press, 2d ed. 2016). For the role of law in multicultural societies, see generally Jeff Spinner-Halev, *Feminism, Multiculturalism, Oppression, and the State*, 112 ETHICS 84 (2001); Will Kymlicka, *Multiculturalism and Minority Rights: West and East*, 4 J. ETHNOPOL. & MINORITY ISSUES IN EUR. 1 (2002).

164. ANDERSON, *supra* note 18, at 1 ("People experience the world as infused with many different values.").

165. John Horton, *Liberalism, Multiculturalism and Toleration, in* LIBERALISM, MULTICULTURALISM AND TOLERATION 1 (John Horton ed., 1993) ("All modern liberal democratic societies are marked by diversity and differences—differences of ethnicity, culture and religion in addition to the many individual differences which characterize the members of such societies.").

166. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (challenging the validity of a Wisconsin compulsory school attendance law); *see, e.g.*, *Pierce*, 268 U.S. at 530–32 (noting that a private school challenged an Oregon statute that mandated compulsory public school attendance, leading to students withdrawing from the school and a subsequent decline in revenue); *see also* Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say*, 1991 U. CHI. LEGAL F. 123 (1991) (arguing that education should be based on diversity and choice).

167. *See, generally* FRASER, *supra* note 163; *see generally* G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989); *see generally* Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOB. LEGAL STUD. 503 (2006).

168. *See, e.g.*, Jeffrey A. Bennett, *Seriality and Multicultural Dissent in the Same-Sex Marriage Debate*, 3 COMMC'N & CRITICAL/CULTURAL STUD. 141, 141–61 (2006) (using the "seriality"

body.[169]

Consider, for example, the refusal of Colorado bakery owner Jack Phillips to bake a cake for the wedding of same-sex couple Charlie Craig and David Mullins.[170] For Craig and Mullins, there was nothing more natural than ordering a cake to celebrate their wedding celebration with loved ones. For Phillips, the very requirement that he decorate a cake to celebrate same-sex marriage—a marriage which, according to his religious beliefs, is forbidden—forced him to employ his artistic expression in support of a practice that goes against his faith.[171] The case is emblematic of the varied and often conflicting ways that seemingly innocuous events and conduct can be freighted with moral and cultural meaning in a pluralistic society.

These disputes often come before the Court, whether because of the American legal structure or due to the decline of other conflict resolution mechanisms, such as the legislative and religious systems.[172] When such a dispute, based on religious, cultural, or social perceptions, comes to the Court, it has two strategies for resolving the dispute: conflict or conciliation. The choice of conflict as the strategy for resolving disputes seeks to decide between the parties sharply, with the goal of eliminating obscurity and leaving no doubt concerning the legal rule to be employed going forward. Thus, for example, in a case where each party claims a violation of a right, the Court can decide in favor of one and reject the other's claim. The advantage of choosing conflict as a strategy for

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heuristic within the context of same-sex marriage public discourse); Priya Kandaswamy, *State Austerity and the Racial Politics of Same-Sex Marriage in the US*, 11 SEXUALITIES 706, 706–25 (2008) (examining the benefits of access marriage for LGBTQ+ activists); Beverly Greene, *The Use and Abuse of Religious Beliefs in Dividing and Conquering Between Socially Marginalized Groups: The Same-Sex Marriage Debate.*, 64 AM. PSYCH. 698, 698–09 (2009) (discussing the tensions that religious beliefs drive between sexual minorities and people of color).

169. *See, e.g.*, Amy Gutmann, *The Challenge of Multiculturalism in Political Ethics*, 22 PHIL. AND PUB. AFFS. 171, 195 (1993) ("On a range of issues such as abortion, capital punishment, fetal tissue research, surrogate mothering contracts, and enforced monogamy, we may discern that reason offers conflicting resolutions, depending at least partly on our culturally shaped beliefs and predispositions that are themselves, at least at present, irreconcilable by reason."); Sawitri Saharso, *Feminist Ethics, Autonomy and the Politics of Multiculturalism*, 4 FEMINIST THEORY 199, 199–215 (2003) (examining multiculturalism and accommodating the cultural traditions of minority groups with regards to hymen reconstruction and gender-selective abortion).

170. *See generally* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018).

171. *See*, JACK PHILLIPS, THE COST OF MY FAITH: HOW A DECISION IN MY CAKE SHOP TOOK ME TO THE SUPREME COURT 2 (Salem Books ed. 2021) ("I explained that I didn't create cakes for same-sex weddings, that the two of them were welcome to anything else in my shop—birthday cakes, shower cakes, cookies, or brownies—but I couldn't prepare a wedding cake for them.").

172. Hasen, *supra* note 17, at 208 ("Polarization is already leading to an increase in the power of the Court against Congress, whether or not the Justices affirmatively seek that additional power.").

resolving disputes is clear. The legal dispute ends in a clear decision, and third parties are put on clear notice of the legal landscape going forward. However, the significant disadvantage of this choice is that a clear decision requires a value-based choice and a preference for one value over another. In cases where the values underlying the controversy are rooted in religious, cultural, and social perceptions, this choice not only cuts against the pluralistic grain of a multicultural society, but it is also likely to form the basis for social demoralization and resistance.[173]

Another strategy available to the courts in resolving value-based disputes is a conciliation. When the Court chooses to deal with a dispute using a conciliation strategy, it waives a straightforward value-based determination. Obviously, the dictates of the legal process require some kind of decision in favor of one party and to the detriment of the other. But when employing a conciliation strategy, the Court decides in favor of one of the parties while refraining from turning the decision into an expression of a value preference of one value over the other. When the conciliation strategy is applied, the losing party is naturally unhappy and the legal result in favor of the other party is not expected to be satisfactorily accepted. However, decisions made in a conciliation strategy do not directly affect the losing party's ability to continue to implement his worldview, and just as importantly, they do not declare that the losing party's worldview is invalid or inappropriate.

The disadvantage of using a conciliation strategy is simply the converse of the advantages of a conciliation strategy. A conciliation strategy, as that employed in *Obergefell*, denies an absolute and complete value preference and avoids denying the felt convictions of the losing party.[174] However, the advantage of the conciliation strategy is

173. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1856). *Dred Scott* is a prominent, though rare, example of the use of conflict strategy by the Supreme Court where the Court determined not only that all people of African descent, free or enslaved, were not United States citizens (and therefore had no right to sue in federal Courts) but also that states cannot constitutionally affect the status of slaves. *Id.* at 453–54 (applying the conflict strategy as it denied people of African descent their most crucial human and citizen rights and deciding that Congress could no longer ban slavery from a federal territory). Expectably, the Court's decision in *Dred Scott* outraged abolitionists, who regarded the ruling as a way to stop the debate about slavery in the United States. It was also considered one of the steppingstones to the Civil War. *See generally* William M. Wiecek, *Slavery and Abolition Before the United States Supreme Court*, 1820-1860, 65 THE J. OF AM. HIST. 34 (1978); Alix Oswald, *The Reaction to the* Dred Scott *Decision*, 4 VOCES NOVAE 9 (2012).

174. *See* Obergefell v. Hodges, 576 U.S. 644, 679–80 (2015) ("Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

significant, especially in a polarized, multicultural society. The use of a conciliation strategy does not prioritize one value over another and therefore does not announce the superiority or inferiority of one worldview vis-a-vis another. Using a conciliation strategy allows different, sometimes wholly contradictory, worldviews to live side by side, without being defined by a governmental body as inferior to the other. Recognizing the existence of different worldviews is necessary for the prosperity of a multicultural society, and it allows for pluralism while maintaining individual autonomy.[175] In contrast to the conflict strategy, the conciliation strategy allows for a decision that respects both parties' values. However, while this has been the strategy the Court has chosen so far, it seems that *Dobbs* marks a sea change in how a newly empowered conservative majority will approach questions that arise from deep conflicts in American society.

IV. *OBERGEFELL* VERSUS *DOBBS:* A SHIFT FROM CONCILIATION TO CONFLICT

Obergefell was one of the critical civil rights cases decided by the Court in the last decade.[176] The ruling provides that every person has the constitutional right to marry a person of either sex, without distinctions in law.[177] The strategy employed by the Court in reaching this decision closely resembled its approach to *Roe* forty-two years earlier. As with the right to abortion, the *Obergefell* Court ruled that the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment protected a person's constitutional right to marry, regardless of his or her spouse's gender identity.[178] The 5–4 ruling requires all fifty states to perform and recognize the marriages of same-sex couples on the same terms and conditions as the marriages of opposite-sex couples, with all the accompanying rights and responsibilities. Writing for the majority, Justice Kennedy elaborated on the origins of marriage in American and world culture, emphasized the importance that people attach to intimate relationships in general and marriage in particular, and established a constitutional anchor for the right to marriage.[179]

Against this background, Justice Kennedy asserts that same-sex couples' request to participate in what he calls "one of civilization's

175. *See* ANDERSON, *supra* note 18, at 1 ("Our evaluative experiences, and the judgments based on them, are deeply pluralistic.").
176. *See generally Obergefell*, 576 U.S. 644 (2015).
177. *Id*. at 681.
178. *Id.* at 672, 675.
179. *Id*. at 681.

oldest institutions"[180] cannot be denied consistently with constitutional protections. In this sense, the decision in *Obergefell* is clear: same-sex couples, like couples of the opposite sex, hold a constitutional right to marry. The decision was not easy to digest for those who hold religious worldviews that deny homosexuality. Various religious organizations protested the decision, sharpening opposition to same-sex relationships.[181]

A. The Choice of Conciliation on Same-Sex Marriage

So, on the face of it, the Court chose to exercise a conflict strategy in *Obergefell*. The value-based debate about recognizing same-sex marriage has been decided against those who believe such a marriage can be prohibited through the exercise of state power. Nevertheless, I argue that *Obergefell* not only symbolizes a choice of conciliation strategy, but also implements this strategy in a sensitive and effective manner.

Obergefell made a significant change in American society. Although prior to *Obergefell*, same-sex marriage had already been established by law, court ruling, or voter initiative in thirty-six states,[182] providing constitutional status to same-sex marriage signals a significant social change.[183] Supreme Court Justices were aware of this. They were also

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180. *Id.*

181. *See, e.g.*, *Orthodox Union Statement on Supreme Court's Ruling in* Obergefell v. Hodges, ORTHODOX UNION (June 26, 2015), https://www.ou.org/news/orthodox-union-statement-on-supreme-courts-ruling-in-obergefell-v-hodges/, [http://perma.cc/94RP-6A28] ("In response to the decisions announced today by the United States Supreme Court with reference to the issue of legal recognition of same sex marriage, we reiterate the historical position of the Jewish faith, enunciated unequivocally in our Bible, Talmud and Codes, which forbids homosexual relationships and condemns the institutionalization of such relationships as marriages. Our religion is emphatic in defining marriage as a relationship between a man and a woman. Our beliefs in this regard are unalterable. At the same time, we note that Judaism teaches respect for others and we condemn discrimination against individuals."). *See also Supreme Court Decision on Marriage "A Tragic Error" Says President of Catholic Bishops' Conference*, U.S. CONF. OF CATH. BISHOPS (June 26, 2015), https://www.usccb.org/news/2015/supreme-court-decision-marriage-tragic-error-says-president-catholic-bishops-conference [http://perma.cc/V3AR-A7VY] ("Today the Court is wrong again. It is profoundly immoral and unjust for the government to declare that two people of the same sex can constitute a marriage."); *Here We Stand: An Evangelical Declaration on Marriage*, CHRISTIANITY TODAY (June 26, 2015), http://www.christianitytoday.com/ct/2015/june-web-only/here-we-stand-evangelical-declaration-on-marriage.html [http://perma.cc/HBX5-JH52] (noting that a coalition of evangelical leaders crafted the statement)*; see generally* Shai Stern, *When One's Right to Marry Makes Others Unmerry,* 79 ALB. L. REV. 627 (2015).

182. *See* Brian Stephens, *Where Were the States? Same-Sex Marriage Before* Obergefell, *in* INTERNATIONAL HANDBOOK ON THE DEMOGRAPHY OF MARRIAGE AND THE FAMILY 273–82 (D. Nicole Harris & A. J. J. Borque eds., 2020) (tracking individual states' stances on same-sex marriage before the Court's decision in *Obergefell*).

183. *See, e.g.*, Zachary A. Kramer, *Before and After* Obergefell, 84 UMKC L. REV. 797, 801

aware of the concerns among various communities in American society which oppose same-sex marriage. These concerns ranged from the fear that religious institutions and officials (i.e., priests, rabbis, and Qadis) would be forced to marry same-sex couples, to the fear that the teaching of parts of the scriptures that forbid same-sex relationships would be banned.[184] In other words, religious communities across America feared that a decision favoring same-sex marriage would not only express a preference for secular values (or the inferiority of religious values) but would also coerce those who do not share those worldviews.[185] The Court, as stated, was aware of this concern. Out of this awareness, Justice Kennedy chose to address these concerns explicitly in the ruling by stating:

> [I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.[186]

Justice Kennedy, however, did not limit this recognition of opposing values to those who oppose same-sex marriage for religious reasons. In the ruling, he also addressed those who opposed same-sex marriage for

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(2016) ("The march from *Lawrence* to *Obergefell*, from sex to marriage, is a case study about acceptance. The gay rights movement has accomplished much in a relatively short amount of time. Social change often feels glacial, especially so for those who have a dog in the fight. But there is no question that the gay rights movement has accomplished an incredible thing."); Adam Deming, *Backlash Blunders:* Obergefell *and the Efficacy of Litigation to Achieve Social Change*, 19 U. PA. J. CONST. L. 271, 298 (2016) ("For advocates, the *Obergefell* story suggests that, far from being a 'hollow hope,' . . . *Obergefell* shows that the judicial branch can act as a potent facilitator of social change. Though the Supreme Court is constrained by public opinion, it is less constrained than the other branches; moreover, it has the limited ability to circumvent this constraint by signaling its policy preferences to lower courts. *Obergefell*'s largely peaceful aftermath will underscore these lessons, restoring the hope of those who put faith in the judiciary's ability to effectively advance the protection of constitutional rights, even where social change is necessary to do so.").

184. *See* ORTHODOX UNION, *supra* note 181 (providing religious leaders' sentiments that the *Obergefell* decision runs contrary to their religious beliefs and practices); *see e.g.*, sources cited *supra* note 181.

185. *See, e.g.*, Daniel Silliman, *Supreme Court Briefs Reveal Religious Groups Don't Agree on How to Oppose Same-Sex Marriage,* WASH. POST (Apr. 27, 2015, 10:11 AM), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/04/27/supreme-court-briefs-reveal-religious-groups-dont-agree-on-how-to-oppose-gay-marriage/ [https://perma.cc/C7ZX-5YZL] (highlighting that religious groups fear their ability to participate in public debate will be undercut).

186. Obergefell v. Hodges, 576 U.S. 644, 679–80 (2015).

non-religious reasons:

The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate.[187]

Justice Kennedy's remarks are emblematic of the Court's choice of conciliation strategy. Although the *Obergefell* ruling did not seek to compel anyone to enter a same-sex marriage against their will, the concern among religious and other communities in America involved both a declaration of value inferiority and practical significance. The Court dismissed these concerns by clarifying that while the ruling requires states to recognize same-sex marriages, it does not coerce the conscience of those who oppose same-sex marriage. In this sense, the judgment in *Obergefell* expresses a pluralistic conception of a multicultural society, as it allows each individual and community to continue to hold onto their worldviews. This is the essence of a conciliation strategy. Choosing to exercise a conciliation strategy does not imply an attempt to avoid a clear decision, but rather, seeks to confirm a decision in favor of one party while acknowledging the views of the other party, their values, and beliefs.

B. The Turn from Conciliation on Abortion

Dobbs, however, tells an entirely different story, one that cannot be told without addressing the changes in American society and the political system that preceded the case, which to some extent, is responsible for it. The polarization in American society has risen significantly in recent decades.[188] Studies distinguish between ideological and affective polarization, with the former referring to differences between the policy positions and the latter referring to the extent to which citizens feel more negatively toward the opposing camp.[189] Comparative studies reveal

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187. *Id.* at 680.

188. *See, e.g.*, *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/ [https://perma.cc/5VRG-7LV9] ("Republicans and Democrats are more divided along ideological lines—and partisan antipathy is deeper and more extensive—than at any point in the last two decades."); Finkel et al., *supra* note 13, at 533. *See also* Nicole Karlis, *The Political Divide in the United States Has Become Irreconcilable, Study Says*, SALON (Dec. 8, 2021, 3:00 PM), https://www.salon.com/2021/12/08/us-political-polarization-tipping-point/ [https://perma.cc/XL54-C8RA] (noting that research shows that the partisan rift has become so extreme in the United States there may be a point of no return).

189. *See, e.g.*, Iyengar et al., *supra* note 14, at 130 ("America, we are told, is a divided nation.

that, among all countries within the Organisation for Economic Co-Operation and Development (OECD), the United States exhibited the most significant increase in affective polarization between 1980 and 2020.[190] These findings were expressed not only in the widening of social atomization, the intensification of identity politics, and the tension between population groups at the local and national levels, but also in the deadlock of the American political system.[191] While in the past, the parties have succeeded in cooperating on national, economic, and human rights issues, the concept of bipartisan has all but disappeared from the American political system in recent years.[192]

The intensification of social and political polarization also brought with it a change in the legal system. The appointment of federal judges, especially Supreme Court Justices, has always been political.[193] Nevertheless, the refusal of the then-Republican majority of the U.S. Senate to consider the Supreme Court nomination of Merrick Garland,

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What does this mean? Political elites—particularly members of Congress—increasingly disagree on policy issues (McCarty et al. 2006), though there is still an active debate about whether the same is true of the mass public (Abramowitz & Saunders 2008, Fiorina et al. 2008). But regardless of how divided Americans may be on the issues, a new type of division has emerged in the mass public in recent years: Ordinary Americans increasingly dislike and distrust those from the other party. Democrats and Republicans both say that the other party's members are hypocritical, selfish, and closed-minded, and they are unwilling to socialize across party lines, or even to partner with opponents in a variety of other activities. This phenomenon of animosity between the parties is known as affective polarization."); *see also, e.g.*, Jon C. Rogowski & Joseph L. Sutherland, *How Ideology Fuels Affective Polarization*, 38 POL. BEHAV. 485, 486 (2016) (arguing that citizens respond to ideological divergence with heightened affective polarization).

190. Levi Boxell et al., *Cross-Country Trends in Affective Polarization* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26669, 2021).

191. *See* Robert W. Merry, *America's Civic Deadlock and the Politics of Crisis*, 119 NAT'L INT. 10, 10–11 (2012) ("Although the defining issues are less explicit and not so tied to moral sensibilities, the country is deadlocked."). *See generally* GARY W. REICHARD, DEADLOCK AND DISILLUSIONMENT: AMERICAN POLITICS SINCE 1968 (Wiley Blackwell 2016).

192. *See* REICHARD, *supra* note 191 at 330–32 (describing how the behavior of recent presidents has increased partisan divide in Congress); JAMES I. WALLNER, THE DEATH OF DELIBERATION: PARTISANSHIP AND POLARIZATION IN THE UNITED STATES SENATE (Lexington Books 2013) (describing polarization within the Senate). *See also* Angela C. Bell et al., *Ingroup Projection in American Politics: An Obstacle to Bipartisanship*, 13 SOC. PSYH. & PERSONALITY SCI. 906 (2022) (arguing that one potential obstacle to cooperation between political parties is ingroup projection).

193. *See* DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 168 (U. of Chi. Press, 2001) (noting that social scientists have gained new insights into the nature of Supreme Court recruitment due to tits high-stakes political attraction); Jeffrey Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. POL. 998, 998, 1014 (1987) (proposes four related models of Supreme Court Justices' confirmation, emphasizing the role of politics in the selection process); Lee Epstein et al., *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 DRAKE L. REV. 609, 610 (2008) (arguing that that there has been an increase in the willingness of judges to express political views as part of the selection process).

then the chief judge of the powerful D.C. Circuit Court of Appeals (currently Attorney General) marked a new intensification of political polarization into the legal system.[194] In addition, the four years of the Trump administration have greatly exacerbated the social and political polarization in America.[195] But it was the death of the late Supreme Court Justice Ruth Bader Ginsburg that opened the door to strategic change in the Court makeup.

Even before the death of Justice Ginsburg, Trump appointed two conservative Justices, Neil Gorsuch and Brett Kavanaugh, to the Court.[196] These two replaced other conservative judges, but the appointment of Amy Coney Barrett as the replacement for Ginsburg marked a significant change in the balance of power of the Court.[197] Suddenly, conservatives could command a five-Justice majority even without the vote of the more moderate Chief Justice.[198] This change, therefore, was not only personal but also ideological. *Dobbs*, in this sense, is the result of the infiltration of social and political polarization into the legal system, with the practical implication being a change in the Court's approach to fundamental disputes: from conciliation to conflict.

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194. *See, e.g.*, Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 325 (2017) ("[T]he extraordinary decision of Senate Republicans to block any consideration of President Obama's nomination of Merrick Garland to succeed Justice Scalia underscores how divisive and partisan Supreme Court confirmation battles have become.").

195. *See, e.g.*, Sam Whitt et al., *Tribalism in America: Behavioral Experiments on Affective Polarization in the Trump Era*, 8 J. EXPERIMENTAL POL. SCI. 247, 248 (2021) (noting that the study was analyzing a survey from 2019 to show the increasing polarization during the Trump era); Larry M. Bartels, *Partisanship in the Trump Era*, 80 J. POL. 1483, 1493 (2018) (noting 4 percent of "Democrats or Democratic leaners" became "Republicans or Republican leaners" by 2017).

196. *See* Jessica Taylor, *President Trump Nominates Neil Gorsuch To The Supreme Court*, NPR (Jan. 31, 2017, 7:48 PM), https://www.npr.org/2017/01/31/512708127/president-trump-to-announce-supreme-court-nominee-shortly [https://perma.cc/XY9R-F42A] (noting the nomination by President Trump); Tucker Higgins, *Trump Nominates Brett Kavanaugh to the Supreme Court*, CNBC (July 10, 2018, 8:52 PM), https://www.cnbc.com/2018/07/05/trump-picks-brett-kavanaugh-for-supreme-court.html [https://perma.cc/NA94-S5CJ] (noting the nomination by President Trump).

197. *See* Masood Farivar, *Trump's Lasting Legacy: Conservative Supermajority on Supreme Court*, VOA (Dec. 24, 2020, 6:48 PM), https://www.voanews.com/a/usa_trumps-lasting-legacy-conservative-supermajority-supreme-court/6199935.html [https://perma.cc/HCC6-AQ2U] ("While Trump's first two Supreme Court picks—Neil Gorsuch and Brett Kavanaugh—succeeded other Republican-appointed conservative justices, his third and final appointee, Amy Coney Barrett, replaced her polar opposite, the late liberal icon Ruth Bader Ginsburg.").

198. *See also*, Tucker Higgins, *Amy Coney Barrett Is Sworn In, Swinging Supreme Court Further to the Right*, CNBC (Oct. 27, 2020, 12:07 AM), https://www.cnbc.com/2020/10/26/amy-coney-barrett-supreme-court-confirmation.html [https://perma.cc/GH5C-SAY5] (describing Justice Barrett's confirmation as assuring an ideological shift in the Court).

C. Roe *as an Example of Conciliation*

In order to understand the Court's strategic change in *Dobbs*, it is worth reading Judge Blackmun's opening remarks in *Roe*. There, Blackmun forged a pluralistic, though realistic, view of American society and its treatment of abortion:

> [w]e forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.[199]

By recognizing that the ruling—which will work a significant change in American law and culture—will conflict with existing, and even prevailing, worldviews in American society, the Court seeks to mitigate the harm to those who hold these worldviews, both declaratively and practically. As with any decision on a conciliation strategy, the ruling will favor one of the parties. At the same time—and this is perhaps the pluralistic advantage of the conciliation strategy—the losing party can maintain their identity, values, and beliefs.

There is no doubt that the decision in *Roe* was not easy to digest for significant sections of American society, who hold worldviews that completely oppose abortion.[200] At the same time, the decision in *Roe* did not oblige any woman to have an abortion against her will, nor did it oblige the states to fund abortions.[201] *Roe* requires states to *allow* abortions to those women who want or need abortions. The ruling refrained from making any value-based statement against worldviews that deny abortion, and in its analysis the Court explicitly recognized that protecting potential fetal life was a legitimate state interest in its own right.[202] *Casey*, which to some extent narrowed *Roe*, even further

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199. Roe v. Wade, 410 U.S. 113, 116 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

200. *See, e.g.,* Greenhouse & Siegel, note 66 (noting *Roe*).

201. For a comprehensive review of states' policies on abortion funding, see generally Kenneth J. Meier & Deborah R. McFarlane, *The Politics of Funding Abortion: State Responses to the Political Environment*, 21 AM. POL. Q. 81 (1993).

202. *See Roe*, 410 U.S. at 162 ("We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life.").

legitimized anti-abortion views by acknowledging the existence of different worldviews and permitting fairly extensive state regulation of abortion.[203] Thus, for example, in a discussion of the provision requiring a waiting period before performing an abortion, the plurality opinion stated that such a period is required for people to consult with their families and discuss the consequences of their decision in "the context of the values and moral or religious principles of their family."[204]

Roe and *Casey* applied a conciliation strategy. Both judgments recognized the existence and legitimacy of different worldviews in American society and gave them legal effect in their opinions. By employing conciliation strategies, *Roe* and *Casey* respected the concerns and interests of those who oppose abortion and, just as importantly, did not prioritize one value over another.

The *Dobbs* Court, however, applied a different strategy. The *Dobbs* opinion denied that the right to abortion had any deep purchase in American history or culture.[205] It asserted, repeatedly, that abortion was a crime both under the common law and under the prevailing American law at the time of the adoption of the Fourteenth Amendment.[206] The Court's opinion repeatedly frames abortion in terms of crime, murder, and homicide. Although Justice Alito opens his remarks with the recognition that "[a]bortion presents a profound moral issue on which Americans hold sharply conflicting views,"[207] the narrative of the majority opinion is one of good and evil, of superior and inferior values, of right and wrong. The *Dobbs* Court left no room for hesitation

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203. *See generally* Planned Parenthood of Pa. v. Casey, 505 U.S. 833, 900 (1992), *overruled in part by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

204. *Id.* at 900.

205. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022) ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.' Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted). The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy.").

206. *Id.* at 2248–49 ("Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.").

207. *Id.* at 2240.

concerning the value decision on the question of abortions. It concludes, "[t]he inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."[208] To further the criminalization of abortion and to demonstrate the Court's rejection of the values of those who support the preservation of a constitutional right to abortion, it compares abortion to assisted suicide, stating that "[t]he Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: 'Attitudes toward [abortion] have changed since *Bracton*, but our laws have consistently condemned, and continue to prohibit, [that practice].'"[209]

The *Dobbs* Court employs a conflict strategy, erasing the losing party's values, both declaratively and practically. In the values discourse it imposes, the *Dobbs* Court clarifies that "a woman's right to control her own body and . . . achieving full equality" is inferior to the values of those who oppose abortion.[210] Although the Court's majority opinion refrains from grounding its decision in religious considerations, the message conveyed by the Court is that the values of those who are proponents of a right to abortion are subordinated to the values of those on the other side.

But the Court's decision—and one might say, with regret—is not merely declaratory. It carries with it severe practical consequences for women, especially underprivileged women, who will be forced to give birth to children against their will because the state in which they live will, now with the approval of the Court, prohibit abortions.[211] About half of the states are expected to enact bans or other limits on the

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208. *Id.* at 2253–54.

209. *Id.* at 2254 (alterations in original).

210. *Id.* at 2258 ("Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an "unborn human being.").

211. *See* Brief of Equal Protection Constitutional Law Scholars Serena Mayeri et al. as Amici Curiae Supporting Respondents at 26, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) ("Moreover, many women who decide to end a pregnancy are poor and low-income mothers who fear that having another child will compromise their ability to provide for the children they already have. Mississippi preserves policies that reinforce those genuine concerns."). *See also* Youyou Zhou and Li Zhou, *Who Overturning* Roe *Hurts Most, Explained in 7 Charts*, VOX (July 1, 2022, 9:50 AM), https://www.vox.com/2022/7/1/23180626/roe-dobbs-charts-impact-abortion-women-rights [https://perma.cc/3UH6-JGD4] ("'It's going to fall on the women who are poor,' [Senator Elizabeth Warren] said last year when the Court was hearing oral arguments in the *Dobbs* case. 'It's going to fall on the women who already have children and cannot leave; it's going to fall on women who are working three jobs; it's going to fall on young, young girls who have been molested and may not know they are pregnant until deep into the pregnancy.'").

procedure.[212] In some states, such prohibitions, which were hitherto unconstitutional, became effective soon thereafter.[213] Therefore, the *Dobbs* decision is not only declaratory but has an immediate practical impact on the lives of women across the country.

However, the strategic change the *Dobbs* Court has chosen to make has implications beyond women's rights over their bodies and even beyond the possible implications for other rights previously recognized by the Court. Although the importance of these rights cannot be underestimated, the Court's transition from a conciliation strategy to a conflict strategy involves significant social implications regarding the legitimacy of the Court and the degree of trust in the judiciary in general. The Court's choice of a conflict strategy threatens not only American social cohesion, but also the rule of law.

V. THE BROADER IMPLICATIONS OF *DOBBS*: UNDERMINING THE RULE OF LAW

The deep social polarization that prevails in American society has impaired the ability of social and political systems to function, cooperate, and deal with controversies.[214] In this sense, the judiciary in general, and the Court in particular, have been somewhat immune from the polarization that pervades other social systems due to the Court's choice of conciliation strategy.[215] In applying the conciliation strategy in cases that implicate fundamental values, the Court refrains from prioritizing values and beliefs and, equally important, from imposing external values and worldviews on individuals and communities. Adopting this pluralistic vision has helped the Court maintain a relatively high rate of public trust and support. Overall, the Court has maintained its status as perhaps the only neutral arena in America today for resolving value

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212. *See* Andrew Witherspoon et al., *Tracking Where Abortion Laws Stand in Every State*, GUARDIAN (June 28, 2022, 6:00 PM), https://www.theguardian.com/us-news/ng-interactive/2022/jun/28/tracking-where-abortion-laws-stand-in-every-state [https://perma.cc/L2TU-EZZH] ("In about 60% of states, abortion is now banned, soon-to-be banned or under serious threat.").

213. Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming, enacted trigger laws that would automatically ban (medically unnecessary) abortion. *See* Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here's What Happens When* Roe *Is Overturned*, GUTTMACHER INST. (June 6, 2022), https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned [https://perma.cc/Q44M-YEJY].

214. *See generally* REICHARD, *supra* note 191; WALLNER, *supra* note 192.

215. *See* Hasen, *supra* note 17, at 147–48 (concluding that political polarization contributes toward changing power dynamics between Congress and the Supreme Court, including the Court's confirmation process); *cf.* Devins, *supra* note at 194 at 306 (arguing that social polarization intruded the supreme court).

disputes prevalent in American society. This status, however, suffered a fatal blow in *Dobbs*.[216]

The Court's choice in *Dobbs* to change its strategy from conciliation to conflict not only violated women's rights but exposed the Court and the entire legal system to the harms of social polarization. The Court's decision thus has implications that go beyond the disputants and even the question of abortion or the scope of civil rights generally. It is likely to significantly undermine the legitimacy and trust of the American public in the Court and the legal system as a whole. This harm has direct consequences for American society, which loses one of the last arenas it has left to resolve fundamental disputes. In many ways, it undermines the foundations of the rule of law and casts American society into uncharted and chaotic waters.

Opinion polls about the American public's trust in the political system and government indicate a substantial and far-reaching collapse. For example, in 2001, 49 percent of Americans trusted their government.[217] By 2022, that figure had plummeted to 20 percent.[218] This drop in public confidence in government is not surprising. It testifies to the extent of ideological and affective polarization in American society. America's political and governmental system is unable to function properly, in part because of its stubborn refusal to act in a bipartisan manner—even on issues previously perceived as undisputed.[219] Ideological conflict seems

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216. *See* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/7QUN-52L3] ("Americans' confidence in the court has dropped sharply over the past year and reached a new low in Gallup's nearly 50-year trend."). *Compare with Public Trust in Government: 1958-2022*, PEW RSCH. CTR. (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/ [https://perma.cc/5L72-X96L] (according to the Gallup poll, the Supreme Court regularly enjoyed trust exceeding 35 percent until June 2021. However, the Pew survey reveals that trust in the government has maintained a rate lower than 30 percent from 2006 onwards).

217. *Public Trust in Government: 1958-2022*, PEW RSCH. CTR. (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/ [https://perma.cc/5L72-X96L].

218. *Id.*

219. A report of the Program for Public Consultation at the University of Maryland found nearly 150 issues on which majorities of Republicans and Democrats agree. Major Report Shows Nearly 150 Issues on Which Majorities of Republicans & Democrats Agree, PROGRAM FOR PUB. CONSULTATION (Aug. 7, 2020) https://publicconsultation.org/defense-budget/major-report-shows-nearly-150-issues-on-which-majorities-of-republicans-democrats-agree/ [https://perma.cc/8AT5-49KS]. Among these issues are tax initiatives, federal poverty programs, government reforms, police reforms, sentencing reforms and limitation of negative consequences of criminal records. *See generally* Steven Kull, *Common Ground for the American People: Policy Positions Supported by Both Democrats and Republicans*, SCH. PUB. POL'Y U. MD. (Aug. 7, 2020), https://vop.org/wp-

to have taken on a life of its own and become intractable.

In this reality, the Court stood out as a beacon of public trust. A survey conducted in 2002 reveals that despite a continuing slow decline in the American public's confidence in the Court, no less than 54 percent of the American public espoused trust in the institution.[220] That is hardly wall-to-wall public support, of course, but it was almost three times higher than the rate of trust in the political system. Another poll conducted after the *Dobbs* draft was leaked reveals a different picture. In a survey conducted in early June 2022, only 25 percent of people trusted the Court.[221] This dramatic drop no doubt in part reflects the shock and dismay attendant on the leak. But at the same time, it indicates a troubling trend about the strategic change taken by the Court in *Dobbs*: a determination to pitch in and declare winners and losers in America's most deeply felt and divisive issues.

The undermining of public trust in the Court has two crucial effects, which go beyond the immediate consequences of the *Dobbs* judgment. One is the loss of the unique status of the Court as a neutral arena for resolving in-depth disputes in American society.[222] The second impact, affected by the first, is the delegitimization of the judiciary and consequent harm to the rule of law. The Court's decision to choose the conflict strategy exposes it to social polarization.[223] The adoption of this

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content/uploads/2021/07/CGOAP_0721.pdf [https://perma.cc/M9FA-Z6MQ]. Most of these issues, despite the support of the bipartisan majority, were not promoted due to the impasse in which the American political system had fallen.

220. *Public's Views of Supreme Court Turned More Negative before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/ [https://perma.cc/S6HC-DEDX] ("In a national survey by Pew Research Center, 54% of U.S. adults say they have a favorable opinion of the Supreme Court while 44% have an unfavorable view.").

221. *See* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx, [https://perma.cc/A8HT-DRTM] ("With the U.S. Supreme Court expected to overturn the 1973 *Roe v. Wade* decision before the end of its 2021-2022 term, Americans' confidence in the court has dropped sharply over the past year and reached a new low in Gallup's nearly 50-year trend. Twenty-five percent of U.S. adults say they have 'a great deal' or 'quite a lot' of confidence in the U.S. Supreme Court.").

222. *See* James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 511, 514–15 (Nov. 2007) (arguing that between the years 1987–2005, public trust in the Supreme Court was not damaged as a result of social and political polarization and is based on democratic values).

223. *See* William N. Eskridge Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1283 (2005) ("For contentious issues that roil the nation, the Supreme Court should not impose national resolutions and should instead rely on dialogic techniques that essentially remand to the democratic process and leave it room to elaborate or respond.").

strategy enshrines a polarized vision of American society, one that rejects a pluralistic view in which different worldviews, and different values, live side by side. The loss of the Court's status as a neutral arbiter is a serious loss in and of itself. However, it is even more doleful in light of the fact that no other social or political system seems poised and capable of filling the role the Court previously filled. There quite literally is no alternative to the Court in terms of defusing conflict in American society.

The lack of arenas for resolving value disputes in American society can lead to disorder, attempts to resolve conflicts independently and without the involvement of state institutions, and serious damage to the rule of law.[224] The rule of law is one of the fundamental principles on which the modern state rests.[225] The understanding that all citizens and institutions within a country, state, or community are accountable to the same laws is a crucial support to society's proper and successful functioning.[226] Disrupting public trust in the Court and the legal system, which both interprets the laws and makes them accessible to the public, may significantly impair the willingness of individuals and communities in American society to obey the law even after the Court has defined its scope and meaning.[227] From there, the road to anarchy is a relatively short one.

To sum up, the significance of the Court's choice to use the conflict strategy in *Dobbs* carries meanings beyond women's rights and the possibility that other rights may hang in the balance. The choice of this strategy should be a warning sign about the loss of public trust in the Court and the entire justice system. This reality will exacerbate the polarization of American society and stress—potentially fatally—its adherence to the rule of law.

CONCLUSION

Understanding that *Dobbs* is not just a crucial judgment on a religiously, culturally, and socially charged issue in American society

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224. *See also* Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 492 (2018) (arguing that in a polarized society, which lacks arenas for social discourse, there is "abundant ground for anxiety about the future of rule-of-law").

225. *See generally* LON L. FULLER, THE MORALITY OF LAW 33–94 (New Haven & London, Yale Univ. Press rev. ed. 1969); TOM BINGHAM, THE RULE OF LAW ch.1 (Penguin Books, 2011); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 788 (1989).

226. *See* ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 114 (Macmillan, Liberty Fund, Inc. 1982) (1915) ("[N]o man is above the law [and] every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.").

227. Gibson, *supra* note 222, at 513–14.

requires a broader look at the many implications of this judgment. Along with the direct violation of women's rights, especially underprivileged women, who will lose their right to choose to have an abortion, and in the shadow of the threat posed by the Court concerning other civil rights that could lose their constitutional status, the *Dobbs* Court has made a strategic change in the way it is going to resolve significant social disputes. The Court's transition from a conciliation strategy to a conflict strategy produces a polarized vision for American society—a vision, according to different worldviews and different values, cannot coexist.

Neglecting the pluralistic vision can lead to a significant decrease in the degree of public trust in the Court and the entire justice system. This reality denies American society an arena that has historically been perceived as neutral for resolving serious disputes and, just as importantly, challenges the ability of individuals and social groups in American society to act under the rule of law. In this view, the Court loses its objectivity, and therefore, its ability to resolve disputes, as noted above.

Accordingly, there may be a new and important role for lower courts, especially federal courts, to fill the gap. Meaning, they should be more aware that they can no longer put all their trust in the Court to moderate and soothe deep tensions in American society. Therefore, lower courts need to be more careful in making decisions about cases that deal with the exposed nerves of American society—both because they are the almost exclusive arena for resolving these disputes, and, and just as importantly, in trying to keep the judicial system out of the polarization of American society.

Although it is too early to estimate the extent of the damage to public trust in the Court and the entire judicial system, it seems that the infiltration of the polarization into the legal system will lead to a significant decrease in this trust, similar to the decline of trust in other social and political systems. However, the choice of conflict strategy is not a matter of fate. Conscious action by lower courts, especially federal courts, may prevent the spread of polarization in the judiciary and the loss of public trust in courts as an arena for resolving value-based conflicts. Adopting a conciliation strategy by lower courts may eliminate the need for the parties to bring the dispute to an arena where a conflict strategy will decide the dispute. As in any dispute, the parties will have to manage the risks that exist for them in the decision made in a conflict strategy. But given the dire consequences of the conflict strategy, not only on the legal outcome in a specific case but on the legal system and its legitimacy, the courts' role is to further the understanding that there are risks that

American society should not take.