POLITICAL EQUALITY, GENDER, AND DEMOCRATIC LEGITIMATION IN *DOBBS*

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ABSTRACT

This Article examines the U.S. Supreme Court's ruling in Dobbs v. Jackson Women's Health Organization*, demonstrating how the Court deploys new arguments about women's political equality—alongside long-standing arguments about federalism and judicial minimalism—to legitimate the overruling of* Roe v. Wade. *In contending that abortion rights are better determined by legislatures, the* Dobbs *Court advances a thin conceptual account of democracy and political equality that ignores a range of anti-democratic features of the political process that shape abortion policy—such as partisan politics and gerrymandering—as well the absence of women in the legislative process. Key to the Court's ruling is its claim that women are "not without" electoral and political power, citing data on women's equal or higher rates of voting in Mississippi. The Court's conceptual account of political equality centers on voting while ignoring other modes of political participation as well as structural inequalities and barriers to women's equal participation as candidates and legislators. When considering political candidacy and representation as measures of participation, a significant dimension of inequality between men and women emerges. Our investigation of the full dimensions of political inequality and the effects of anti-democratic distortions has important implications for those who wish to bring equal protection and other legal challenges to reproductive restrictions at the state level, and for ensuring inclusive and legitimate policymaking on reproductive rights and beyond. As scholars and commentators debate the proper role of the U.S. Supreme Court in democracy and argue for shifting rights determination to the legislative arena, an examination of the structure of the political process and whether legislatures are inclusive is crucial.*

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Introduction

A principal argument offered by the Court majority in *Dobbs v. Jackson Women's Health* to justify its overruling of *Roe v. Wade* is that women are fully capable of protecting their rights in the political process. The *Dobbs* majority asserts that "[w]omen are not without electoral or political power," and "[t]he percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so."[2] Overruling *Roe* will simply "return[ ]" the issue of abortion to the state legislative process, a process that the Court posits is fully open to women.[3] This argument echoes those offered by Mississippi in its arguments for upholding its restriction on abortion, and it is one often invoked by abortion opponents: that the question should be left to the pluralist democratic process, one in which women are equal participants.[4] This argument of course depends on

[2] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 65 (June 24, 2022) (citing Dep't of Com., U.S. Census Bureau, *An Analysis of the 2018 Congressional Election* 6 fig. 5 (Dec. 2021)).

[3] *Dobbs*, slip op. at 65.

[4] *See infra* note 49 and accompanying text (citing oral argument of the Mississippi Attorney General).

the contested notion that there is *not* a constitutionally protected liberty interest at stake. It has resonance, too, with the political process conception of judicial review, which posits that the Court should give legislation deferential review unless the law disfavors a politically powerless group.[5] Women, the argument goes, are not such a group because half of the voting population is female; therefore, women are equally able to influence the political process.

Yet Mississippi is an unlikely place to locate arguments about equality in the political process: women make up less than fifteen percent of the Mississippi legislature. In fact, Mississippi ranks among the bottom of all states in terms of the representation of women in the legislature.[6] Women may be equal participants as voters, but they are not equally represented in Mississippi's state legislature. And this pattern is true beyond Mississippi. The states with the most restrictive abortion policies have, on average, ten percent fewer women representatives in their state legislatures than those with more permissive policies.[7] The states in the lowest third of representation of women in their legislatures all adopted pre-*Dobbs* abortion restrictions,[8] and those with higher percentages of women in their legislatures are more likely to safeguard abortion rights.[9] This state-level data mirror global level data that show that legislatures with more female representation are more likely to adopt reproductive rights policies.

This Article argues that the political equality arguments deployed in *Dobbs* are based on an inadequate account of the contemporary political process, including that of women's ability to exercise their power within that process. The argument that courts should not decide the legality of abortion, and that the extent of regulation should instead be deliberated in the political process, is a familiar one. If *Dobbs* has a new emphasis, it's on the role of women in that political process. The *Dobbs* Court offers up its account of women's participation in the political process to support the absence of "concrete reliance"[10] on *Roe*[11] and *Casey*,[12] to counter its own deployment of

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[5] *See infra* notes 54–57 and accompanying text (discussing the Court's arguments drawing on political process and the countermajoritarian difficulty of the Supreme Court).

[6] *See Women in State Legislatures 2022*, Ctr. for Am. Women in Pol. (2022), https://cawp.rutgers.edu/facts/levels-office/state-legislature/women-state-legislatures-2022 [https://perma.cc/W9RF-CY8T] (ranking Mississippi forty-ninth in the percentage of women in the state legislature); *see also infra* Part II.B.1.

[7] The twenty-six states with the most restrictive policies have on average 27% female representatives in the state legislature, while the twenty-five states with more permissive policies have on average 37% women in state legislatures. The five states with the most restrictive policies (according to our scale) have 26% female representatives in their state legislatures. *Id.* (Oklahoma, Texas, Indiana, Kansas, Nebraska); *see also infra* Part II.B.

[8] *See id.* (Oklahoma, Tennessee, West Virginia, South Carolina, Louisiana).

[9] *See infra* Part I.B.

[10] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 64–66 (June 24, 2022)

[11] Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., No. 19-1392 (June 24, 2022).

text and legal traditions in which women were non-participants, and seemingly to show to the general public that the Court has not overstepped its judicial role.[13] And yet *Dobbs*'s account of the political process generally and women's role therein is not fully theorized, and the majority's claim about women as equal voting participants is but one mark of the paucity of the conception. In addition to invoking women's ability to participate through voting, the *Dobbs* Court also appeals to the pluralism of women's position on abortion.[14] But the pluralism that the Court celebrates in noting that citizens are divided over whether to allow or ban abortion[15] takes place under conditions of gender inequality in politics: women are often absent from the legislative bodies that are charged with making decisions about reproductive rights, health care, and the social supports necessary for healthy childbirth and child-rearing. This Article argues that there is a distinct connection between women's representation and policy output, especially concerning abortion policy. Therefore, the underrepresentation of women in elected positions, as well as other flaws in the American democratic process, problematize the claim of equality in political participation. This Article employs statistical analysis to establish the empirical relationship between women's political representation and abortion policy, as well as to establish the idea of a distinctly gendered policy issue. We use the econometric method of linear regression modeling to test the correlative relationship between women's representation in state legislatures and the permissiveness of state abortion policy.

Why offer this empirical correction given that the *Dobbs* majority's opinion is primarily devoted to a textual and historical analysis of liberty and privacy? Concededly, more accurate empirics on the contemporary underrepresentation of women in the legislature would have been unlikely to sway the outcome. We argue that *Dobbs*'s conception of the political process and its notion of political equality are important beyond the Court's reading of a specific constitutional provision; it is offered to legitimate the Court's overruling of *Roe* and *Casey* to the general public and ward off potential criti-

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[12] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., No. 19-1392 (June 24, 2022).

[13] Post-*Dobbs*, Justice Samuel Alito responded to questioning about whether the public is losing faith in the Supreme Court by stating that while "[e]veryone is free to express disagreement with our decision and to criticize our reasoning as they see fit . . . [s]aying or implying that the court is becoming an illegitimate institution or questioning our integrity crosses an important line." Brad Dress, *Alito: Questioning Supreme Court Legitimacy "Crosses an Important Line"*, HILL (Sept. 29, 2022) https://thehill.com/homenews/3666845-alito-questioning-supreme-court-legitimacy-crosses-an-important-line/ [https://perma.cc/3DBX-2G9Z]; *see also id.* (quoting Chief Justice John Roberts that disagreement "with an opinion is not basis for questioning the legitimacy of the court").

[14] *Dobbs*, slip op. at 68–69.

[15] *See infra* notes 48–50 and accompanying text (describing the *Dobbs* Court's celebration of subnational pluralism—allowing each state legislature to decide how to regulate abortion—as an antidote to entrenching abortion as a national right).

cism of the Court's reasoning and result.[16] The originalist methodology that the Court purports to apply does not include women or abortion rights, but according to the *Dobbs* Court, women can safeguard their rights or health as equal participants in the political process. We argue that while the Court gestures towards the importance of political equality of women, and to the superior legitimacy of the political process, it fails to grapple with its full measure. A fuller notion of political equality would include more than just voting but "[e]qual consideration of the preferences and needs of all citizens fostered by equal political activity among citizens."[17] This includes the ability to participate and effectuate policy as voters, and also to act as representatives in the policymaking process. Thus, even apart from doctrinal objections to the Court's analysis of the liberty right, the Court's move to overrule *Roe* and *Casey* lacks the democratic moorings that the Court seeks as legitimation.

Bringing attention to the participation of women—with all intersectional identities—in the political process is also timely given the increasing prominence of commentary advocating a diminished role for the Supreme Court and of constitutional rights in American political life. These arguments include critiques of a "juristocracy"[18] that cannibalizes others forms of policymaking and distorts our democracy;[19] the U.S.'s emphasis on trans-

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[16] *See* RICHARD H. FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT 21–22, 35–36 (2018) (delineating three forms of legitimacy for judicial decisions: sociological, legal, and moral).

[17] *See* Sydney Verba, *Political Equality: What is it? Why Do We Want It?*, RUSSELL SAGE FOUND. (Jan. 2001), https://www.russellsage.org/research/reports/political-equality [https://perma.cc/X4S7-CLQD] ("One of the bedrock principles in a democracy is the equal consideration of the preferences and interests of all citizens. This is expressed in such principles as one-person/one-vote, equality before the law, and equal rights of free speech. Equal consideration of the preferences and needs of all citizens is fostered by equal political activity among citizens; not only equal voting turnout across significant categories of citizens but equality in other forms of activity."); *see also* IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 17 (Oxford Univ. Press ed., 2002) (suggesting that just democratic policies emerge where there is inclusive political equality and public reasonableness); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 34 (Univ. of Chi. Press ed., 1956) (associating democracy with "political equality, popular sovereignty, and rule by majorities"); AUSTIN RANNEY & WILLMOORE KENDALL, DEMOCRACY AND THE AMERICAN PARTY SYSTEM 23–39 (Earl Latham ed., 1956) (defining democracy in terms of "political equality," as well as "popular sovereignty," "popular consultation," and "majority rule").

[18] Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), https://bostonreview.net/articles/samuel-moyn-resisting-juristocracy/ [https://perma.cc/HN4Q-6KP4] (advocating that progressives abandon the current "juristocracy" which "empowers constitutional judges to an extraordinary extent to make enormous policy decisions").

[19] *See id.* ("A legal culture less oriented to the judiciary and more to public service in obtaining and using democratic power in legislatures at all levels is the sole path to progress now. In fact, it always has been."); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703, 1721 (2021) (arguing for reforms that would disempower the Supreme Court in the name of progressive democracy); Nikolas Bowie & Daphna Renan, *The Supreme Court is Not Supposed to Have this Much Power*, ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/ [https://perma.cc/H6U9-8WLR]

forming political contestations into strong "rights" based claims for courts rather than legislatures;[20] and questioning of the ability or capacity of the Supreme Court's constitutional decision-making to resolve challenging policy or ethical questions.[21] The remedy often includes curbing judicial supremacy[22] and encouraging lawyers and social movements to more fruitfully engage in the political and legislative process.[23] However, these critiques of *Roe* and the separate critiques of judicial supremacy also require attention to how that political domain is constituted: who is represented, who has meaningful participation, and what modes and structures of decision-making exist within legislative bodies. In essence, if we are to offer the political domain as an alternative to courts—a claim for which we have some sympathy—one must ensure that the political arena has the key elements of inclusive democracy. Given the asymmetrical gender burdens of restrictions on reproductive rights, attention to the role of women and their intersectional identities as legislators is an important measure of inclusion in addition to the ability to participate as voters.

Our examination of the political process also has practical importance for women and other people who can get pregnant. Federal, state, and local legislatures will now be the terrain where reproductive health and rights will be contested and determined.[24] The legislative bodies that decide on these

("[J]udicial supremacy has also impoverished what we think is possible through democratic politics—and through organizing for political change at the national level.") (emphasis omitted); Presidential Commission on the Supreme Court of the United States 1, 12 (June 30, 2021) (written testimony of Nikolas Bowie, Assistant Professor of Law, Harvard Law School), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf [https://perma.cc/3SMY-JRZR] ("[A]s Tocqueville observed . . . judicial review is also antidemocratic as a matter of theory.").

[20] *See* JAMAL GREENE, HOW RIGHTS WENT WRONG xx (Alexander Littlefield ed., 2021) ("We need a different strategy of responding to competing rights, a strategy of rights *mediation*. U.S. Courts recognize relatively few rights but strongly. They should instead recognize more rights, but weakly.") (emphasis omitted).

[21] *See, e.g.*, David E. Pozen & Adam Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 794 (2021) (contending that the prevalent modalities of judicial reasoning "wall off constitutional decisionmaking from the better parts of policy analysis, comprehensive normative theory, emotional empathy in context, and complex arrangements for multiparty compromise," with the result that "[m]any people's first-order commitments are sacrificed or obscured to the dictates of constitutional grammar").

[22] *See, e.g.*, Doerfler & Moyn, *supra* note 19, at 1725–28 (exploring a range of disempowering reforms to the Supreme Court including jurisdiction stripping, supermajority review of legislation, and legislative override).

[23] *Id.* at 1706 ("[P]rogressives should ignore criteria [for judicial reform] that preserve national stasis, which they understandably reject, and avoid old errors in their relationship to judicial power, which they tried at their last moment of political opportunity in the 1930s.").

[24] *See After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS. (July 2022), https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/3L6P-SLH3] (finding that abortion is "at risk of being severely limited or prohibited in twenty-six states and three territories"); *see also* Marielle Kirstein et al., *One Month Post-*Roe*: At Least 43 Abortion Clinics Across 11 States Have Stopped Offering Abortion Care*, GUTTMACHER INST. (July 28, 2022), https://www.guttmacher.org/article/2022/07/one-month-post-roe-least-43-abortion-clinics-across-11-states-have-stopped-offering [https://

questions should have equal and meaningful representation of women—including low-income women, women with disabilities, and women of color who are often most affected by these policy issues.[25] Findings show not only that legislatures with more women are less likely to adopt abortion restrictions but also that gender equality in legislatures remains salient to evaluating the legitimacy and fairness of reproductive policy.[26]

Part I of this Article shows how the *Dobbs* Court deploys arguments about women's political equality to buttress its holding that *Roe* should be overturned. Specifically, the arguments serve to underscore federalism-based arguments, to highlight judicial minimalism, and to justify the Court's rejection of stare decisis, all in service of the long-standing truism that "returning abortion to the States" is consistent with democratic self-governance and judicial legitimacy. These arguments function to legitimize the Court's act of overruling *Roe* and *Casey* to the public. Part II reveals what is missing from these political equality arguments: a proper account of the political process that shapes reproductive rights legislation, including the role of women in legislative bodies. This Part considers how democratic distortions and deficits in the political process shape the abortion debate generally. It then presents data on how the percentage of women in legislatures affects reproductive rights legislation, presenting global as well as U.S. state-level data. U.S. state legislatures in which women are most underrepresented are more likely to adopt abortion-restrictive legislation, which we argue presents another distortion of the political process. Part III reveals the practical, doctrinal, and democratic consequences of highlighting this underrepresentation. A fuller conception of political inequality can be used to challenge state level abortion restrictions. Beyond the courts, we argue for greater attention to the representation of women in legislatures as an important measure of equality and as a safeguard for legitimizing government decision-making.[27]

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perma.cc/ME9W-55U3] (describing the current and predicted landscape for accessing abortions by state post-*Dobbs*).

[25] *See* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice & The Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2093 (2021) (emphasizing that "abortion restrictions are often especially burdensome for poor women," and "because race and socioeconomic status are often related—particularly in those regions of the country where abortion restrictions are more extensive—the burden on poor women will also result in a burden on women of color, rendering abortion inaccessible to these groups").

[26] *See infra* Part III.B.

[27] Just as this Article does not assume that women will all take the same approach to the question of reproductive rights (understanding that intersectional identities and reproductive capacity matter), it also does not assume that those identifying as women are the only people with a stake in the abortion discourse. Those who identify as men and others with the capacity for pregnancy may also have a particular stake. This Article is concerned with investigating one dimension of representation—those identifying as women—because this is the argument offered by the *Dobbs* majority as well as a category of subordination that has been historically salient in politics and law.

I. Political Equality as Legitimation in *Dobbs*

Dobbs presented a challenge to Mississippi's law prohibiting most abortions after the fifteenth week of pregnancy.[28] More than just upholding Mississippi's law, the Court held that "*Roe* and *Casey* must be overruled."[29] At the core of the Court's argument is an apparently simple proposition: "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . ."[30] In the Court's view, the "right to abortion" is neither textually committed to the Constitution nor protected in the broader notion of liberty that emerges from the Due Process Clause of the Fourteenth Amendment.[31] According to the *Dobbs* majority, abortion is not "deeply rooted in this Nation's history and tradition" and—unlike rights involving intimate sexual relations, contraception, and marriage—is not "implicit in the concept of ordered liberty."[32] To the Court, abortion is "fundamentally different" from these other liberty rights because it destroys an "unborn human being."[33] In arriving at its conclusion, the Court articulates the right at issue as the constitutional protection for a *specific* right to abortion, rather than a general privacy or liberty right that includes the right to make decisions concerning family, marriage, sex, childrearing, or other decisions central to personal dignity and autonomy.[34]

Yet despite the pages devoted to textual and historical understanding, the Court's opinion cannot stand merely on the analysis of liberty or autonomy in the first instance. To arrive at its conclusion that the right to abortion is not protected in the Constitution requires the Court to overturn precedent. Thus, in addition to standard constitutional arguments about text and history,[35] *Dobbs* offers arguments to justify its anti-stare decisis move away from *Roe* and *Casey*. Woven through its doctrinal application is a familiar idea about the judicial role—that *Roe* constituted judicial overreach and the

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[28] Miss. Code Ann. §41-41-191(4)(b) (2018) ("Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform, induce, or attempt to perform or induce an abortion of an unborn human being if the probably gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.").

[29] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 5 (June 24, 2022).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* (quoting Miss. Code Ann. §41-41-191(4)(b) (2018)).

[34] *See* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992), *overruled by Dobbs*, No. 19-1392 (recognizing Fourteenth Amendment liberty to encompass "intimate and personal choices . . . central to personal dignity and autonomy"). For cases on which *Casey* relied, see Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception for married couples); Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception for unmarried persons).

[35] *See* Philip Bobbitt, Constitutional Fate: Theory of the Constitution 7 (1982) (describing five archetypal types of constitutional argument as historical, textual, structural, prudential, and doctrinal).

issue of abortion should rest with "the people"[36]—combined with a new emphasis on the role of women in the political process.[37]

In what follows, we explain how the Court articulates a theory of the political process and its contentions about the role of women in that process, and we argue that these arguments operate in the register of legitimation for the Court's ruling. Arguments about which branch is properly suited to make decisions about reproductive rights in a democracy are not about the specific question of whether the privacy or liberty right in the Constitution encompasses abortion.[38] The arguments about the political process operate to legitimize the Court's opinion as distinct from the judicial power-grab that the *Dobbs* Court assigns to the *Roe* Court.[39] These political process arguments serve to reinforce the democratic *illegitimacy* of *Roe* and support the legitimacy of overruling *Roe* by returning the issue to a presumably fair, equal, and open democratic process. This form of democratic legitimation, we suggest, has components of both "legal legitimation," an effort to inspire trust in its reasoning that *Roe* should be overruled, and "sociological" legitimation, trust in the Court's decision by the public.[40] But they also emphasize the democratic role of the *Dobbs* Court. When we use the term "democratic" here, we reference the view that the legislature—the elected branch—should make contested decisions about reproductive rights, rather than the notion that the right to abortion should be guided by its popularity with voters.[41]

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[36] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 6 (June 24, 2022).
[37] *Id.* at 65.
[38] *See infra* Part I.A.3.
[39] *See id.*
[40] FALLON, *supra* note 16, at 21–22. Others have noted overlap and tensions between the legitimation categories. *See* Tara Lee Grove, *Book Review: The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2246 (2019) (arguing that "in politically divisive moments like today, the Justices face a potential conflict between sociological and legal legitimacy"); Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1473–74 (2007) (describing the tension between legal and sociological legitimacy).
[41] Though the Court justifies its decision in *Dobbs* by pointing to the divisiveness of the abortion issue and to the failure of *Casey* to settle the matter, the Court denies that its reasoning depends on the popularity of the outcome—a common refrain in constitutional decision-making. *See Dobbs*, slip op. at 67–69; *cf.* Pozen & Samaha, *supra* note 21, at 762 (describing appeals to the popularity of a constitutional right as an "anti-modality" in constitutional decision-making and stating that "one does not find constitutional decisionmakers relying on the popularity or unpopularity of a proposition as the sole basis for their decision"). How majoritarianism and popular views shape Court opinion is a topic of longstanding debate. *Compare* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 15 (2009) (arguing that "over time, with what is admittedly great public discussion . . . the Court and the public will come into basic alliance with each other") *with* Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 158 (2011) ("*Citizens United* is a powerful reminder that, despite the best efforts of modern majoritarian theorists, Bickel's countermajoritarian difficulty endures.").

The political equality of women is central to the Court's argument. *Dobbs* depends on an account of a democratic and legislative sphere that is free of distortions. Specifically, the decision assumes that women have political equality in this sphere. Women's ability to access and to utilize the political process became central to the Court's justification for overruling *Roe* and *Casey*. Coupled with the invocation of diverse female voices, the Court cast the overturning of double precedent as more democratic than letting it stand.

The Court's account of the political process—including assertions of pluralism and political equality—surfaces in three closely related categories of arguments: federalism, judicial minimalism, and stare decisis, which we discuss and evaluate in the next three sections.

A. Federalism and Pluralist Politics

Drawing on long-standing tropes about *Roe*,[42] the Court begins its opinion by characterizing *Roe* as inconsistent with democracy: "For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens."[43] The Court contends that *Roe* created a constitutional right without basis and thus transferred power to courts that properly belonged to the "people[ ]" represented by their state legislatures.[44] Invoking Justice Scalia's partial dissent in *Casey*, the Court argues that abortion should be resolved "like most important questions in our democracy: by citizens trying to persuade one another and then voting."[45]

In large part, the Court's invocation of federalism serves to buttress its finding that the Constitution contains no right to an abortion. Contrast the Court's approach here to its opinion in *New York State Rifle and Pistol Association v. Bruen*, issued one day before *Dobbs*.[46] In *Bruen*, the Court approved vigorous protection of an individual's right to bear arms, allowing this right to trump a long-standing state law.[47] But in *Dobbs*, because abor-

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[42] *See generally* Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of* Roe v. Wade: *Why Abortion Should Be Returned to the States*, 10 TEXAS REV. L. & POL. 85 (2005) (arguing no positive reliance interests for stare decisis and critiquing the *Roe* and *Casey* Courts' "abortion policymaking").

[43] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 1 (June 24, 2022).

[44] *Id.* at 6 (contending that the legality of abortion is a matter for "the people's elected representatives").

[45] *Id.* (quoting Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 979 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., No. 19-1392 (June 24, 2022) (Scalia, J., concurring in judgment in part and dissenting in part)).

[46] *See* N.Y. State Rifle & Pistol Assoc. v. Bruen, No. 20-843 (June 23, 2022) (striking down New York law requiring a special issue license for carrying firearms outside the home).

[47] The dissent in *Bruen* emphasizes the federalism argument that "balancing these lawful uses against the dangers of firearms is primarily the responsibility of elected bodies, such as legislatures." *Id.* at 7 (Breyer, J., dissenting).

tion is neither protected in the constitution nor a component of "ordered liberty," the question of how to strike an appropriate balance between competing priorities such as women's health and fetal life should be subject to state legislative processes.[48]

Federalism, as expressed in *Dobbs*, serves the goal of celebrating subnational pluralism, which in turn functions to legitimize the Court's overruling of precedent. Justice Kavanaugh seized on the "federalism-as-pluralism" theme early during oral arguments, asking the Mississippi attorney general why the Court should decide the issue rather than legislative branches and state courts, stating with seeming approval: "[T]here'll be different answers in Mississippi than New York, different answers in Alabama than California."[49] The conviction that abortion is an issue properly regulated by the states, and devolution to pluralist politics, shapes the final note of the Court's opinion: "Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogate that authority. We now overrule those decisions and return that authority to the people and their elected representatives."[50]

It is not fully clear whether the Court imagines federalism as continued disharmony and contestation at the state level to accommodate conflicting views,[51] or federalism in service of an ultimate national consensus and settlement. Nor does the Court engage with arguments that States may have an interest in a federal approach in order to nationalize a right to abortion to safeguard reproductive access of all citizens and prevent inter-state variation

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[48] *See Dobbs*, slip op. at 31 ("In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an 'unborn human being.'"); *see also id.* at 34–35 (concluding that given the lack of constitutional force of policy arguments for and against abortion, the Court thus "return[ed] the power to weigh those arguments to the people and their elected representatives"). For accounts of the potential pluralist benefits of federalism, see Michael W. McConnell*, Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–95 (1987); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1108–09 (2005).

[49] Oral Argument at 1:47:00, Dobbs v. Jackson Women's Health Org., No. 19-1392, https://www.supremecourt.gov/oral_arguments/audio/2021/19-1392 [https://perma.cc/DR7C-DDJ4] (Justice Kavanaugh asked, "Why should this court be the arbiter rather than Congress, the state legislatures, state supreme courts, the people being able to resolve this?").

[50] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 79 (June 24, 2022).

[51] *Cf.* Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 11–12 (2010) ("Federalism is an idea that depends on, even glories in, the notion of minority rule. It involves decentralized governance and a population that is unevenly distributed across two levels of government, something that allows national minorities to constitute local majorities."); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1864 (2019) ("Empowering minorities to rule is part and parcel of American democracy.").

and conflict.[52] But one function of the argument is clear: the invocation of federalism offers a balm to offset the Court's reversal of long-standing precedent.[53]

B. Judicial Minimalism

The Court invokes its conception of the political process with another familiar argument against *Roe*: that the decision overstepped the judicial role. This argument draws on the notion that the Supreme Court should engage in "judicial minimalism" guided by "passive virtues"[54] and act with *Thayerian* deference to political branches.[55] The argument also resonates with John Hart Ely's "representation-reinforcing" view of judicial review, which posits that courts should step out of their role of deference to legislative bodies only to safeguard explicit constitutional rights or those protecting discrete and insular minorities whose rights cannot be protected in the ordinary political process.[56] The Court gives voice to scholarly and political ar-

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[52] *Cf.* Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 602–03 (2011) (noting that states often have an interest in federal regulation of a problem); *see also* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023) (delineating interstate legal conflicts over abortion that are likely to arise after *Dobbs*).

[53] Some commentators would say more sharply: this invocation is a "rhetorical feint." Scott Lemieux, *Abortion Will Not Be Sent Back to the States*, AM. PROSPECT (Dec. 6, 2021), https://prospect.org/justice/abortion-will-not-be-sent-back-to-the-states/ [https://perma.cc/LF3E-S83U] ("Despite rhetorical feints at the virtues of federalism, Republicans have passed national abortion bans before and they will again. No House Republicans support abortion rights, and only two Senate Republicans (Susan Collins and Lisa Murkowski) do.").

[54] *See* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 79 (1961) (discussing need for Court as least powerful branch to exercise passive virtues); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 24–45 (1999) (making a case for restrained judicial decisionmaking decisions that leave the details to the political process to deliberate and decide); *see also* Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 938 (2016) (delineating various minimalist arguments against *Roe,* including those of Professor Bickel, a procedural minimalist who believes that the Supreme Court should avoid granting certiorari in some cases to avoid conflict, and Professor Sunstein, a substantive minimalist who believes that Court decisions should catalyze and not preempt democratic deliberation).

[55] *See* JAMES BRADLEY THAYER, THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW 28–30 (1893) (arguing for limited judicial review and for judicial deference to federal and state legislation).

[56] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 101–02, 135–79 (1980). Justice Alito relies on Ely's critique of *Roe*, though he does not specifically invoke Ely's most famous tome. *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 54 (June 24, 2022). Ely's account derives in part from the Court's famous footnote four in *United States v. Carolene Products*, 304 U.S 144 (1938), which provides an exception to generally deferential judicial review of legislation and calls for "searching judicial inquiry" when "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *See id.* at 152 n.4. The Court's decision in *Frontiero v. Richardson*, 411 U.S. 677 (1973), also resonates with *Ely's* justification of heightened judicial

guments that *Roe* curtailed democratic debate on abortion rights and compounded divisions.[57]

Citing Justice Ginsburg's 1992 critique of *Roe*[58]—and not her contention that Texas's statute should have been overturned and that *Roe* should have connected women's autonomy to equality and full citizenship[59]—the Court casts *Roe* as putting an end to a political process that was moving towards liberalization and compromise.[60] This curtailment of the political process through an "'exercise of raw judicial power'"[61] "embittered our political culture for a half century."[62]

The *Dobbs* majority rejects *Casey's* view that preserving *Roe* preserves faith in the Court as a principled institution. On the contrary, the *Dobbs* majority claims that preserving *Roe* exacerbates the problem. The *Casey* Court "misjudged the practical limits of this Court's influence[;]" "[t]he Court cannot bring about the permanent resolution of a rancorous national controversy simply by dictating a settlement and telling the people to move on."[63] The *Dobbs* Court disavows that its refusal to adhere to stare decisis is itself a political act or that it will bring about an anti-abortion outcome but suggests instead that stepping aside will allow the political process to properly unfold without judicial interference: "We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*."[64]

Here again, the Court rehashes a classic critique of *Roe*?—that it mobilized opponents and that the Court should have issued a narrower decision.[65]

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review in cases in which the government activity burdens an immutable class, which is politically powerless.

[57] *See, e.g.*, Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1981–82 (1999) (summarizing these accounts).

[58] *Dobbs*, slip op. at 3 (citing Ruth B. Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992)) ("*Roe* . . . halted a political process that was moving in a reform direction and thereby, I believed, prolonged divisiveness and deferred stable settlement of the issue.").

[59] *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 383 (1985) ("[I]n the balance is a woman's autonomous charge of her full life's course-as Professor [Kenneth] Karst put it, her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.").

[60] *See Dobbs*, slip op. at 2 ("At the time of *Roe,* 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process.").

[61] *Id.* at 3 (quoting Roe v. Wade, 410 U.S. 113, 222 (1973), *overruled by Dobbs*, No. 19-1392 (White, J., dissenting)).

[62] *Id.* at 3 (citing Ginsburg, *supra* note 58, at 1208).

[63] *Id.* at 68.

[64] *Id.* at 69.

[65] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 995, 1002 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., No. 19-1392 (June 24, 2022) (Scalia, J., dissenting) (faulting *Roe* for "foreclosing all democratic outlet for the deep passions this issue arouses"). For some examples of this argument, see JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 96 (2006) ("When the Supreme Court struck some of these abortion restrictions down in the late 1970s and '80s, it finally energized abortion opponents who otherwise would have had to make their

When advanced by those favoring abortion access, it often takes the form that *Roe* had the unintended consequence of mobilizing opposition in backlash, and that the pro-choice position or "some consensus" would have prevailed in the political domain without judicial interference.[66] By now, a large body of scholarship has complicated this basic claim. Scholars have shown there was pre-*Roe* mobilization against abortion,[67] that the modern day anti-abortion movement came after *Roe* in response to the women's and gay rights movement and was effectuated by a rising evangelical movement seeking to promote traditional "family values,"[68] and that in the 1980s Republican elites began to mobilize evangelical voters, giving the anti-abortion movement the political salience and partisan tenor that persists today.[69] The

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case in the political arena"); SUNSTEIN, *supra* note 54, at 114–15 (making case for minimalist approach to abortion rights); Devins*, supra* note 57, at 1981–82 ("What would have happened if the Court followed this course [of Cass Sunstein's judicial minimalism] issuing a less ambitious decision in *Roe* and then steering clear of the controversy for several years? Would the acrimony that followed in *Roe's* wake have been moderated? Quite possibly.").

[66] *See* Devins, *supra* note 57, at 1982 (arguing that a loss in *Roe* "might well have spurred the pro-choice community into action" to "pursue[ ] abortion legislation in the shadow of constitutional uncertainty," making it "possible that some consensus would have emerged").

[67] *See* Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2079–80 (2011); *see also* DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 88–94 (2016) (describing origins of the National Right to Life organization in 1967); GENE BURNS, THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, & CULTURAL PLURALISM IN THE UNITED STATES 227–28 (2005) ("*Roe* did not *initiate* a period of divided moral sentiment over abortion; it did not serve as a sharp break from the point where state discussions had left off."); David J. Garrow*, Abortion Before and After* Roe v. Wade*: An Historical Perspective*, 62 ALB. L. REV. 833, 840–41 (1999) (arguing that the claim that *Roe* energized right to life groups is "utterly wrong" and providing an account of the pro-life groups near defeat of a 1972 New York law granting abortion rights); Scott E. Lemieux, *Roe* and the Politics of Backlash: Countermobilization against the Courts and Abortion Rights Claiming 1, 33 (Jan. 2009) (unpublished manuscript) [https://perma.cc/S8YY-WVY7] (showing pre-*Roe* mobilization by pro-life groups to ban abortion).

[68] *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 415 (2007) ("By the end of the [1970s], however, the views of Protestant evangelicals were to change markedly. Increasing numbers of evangelical Protestants joined a pan-Christian coalition opposing abortion as an expression of "secular humanism."); *id.* at 416 (detailing the speeches of Tim Hayes, the co-founder of the Moral Majority, on the threat that the women's and gay rights movement posed to traditional family structures and more broadly male-headed households); MARJORIE J. SPRUILL, DIVIDED WE STAND: THE BATTLE OVER WOMEN'S RIGHTS AND FAMILY VALUES THAT POLARIZED AMERICAN POLITICS 71–79 (2017) (describing rise of conservative women's groups in the late 1970s that emphasized traditional family relationships as a response to feminist women's groups' influence in politics); JANE MANSBRIDGE, WHY WE LOST THE ERA 5, 135–38 (1986) (describing how opponents of the ERA mobilized previously unorganized constituency of "traditional homemakers" to rally against the proposed amendment).

[69] *See* Daniel K. Williams, *This Really Is a Different Pro-Life Movement*, ATLANTIC (May 9, 2022), https://www.theatlantic.com/ideas/archive/2022/05/south-abortion-pro-life-protestants-catholics/629779/ [https://perma.cc/CB9G-MNAQ] ("In 1973 many of the most vocal opponents of abortion were northern Democrats who believed in an expanded social-welfare state and who wanted to reduce abortion rates through prenatal

abortion issue was not always politically salient; religious groups (including Evangelicals, but not Catholics) had mixed views regarding abortions for much of the 1970s, and positions on abortion were only marginally affected by partisan identity even in the immediate years after the Court decided *Roe*.[70]

Beyond the specific criticisms of the historical account, scholars have challenged the theory of constitutionalism, courts, and democracy that emerges from an emphasis on judicial minimalism. Richer theories of courts extend beyond the countermajoritarian difficulty and show how courts often enable pro-majoritarian policies by unlocking vetogates, and political obstacles caused by interest group dynamics.[71] In addition, rights enforcement by courts can play a complementary role with legislatures in "restricting and enabling democratic participation."[72] As to *Roe* itself, some commentators

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insurance and federally funded day care. In 2022, most anti-abortion politicians are conservative Republicans who are skeptical of such measures."); *see also id.* ("The crucial change came in the midterm elections of 1994, when southern conservatives gave Republicans the votes they needed to take over both houses of Congress for the first time in 40 years."). Some scholars note that as early as 1972, Republicans began to explore using abortion as a strategy to gain support from anti-abortion Catholics. *See* SPRUILL, *supra* note 68, at 45. *But cf.* Randall Balmer, *The Real Origins of the Religious Right*, POLITICO (May 27, 2014), https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133/ [https://perma.cc/K8HD-T3E2] ("Although abortion had emerged as a rallying cry by 1980, the real roots of the religious right lie not the defense of a fetus but in the defense of racial segregation.").

[70] *See, e.g.*, Greg D. Adams, *Abortion: Evidence of Issue Evolution*, 41 AM J. POL. SCI. 718, 731 (1997) (finding no significant partisan divide in support for abortion in the period between 1972-1987 and that Republicans were slightly more likely to self-identify as pro-choice); Samantha Luks & Micheal Salamon, *Abortion*, *in* PUBLIC OPINION & CONSTITUTIONAL CONTROVERSY 80, 98–99 (Nathaniel Persily et al. ed., 2008) (finding that Democratic and Republican attitudes on abortion began to diverge in 1985); *see also* Donald Granberg & Beth Wellsman Granberg, *Abortion Attitudes, 1965-1980: Trends and Determinants*, 12 FAM. PLAN. PERSP. 250, 258 (1980) (finding in 1980 that party affiliation had little effect on attitude toward abortion policy).

[71] *See* Jonathan P. Kastellac, *Empirically Evaluating the Countermajoritarian Difficulty*, J. L. & CTS. 1, 24 (Spring 2016) (analyzing pre-*Roe* state-level legislative activity on abortion and concluding that "[t]he results presented here contribute to a growing body of evidence that suggests that the traditional view of the countermajoritarian difficulty does not adequately capture the political realities in which courts operate. In particular, given the prevalence of status quo biases in a government with multiple veto players and multiple interests, there will be many occasions in which policy lags behind changes in public opinion. In ruling state statutes invalid, many judges were acting in concert, and not discord, with the preference of state majorities."). For jurisprudential challenges to "backlash," see Post & Siegel, *supra* note 68, at 401 ("*Roe* and *Hardwick* can be condemned (or praised) as a matter of substantive constitutional law, but we are not persuaded that there is an independent and neutral criterion of healthy political pluralism on which it is possible to condemn them."); Barry Friedman, *The Importance of Being Positive*: *The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1293 (2004) ("[A]fter all is said and done, if the fight is fought and pursued with focus, and attracts enough adherents, the law changes. *Roe* becomes *Casey*. *Bowers* becomes *Romer* and then *Lawrence*.").

[72] *See* Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process & The Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1906, 1908–09 (2021) (reassessing John Hart Ely's "now-canonical interpretation of the *Carolene* framework" by showing the social movement forces underlying the modern

argue that *Roe* did not shut down democratic debate, it just channeled it into different spheres.[73]

Even if the causal support for the Court's argument that *Roe* created political division is not strong, the larger function of the judicial minimalism notion in *Dobbs* is to emphasize the illegitimacy of *Roe* and to position the act of overruling *Roe* as consistent with the proper judicial role. In this way, arguments about judicial overstepping in *Roe* are offered to buttress the democratic legitimacy of *Dobbs*.

C. Stare Decisis and the Absence of Reliance

The *Dobbs* Court's arguments against stare decisis also function to buttress the democratic legitimacy of the opinion. The majority begins by offering the doctrinal framework that justifies moving away from precedent but then adds an empirical claim: that women are equal political participants as voters.[74] Specifically, the Court cites data finding that women are about "51.5 percent of the population" in Mississippi and "55.5 percent of the voters who cast ballots."[75]

The Court's analysis begins with the five-factor analysis for revisiting precedent in the constitutional context, which entails an examination of "the nature of [the original Court's] error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[76] The Court finds that the first four factors are met largely due to its initial doctrinal analysis, that *Roe* lacks textual or historical grounding.[77] The Court also rejects *Casey's* attempt to salvage *Roe,* finding that *Casey* compounds *Roe*'s problems by substituting *Roe*'s trimester framework with the "undue burden" standard.[78] According to the *Dobbs* Court, this standard is not "workable" and is ambiguous, difficult to apply, and was "not built to last."[79] These first four arguments against adhering to stare decisis also provide an occasion to revisit the Court's democratic objections to *Roe*, that *Roe* usurped

substantive due process cases and that these substantive due process cases by enabling "the participation of groups both historically marginalized, can be understood as democracy-promoting as well").

[73] *See* Post & Siegel, *supra* note 68, at 400.

[74] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 65–66 (June 24, 2022).

[75] *Id.* (citing Dep't of Commerce, U.S. Census Bureau, *Voting and Registration in the Election of November 2020* tbl. 4b (Apr. 2021)).

[76] *Id*. at 43.

[77] *See id*. at 39–69.

[78] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 878 (1992), *overruled by Dobbs*, No. 19-1392.

[79] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 60 (June 24, 2022) (quoting *Casey*, 505 U.S. at 965 (Rehnquist, C.J., dissenting in part)).

power reserved to the people, short-circuiting the democratic process and inflaming our national politics.[80]

It is in evaluating the fifth factor—reliance—that the Court relies on the empirical claim that women are equal participants as voters.[81] Reliance on abortion was a key reason why *Casey*, though moving away from *Roe*'s trimester system and replacing it with the "undue burden" standard, reaffirmed *Roe*.[82] According to *Casey*, "people [had] structured intimate relationships and made choices that define their view of themselves and their places in society in reliance on the availability of abortion in the event that contraception should fail" and the "ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[83] But to the *Dobbs* majority this argument is unpersuasive because women themselves offer conflicting arguments about how abortion impacts their lives and on the "status of the fetus."[84] Removing the Court from this contested question thus allows women to express their views in the political domain. "[W]omen on both sides of the abortion issue [can] seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office."[85]

As the dissent contends, the *Dobbs* Court's narrow conception of permissible reliance interests ignores that abortion is a "common medical procedure"—about a quarter of American women will have one before age forty-five.[86] We offer an additional limitation of the Court's conception of reliance: it relies on a contested empirical assumption about women's political power. Even while arguing that *Casey*'s notion of reliance is "intangible" and based on difficult and conflicting empirical assumptions, the Court offers its own empirical claim. "Women are not without electoral or political power," the *Dobbs* majority asserts: "It is noteworthy that the percentage of women who register to vote and cast ballots [in Mississippi] is consistently higher than the percentage of men who do so."[87] This data is offered to sustain the move away from precedent. The logic of the argument is that there is no need for stare decisis because there is no evidence that women as a political group have relied on *Roe* and *Casey*.

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[80] *Id.* at 44.

[81] *Id.* at 66.

[82] *See Casey*, 505 U.S. at 874.

[83] *Id.* at 835, 856. The *Casey* plurality does not find reliance in the typical sense of disrupting planning since abortion is generally "unplanned activity." *Id.* at 856.

[84] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 65 (June 24, 2022).

[85] *Id.*

[86] *See id.* at 48 (Breyer, Sotomayor, Kagan, JJ., dissenting) ("The disruption of overturning *Roe* and *Casey* will therefore be profound.").

[87] *Id.* at 65 (citing Dep't of Commerce, U.S. Census Bureau, *An Analysis of the 2018 Congressional Election* 6, tbl. 5 (Dec. 2021)).

D. Women's Political Equality as Legitimation

Through these reliance arguments, sewn together with the arguments about federalism and judicial minimalism, a legitimating account of the Court's decision begins to emerge. As the *Dobbs* Court tells it, *Casey* adhered to *Roe* because of its view that the "American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not 'social and political pressures.'"[88] To the *Dobbs* Court, *Casey's* analysis is wrong: it is the judiciary's adherence to an erroneously decided *Roe* that would undermine the legitimacy of the Court.

Dobbs landed in the midst of heated conversations about the power and role of the Court: whether partisans were unfairly packing the Court to advance an agenda to the right of most Americans,[89] and whether the Court's entrenchment of views unsupported by political majorities posed a "threat to liberal democracy."[90] In speeches and public statements before *Dobbs*, several Justices warned that tactics like adding additional justices to the Court would damage the Court's reputation and undermine its legitimacy.[91] In this context, the *Dobbs* majority's opinion goes further than simply deeming *Roe* "egregiously wrong" as a matter of constitutional law, it repeatedly invokes legislatures, politics, the political process, democratic division, and democratic debate—all of which operate in the register of legitimation.

In the same vein, the State, in oral argument, responded to Justice Sotomayor's query about how the Court could "survive the stench that [overruling *Roe* and *Casey*] creates in the public perception that the Consti-

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[88] *See id.* at 66 (citing Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 865 (1992), *overruled by Dobbs*, No. 19-1392).

[89] *See* Presidential Commission on the Supreme Court 12 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf [https://perma.cc/G7XA-UZVH] (describing the Court Reform Commission as arising from the "intense and ongoing debate about the Court's composition, the direction of its jurisprudence, and whether one political party or the other has breached norms that guide the process of confirming new Justices"); *see also* Stephen Breyer, The Authority of the Court and the Peril of Politics 51 (2021) ("[T]he popular perception has grown that Supreme Court justices are unelected political officials or 'junior varsity' politicians themselves, rather than jurists. But that is not how most judges see themselves or the judiciary. Nevertheless, it has become a matter of concern that this is what the public thinks.").

[90] Ian Millhiser, The Agenda: How a Republican Supreme Court is Reshaping America 337, 344 (2021) ("[A] Republican supreme court will fundamentally alter the structure of the American system of government" and "is likely to build a nation where . . . only conservatives have the opportunity to govern.").

[91] *See, e.g.*, Assoc. Press, *Justice Thomas Worries "Trends" like "Cancel Culture" will Compromise Institution*, NPR (Mar. 12, 2022), https://www.npr.org/2022/03/12/1086267179/justice-thomas-worries-trends-like-cancel-culture-will-compromise-institutions [https://perma.cc/GZ2Z-6JUK] (In a speech sponsored by the Orrin J. Hatch Foundation, Justice Thomas stated, "You can cavalierly talk about packing or stacking the court . . ." but "[a]t some point the institution is going to be compromised," and "[b]y doing this, you continue to chip away at the respect of the institutions that the next generation is going to need if they're going to have civil society.").

tution and its reading are just political acts."[92] According to the State, public perception would be satisfied by a decision better grounded in the Constitution and returned to the people: "[I]f the matter is returned to the people, the people can deal with it, they can work, they can compromise and reach different solutions. But, if we don't do that, we're just going to have all this sort of damage, and at some point, it's appropriate for the Court to say enough."[93]

In *Dobbs*, the Court deploys women in a new way as a support for overruling *Roe*. Not only do women not have a reliance interest in abortion, they also do not need courts to protect their rights because they can function as equal participants in the political marketplace.[94] A celebration of contemporary political power functions as an antidote to the textualist and originalist methodology the Court employs.[95] The Court's appeal to contemporary politics thus asks for legitimacy from the public for a constitutional decision grounded on an imperfect past.

In addition, the Court draws on contestation among women-led groups to support its general account of a political process that allows a plurality of views to gain expression. In rejecting the reliance arguments,[96] *Dobbs* cites the conflicting arguments that women's amici groups offer on the question.[97]

The Court's "both sides"[98] argument obfuscates the reality of women's support for abortion access.[99] But it has resonance because of the steady and tactical rise of women's voices in the anti-abortion movement. The Court invokes women-led anti-abortion groups who began to feature more promi-

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[92] *See* Petitioner Oral Argument, Oral Argument Transcript, Dobbs v. Jackson Women's Health Org., No. 19-1392, at 15–16, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_4425.pdf [https://perma.cc/Q33Q-P8Y7] (arguing that the Court should "reach a decision well-grounded in the Constitution, in text, structure, history, and tradition").

[93] *Id.* at 36.

[94] *Cf.* United States v. Virginia, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting) (contending that "the suggestion that [women] are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns"); *id.* at 575 (citing women's legislative success in securing passage of legislation such as the Equal Pay Act of 1963, Title IX of the Education Amendments of 1972, and the Violence Against Women's Act of 1994).

[95] *Cf.* Ilya Somin, *The Borkean Dilemma: Robert Bork and The Tension Between Originalism and Democracy*, 80 U. CHI. L. REV. 243, 249–50 (2013) (summarizing the "dilemma" of originalism as including that "the political processes of 1787, 1791, and the 1860s" excluded people of color, and that the Constitution binds future political majorities and is "old" and "difficult to change").

[96] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 65 (June 24, 2022).

[97] *See id.* ("The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. Compare Brief for Petitioners 34–36; Brief for Women Scholars et al. as Amici Curiae 13–20, 29–41, with Brief for Respondents 36–41; Brief for National Women's Law Center et al. as Amici Curiae 15–32.").

[98] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 1–2 (June 24, 2022) (Kavanaugh, J., concurring).

[99] *See infra* Part II.A.

nently in the larger public debate over abortion in the 1980s, alongside arguments against abortion that are grounded in women's health and agency.[100] The amplification of women in social and political movements to limit abortion[101] (though not entirely new[102]) functions in the opinion and in the larger public debate to decouple abortion prohibition from arguments for women's equality and to emphasize women's agency as full participants in the political and social discourse over abortion. Since the 1990s, anti-abortion advocates have pressed women's health protective arguments,[103] including informed consent and waiting period laws that purport to protect women from coercion and domestic violence.[104]

These women-led anti-abortion groups have their own internal pluralism, contestation, and identities. Some take a redistributive stance associated with progressive politics, emphasizing support for maternal and family care.[105] Others emphasize the anti-abortion rights stance as consistent with

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[100] *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 YALE L.J. 1694, 1724 (2008) (arguing that anti-abortion movement sought "to appropriate feminism's political authority and express antiabortion argument in the language of women's rights and freedom of choice"); Mary Ziegler, *After Life: Governmental Interests and the New Antiabortion Incrementalism*, 73 U. MIAMI L. REV. 78, 90 (Fall 2018) (demonstrating the rise of targeted regulation of abortion providers ("TRAP") laws that claim to protect women from domestic violence or medical abortion by making it a "crime to coerce anyone to have an abortion.").

[101] *See generally* KARISSA HAUGEBERG, WOMEN AGAINST ABORTION: INSIDE THE LARGEST MORAL REFORM MOVEMENT OF THE TWENTIETH CENTURY (2017) (documenting the increasing role of women in the traditionally "patriarchal" anti-abortion movement and examining their intersecting racial, partisan, and religious identities); PAUL SAURETTE & KELLY GORDON, THE CHANGING VOICE OF THE ANTI-ABORTION MOVEMENT: THE RISE OF PRO-WOMAN RHETORIC IN CANADA AND THE UNITED STATES (2016) (describing how the anti-abortion movement increasingly presents itself as "pro-women").

[102] *See* Sidney Callahan, *Feminist as Anti-Abortionist*, *reprinted in* LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 48 (2010) (calling on women to "[a]ffirm that full feminine humanity includes distinctly feminine functions" and to make clear that "[w]omen need not identify with male sexuality, male aggression and womb-less male lifestyles in order to win social equality because "[g]etting into the club is not worth the price of alienation from body-life, emotion, empathy and sensitivity").

[103] Commentators have documented the tactical shift in "pro-woman" arguments from anti-abortion groups. *See, e.g.*, Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 837 (2007) (reading the Court's decision in *Gonzales v. Carhart*, 550 U.S. 124 (2007), which upheld a federal ban on D&X abortions as the Court's first acceptance of "a woman-protective justification for restricting access to abortion").

[104] *See generally* Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on June Medical*, 2020 SUP. CT. REV. 277 (2021) (detailing anti-abortion movement's development of "pro-woman and pro-life" arguments).

[105] For an account of this feminist perspective opposing abortion rights that emphasizes improved public and private supports for families and women, see *Sex, Abortion, & Feminism As Seen from the Right*, N.Y. TIMES (May 31, 2022), https://www.nytimes.com/2022/05/31/opinion/ezra-klein-podcast-erika-bachiochi.html [https://perma.cc/77UY-RVAZ].

honoring female dignity.[106] Yet the most powerful of these groups advance "a distinctly right-wing feminism"—one that emphasizes traditional family roles and provides a very limited space for the state in supporting reproductive access and families.[107] Regardless of their provenance and strength, and despite their differing approaches, the *Dobbs* Court suggests that these women-led groups provide an example of the pluralist politics and varied social movements that make overturning *Roe* appear democracy-enhancing.[108] However, as we discuss in the next Part, the extent to which *Dobbs* is democracy-enhancing depends significantly on how women (with their intersecting identities) are able to participate as voters and as legislators in this political process.

II. Abortion Politics & the Role of Gender

Whether relying on legislatures is more democratic than courts, as the *Dobbs* Court contends, depends in part on a just and properly functioning legislative and political process. Because reproductive rights policy imposes specific burdens on women and other people with the capacity for pregnancy, the democratic justice and legitimacy of regulation depends on a political process in which women and other people who can become pregnant are key participants. An initial examination of the data would lead one to question whether those conditions are met in the United States. In the United States, a majority of women are supportive of abortion access,[109] yet they constitute a minority of the legislators that are positioned to make such determinations about reproductive rights. Further, leading up to *Dobbs,* much of the most restrictive abortion legislation was generated by legislatures in which women were significantly underrepresented.

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[106] *See, e.g.*, Kristan Hawkins, '*In a Post*-Roe *America, I am Hopeful that Our Society Will Rebuild, and Our Communities Will Heal*', Politico Mag. (June 25, 2022, 2:23 PM), https://www.politico.com/news/magazine/2022/06/25/post-roe-america-roundup-00042377 [https://perma.cc/VVC4-ZDPH] ("Easy access to abortion has fostered a culture of people who have lost respect for the dignity of their own lives and the lives of those around them.").

[107] Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism, 1968 to the Present*, 28 Berkeley J. Gender L. & Just. 232, 234 (2013) (documenting rise of anti-abortion feminist groups such as the Susan B. Anthony List); *id.* at 256–57 (detailing increasing conservatism of Susan B. Anthony List).

[108] Doctrinally, the Court has also given air to a "pro-woman" abortion position in cases like Gonzales v. Carhart, 126 S. Ct. 1607 (2006). *See* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Women-Protective Abortion Restrictions*, 2007 U. Ill. L. Rev. 991, 1026 (2007) (highlighting "pro-woman" arguments for restricting abortion).

[109] In a 2022 Pew Research Center survey of American adults, 63% of the women polled said that they supported legalizing abortion in all/most cases. 58% of men polled said that they supported legalizing abortion in all/most cases. *See Public Opinion on Abortion*, Pew Rsch. Ctr., https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/ [https://perma.cc/F93R-MRQN] [hereinafter Pew Survey].

We show in this Part that there are democratic deficits that shape abortion regulation in the United States. This Part begins by establishing the disconnect between public opinion on abortion and abortion policy, then showing how polarized politics, anti-democratic structures, and gerrymandering complicate assumptions that abortion regulation is the result of majoritarian preferences.[110] We then show how the absence of women in legislatures further shapes legislative outcomes regarding abortion, more specifically that the absence of women in the legislature is a result of systematic barriers to equal participation.

A. Public Opinion, Polarized Politics and Democratic Distortions

An assumption that abortion regulation is the simple product of voter preferences hides a historical and contemporary reality that is more complex. Abortion politics are both a symptom and an output of intense partisan polarization, interest group mobilization, and conservative capture of state legislatures in ways that often distort majoritarian politics. As a result, restrictions on abortion are not the product of a democratic system characterized by "responsiveness . . . to the preferences of its citizens, considered as political equals."[111] This section explains some of the key dynamics.

1. *Attitudes and Public Opinion*

Public opinion is highly correlated with state abortion policy. Using data from state level surveys of public opinion on abortion, Figure 1 visually demonstrates that as public support increases, so does the permissiveness of the policy itself generally.[112] For our analysis, we use a survey conducted by the Pew Research Center in which people were asked if they think abortion should be illegal in all/most cases, none/few cases, or if they don't know.[113] The permissiveness of states' abortion policies is measured on a scale of zero to seven, zero being the most restrictive and seven being most permissive score (detail on how the score was calculated can be found in appendix A). Table 1 reports the data by state, along with state-by-state data on women's representation in the legislature.

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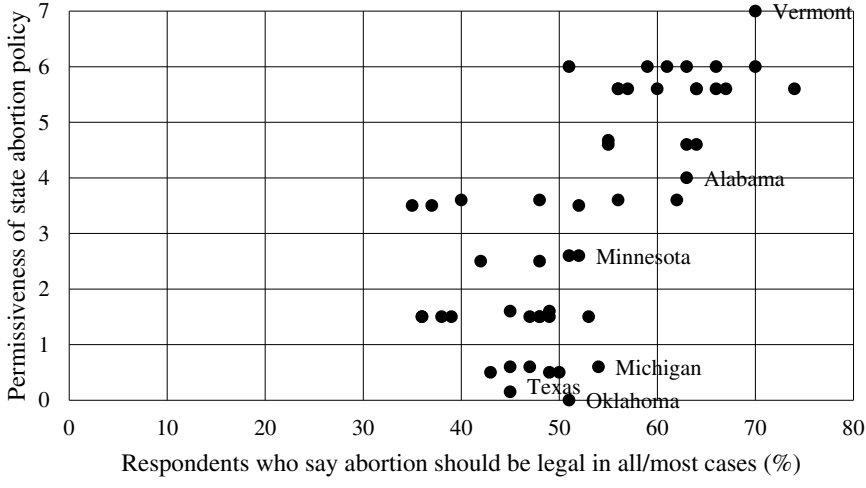
[110] For an argument claiming that because majorities support abortion, judicial review of abortion restrictions is not countermajoritarian, see Corinna Barrett Lain, *Upside Down Judicial Review*, 101 GEO. L. J. 113, 133–44 (2012).

[111] ROBERT DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1 (1971); *see also* DAHL, *supra* note 17, at 34 (identifying political equality as a central principle of democracy).

[112] A regression table of the relationship between public opinion on abortion and the permissiveness of state policy can be found in appendix B.

[113] *See Religious Landscape Study: Views About Abortion by State*, PEW RSCH. CTR. (May 12, 2015), https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-abortion/by/state/ [https://perma.cc/EWK3-9BEC].

FIGURE 1 - RELATIONSHIP BETWEEN PUBLIC OPINION ON ABORTION AND PERMISSIVENESS OF ABORTION POLICY BY STATE



In general, abortion policy tends to be more restrictive than overall public opinion would prefer. This is illustrated in Table 1, where it can be seen that even in states where the majority supports permissive policy, there are still often many restrictions. In some cases, there are extreme disconnects between public opinion and policy. This phenomenon can be seen for example in Oklahoma, where 51% of the survey respondents believe that women should be able to access abortion under all or most circumstances. Despite this relatively widespread support for permissive policy, Oklahoma has among the most restrictive policies in the US.[114]

[114] This is based on the Guttmacher review of state abortion policies. *An Overview of Abortion Laws*, GUTTMACHER INST. (Oct. 6, 2022) https://www.guttmacher.org/state-policy/explore/overview-abortion-laws, [https://perma.cc/E7GG-SYPL]. Oklahoma policy restricts abortion for all the restrictions for which the Guttmacher Institute collects data. It also imposes it from the beginning of pregnancy.

TABLE 1

State	Survey respondents who support access to abortion in all/most cases	Permissiveness of abortion policy (1-7)	Women in state legislature (%)
Maryland	74	4.6	44
Vermont	70	7	42
Washington D.C.	70	6	53
Connecticut	67	5.6	34
New Hampshire	66	6	35
Hawaii	66	5.6	36
Maine	64	5.6	44
New York	64	5.6	34
Oregon	63	6	44
Rhode Island	63	4.6	44
Alaska	63	4	30
Nevada	62	3.6	59
New Jersey	61	6	34
Washington	60	5.6	42
Colorado	59	6	45
California	57	5.6	32
Illinois	56	5.6	41
Montana	56	5.6	33
Florida	56	3.6	35
Virginia	55	4.675	34
Delaware	55	4.6	31
Massachusetts	54	5.6	30
Michigan	54	0.6	36
Wisconsin	53	1.5	31
Iowa	52	3.5	29
Minnesota	52	2.6	36
New Mexico	51	6	43
Pennsylvania	51	2.6	29
Oklahoma	51	0	21
Nebraska	50	0.5	27
Arizona	49	1.6	43
North Carolina	49	1.5	26
Kansas	49	0.5	30

State	Survey respondents who support access to abortion in all/most cases	Permissiveness of abortion policy (1-7)	Women in state legislature (%)
Wyoming	48	3.6	18
Ohio	48	2.5	31
Georgia	48	1.5	34
South Dakota	48	1.5	29
North Dakota	47	1.5	22
Utah	47	0.6	26
Idaho	45	1.6	31
Missouri	45	0.6	26
Texas	45	0.15	27
Indiana	43	0.5	23
South Carolina	42	2.5	17
Tennessee	40	3.6	15
Louisiana	39	1.5	19
Arkansas	38	1.5	23
Alabama	37	3.5	16
Kentucky	36	1.5	28
Mississippi	36	1.5	14
West Virginia	35	3.5	13

There are a number of key demographic attributes that shape public opinion on abortion, including socioeconomic status and education, with higher levels of wealth and education associated with increased support for permissive abortion policy.[115]

Over time, religion has consistently been highly significant in determining opinion on abortion, and certain religious constituencies increase the probability of support for restrictive abortion policy and the likelihood of

[115] *See* Sarah Raifman et al., *Exploring Attitudes About the Legality of Self-Managed Abortion in the US: Results from a Nationally Representative Survey*, 19 SEXUALITY RSCH. AND SOC. POL'Y 574, 575 (2022) (finding an association between support of self-managed abortion and higher levels of education and income); Amy Adamczyk et al., *Examining Public Opinion about Abortion: A Mixed-Methods Systematic Review of Research over the Last 15 Years*, 90 SOC. INQUIRY 920, 925–27 (2020) (finding religion, education, and income/employment as the most significant predictors of abortion attitudes). Findings on the influence of race and ethnicity have been somewhat inconclusive. *See* Mikaela H. Smith et al., *Opinions About Abortion Among Reproductive-Age Women in Ohio*, 19 SEXUALITY RSCH. AND SOC. POL'Y 909, 909 (2021); John P. Bartkowski et al., *Faith, Race-Ethnicity, and Public Policy Preferences: Religious Schemas and Abortion Attitudes Among U.S. Latinos*, 51 J. FOR SCI. STUDY RELIGION 343, 354 (2012).

adopting conservative abortion policy.[116] Anti-abortion public opinion is associated with large Catholic and Evangelical Protestant constituencies.[117] Other Protestant groups, on the other hand, correlate with increased support for liberal abortion policy.[118] In general, the less religious an individual is overall, the more likely they are to support a permissive abortion policy.[119] There are also interactions between religious groups that further shape how religion influences opinion. For example, as the number of Catholics in an area increases, politically liberal and moderate Protestant views become more permissive.[120] Adamczyk and Valdimarsdóttir explain that this could be the result of a backlash against the Catholic presence on the part of moderate and liberal Protestants. These moderate Protestants might adopt stronger pro-choice positions in response to the perceived influence of the Catholic population.[121]

Despite the known power of religious identity, over time, partisan identity[122] has become the primary determinant of an individual's stance on abortion.[123] The polarization of abortion as a party issue and its use as a tool for partisan mobilization has increased since the 1980s,[124] when Republicans courted "pro-life" voters and incorporated anti-abortion positions into their party platform.[125] Today, partisan identity has become almost synonymous with opinion on abortion. While over time, men and women of both parties have to a large extent converged to conform to a single party position, there are still certain types of legislative proposals relating to abortion for which Republican women exhibit preferences more in favor of permissive policy.[126]

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[116] *See* Rebecca J. Kreitzer, *Politics and Morality in State Abortion Policy*, 15 STATE POL. & POL'Y Q., 41, 44, 58 (2015).

[117] *See* John P. Hoffmann & Sherrie Mills Johnson, *Attitudes toward Abortion among Religious Traditions in the United States: Change or Continuity?*, 66 SOCIO. RELIGION, 161, 173, 178 (2005).

[118] *See* Robert E. O'Connor & Michael B. Berkman, *Religious Determinants of State Abortion Policy*, SOC. SCI. Q., 447, 448 (1995).

[119] *See* Raifman et al., *supra* note 115, at 575; Smith et al., *supra* note 115, at 913.

[120] *Id.*

[121] *See* Amy Adamczyk & Margrét Valdimarsdóttir, *Understanding Americans' Abortion Attitudes: The Role of the Local Religious Context*, 71 SOC. SCIENCE RSCH. 129, 131–32 (2018).

[122] *See* Kelly L. Rolfes-Haase & Michele L. Swers, *Understanding the Gender and Partisan Dynamics of Abortion Voting in the House of Representatives*, 18 POL. & GENDER 448, 448–52 (2022).

[123] *See* David Karol & Chloe N. Thurston, *From Personal to Partisan: Abortion, Party, and Religion Among California State Legislators*, 34 STUDIES IN AMERICAN POL. DEV. 91, 91–109 (2020).

[124] *See* Rolfes-Haase & Swers, *supra* note 122, at 452.

[125] *See* Linda Greenhouse & Reva Siegel, *The Unfinished Story of* Roe v. Wade, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES (Melissa Murray, Kate Shaw & Reva Siegel eds., 2019) (describing the halting of state-level referenda and legislative efforts to repeal abortion criminalization and concluding that "[t]he shutdown of legislative reform in the face of overwhelming popular support illustrates the ability of a mobilized minority, committed to a single issue and institutionally funded and organized, to thwart reforms that have broad popular support").

[126] *See* Smith, et al., *supra* note 115, at 5.

The following two sections provide institutional and partisan explanations for the skewed relationship between public opinion and state abortion policy.

2. *Vetogates, Interest Groups, and Partisanship*

At the federal level, anti-majoritarian mechanisms are a general characteristic of policymaking. Vetogates—which are hurdles that prevent the passage of legislation—built into the structure of the U.S. Constitution,[127] the democratic deficits in the design of the Senate, and the operation of the filibuster often function to thwart popular legislation.[128] Due to the design and function of the Senate, super-majority support of legislative proposals is often necessary to translate general public preferences into policy. A recent example is the failure in the Senate of the Women's Health Protection Act, which would have provided women and other persons with the capacity for pregnancy the right to access first trimester abortion and a corresponding right for health care providers to provide such services free from medically unnecessary restrictions and bans.[129]

At the state level, where the democratic structure is more majoritarian than at the federal level,[130] there are still more bans than protections for abortion. One explanation is that after *Roe,* reproductive rights and women's health groups over-relied on the courts and paid less attention to providing affirmative legislative protection for women's health and reproductive rights or in building grassroots networks necessary to do so.[131] This is a hard claim to fully substantiate,[132] and likely discounts the degree of difficulty in enact-

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[127] *See generally* William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J. L. Econ. & Org. 756 (2015) (describing the difficulty of enacting statutes at the federal level); *see also* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 Geo L.J. 523, 528–33 (1992); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 706–10 (1997); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 Geo L.J. 705, 716–27 (1992).

[128] *See* Vicki C. Jackson, *The Democratic Deficit of United States Federalism? Red State, Blue State, Purple?*, 46 Fed. L. Rev. 645, 650–51 (2018) (noting that because each state gets two Senators regardless of population size, the party that controls the Senate sometimes does not represent the majority of voters); *see also* Jonathan Gould et al., *Democratizing the Senate From Within*, 13 J.L. Ana. 502, 503 (2021) (noting that, as a result of malapportionment and the current cloture rule, "[t]he Senate is an undemocratic institution").

[129] *See* Women's Health Protection Act H.R. 3755, 117th Cong. (2022). While the bill passed in the U.S. House, it failed to receive the sixty votes necessary to pass the U.S. Senate.

[130] *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 861 (2021) (In their "text, history, and structure alike, [state constitutions] privilege 'rule by the people,' and especially rule by popular majorities.").

[131] *See, e.g.*, Joan Williams, *The Case for Accepting Defeat on* Roe, N.Y. Times (Sept. 29, 2020), https://www.nytimes.com/2020/09/29/opinion/sunday/abortion-roe-supreme-court.html [https://perma.cc/Q8KG-QX6C] (arguing post-*Roe* and pre-*Dobbs* for an organizing and legislative strategy to preserve abortion access).

[132] *See* David S. Meyer & Suzanne Staggenborg, *Opposing Movement Strategies in U.S. Abortion Politics*, *in* Research in Social Movements, Conflicts and Change

ing affirmative protections for abortion at the federal and state levels.[133] While abortion-rights groups gained some legislative successes around important but discrete questions such as clinic buffer zones,[134] they suffered legislative losses throughout the 1980s and 1990s on questions such as public funding for abortion[135] and later term abortion.[136] Even as societal norms have shifted over the past several decades, public and legislative support for abortion is often grudging, as the shame, stigma, and "disgust"[137] associated with abortion procedures might play a role in inhibiting affirmative protections for abortion rights. This may change in the wake of the demise of *Roe* and *Casey*. Positive political theory would predict that reproductive rights social movements will now have more incentives to put pressure on legislators, given the alteration of the status quo baseline.[138]

By contrast, abortion-restrictive legislation has fared better in recent years.[139] Ever since the 1980s, when abortion increasingly became a partisan issue, groups opposing abortion have been successful at mobilizing the courts and the state legislative processes. Republicans captured state legislatures and governorships and have rewarded their religious conservative and anti-abortion base with restrictive policies.[140] Anti-choice groups are increas-

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207–38 (Patrick G. Coy ed., 2008) (describing how abortion rights groups were occupied in the 1980s defending increasingly aggressive tactics by abortion rights opponents including clinic blockades).

[133] *See id.* Post-*Dobbs* commentators have suggested an increased focus on legislators for securing abortion rights. *See* David S. Cohen, Greer Donley & Rachel Rebouché, *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1, 3–4, 6, 9 (2022) (arguing for a shift to a legislative strategy).

[134] *See* Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248 (2018) (criminalizing injury or intimidation of those seeking an abortion and obstruction of abortion clinics).

[135] *See* Khiara M. Bridges, *Elision and Erasure: Race, Class, and Gender in* Harris v. McCrae, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 118–27 (2019).

[136] *See* Anuradh Kumar, *Disgust, Stigma & The Politics of Abortion*, 28 FEMINISM & PSYCH. 530, 533 (2018) (detailing federal legislative road to banning later-term abortions).

[137] *Id.* at 535; Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 410, 418 (2013) ("[S]tudies demonstrate that disgust likely plays a role in a large swath of abortion regulation, not just in the regulation of particularly controversial abortion procedures (like D&X abortion) or in the context of particularly inflammatory abortion issues (like fetal pain).").

[138] There are outliers to be sure, such as Washington state, which codified a right to abortion in the years before *Roe* and expanded public funding for abortion in the 1990s after federal judicial decisions and congressional actions made clear that there was no right to public funding for even medically necessary abortions for poor women. *See* Angie Weiss, *Washington's 1970 Abortion Reform Victory: The Referendum 20 Campaign*, SEATTLE C.R. & LAB. HIST. PROJECT, UNIV. OF WASH., https://depts.washington.edu/civilr/referendum20.html [https://perma.cc/UA3W-Q94Q].

[139] *See* MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA 3–4 (2020) (describing emergent strategy of anti-abortion rights groups in the mid-1970s to focus on "incremental" regulation of abortion that created obstacles to abortion).

[140] *See generally* ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESS, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION (2019) (detailing the rise of conservative control of state legislatures).

ingly well-funded compared to pro-choice groups.[141] These anti-abortion groups are often single issue, with intense preference, and thus are able to deploy their resources more effectively than more diffuse pro-choice and reproductive health groups.[142] Of course, abortion is not the only issue in which diffuse support does not translate into legislative outcomes; political scientists and commentators have found similar outcomes in gun regulation.[143] These discrepancies may reflect intensity of preferences and that voters hold more nuanced views than are captured by polling. In the context of abortion, commentators have noted the challenges of turning "pro-choice Americans into pro-choice voters" and pre-*Dobbs* complacency that dampened mobilization.[144]

3. *Partisan Gerrymandering and Limitations on the Franchise*

These dynamics are compounded by partisan gerrymandering, which leads to urban under-representation in the state legislature.[145] Partisan gerry-

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[141] For an account of the funding structure that supports anti-choice groups, candidates, and judicial nominations, see NARAL, THE INSIDIOUS POWER OF THE ANTI-CHOICE MOVEMENT (2018) https://www.prochoiceamerica.org/wp-content/uploads/2018/01/NARAL-Research-Report_FINAL-LINKS.pdf [https://perma.cc/W5M7-MJAS]; *see also* MARY ZIEGLER, DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE RISE AND FALL OF THE REPUBLICAN ESTABLISHMENT (2022) (describing the intersection of anti-abortion politics and campaign spending). Reproductive rights groups also have had their own funding and political apparatus, which they mobilized to support "pro-choice" political candidates and advance state-level policies favoring abortion rights and expanding care and protections for pregnant women. *See generally* Carol Matlack & Maya Weber, *Abortion Lobbyists Striking A Vein of Gold*, 11 NAT. L. J. 632 (1991) (describing the rise in funding for pro-choice groups and PACS in the years after *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), a pre-*Casey* decision in which a plurality of the Court signaled that it might reconsider *Roe*).

[142] To be sure, some state-level abortion laws track majoritarian preferences at the state level. This is not to say that abortion legislation is always the result of a kind of democratic distortion. Abortion restrictions in many states track majoritarian preferences. For instance, according to polling in 2014 by the Pew Research Center, a majority of Mississippi residents say that abortion should be illegal in all or most cases. *See Views About Abortion Among Adults in Mississippi*, PEW RSCH. CTR., https://www.pewresearch.org/religion/religious-landscape-study/state/mississippi/views-about-abortion/#demographic-information [https://perma.cc/7V4J-HRHP].

[143] *See, e.g.*, Nate Cohn & Margot Sanger-Katz, *On Guns, Public Opinion and Public Policy Often Diverge*, N.Y. TIMES (Aug. 10, 2019), https://www.nytimes.com/2019/08/10/upshot/gun-control-polling-policies.html [https://perma.cc/9UUF-4PVQ] ("Measures like universal background checks often attract the support of more than 90 percent of the American public, but overwhelming support has not translated into overwhelming victories for gun control measures when they've been put to public votes.").

[144] Rachel M. Cohen, *The Challenge of Turning Pro-Choice Americans into Pro-Choice Voters*, VOX (July 13, 2022), https://www.vox.com/2022/7/13/23204957/roe-wade-abortion-dobbs-persuasion-midterms [https://perma.cc/AFN6-9HDA].

[145] Professor Miriam Seifter has explained that even apart from partisan gerrymandering, certain features of state legislatures inflate the power of electoral minorities and that, as a result, state legislatures are generally the least majoritarian branch of state government. *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1735 (2021) ("[T]he combination of winner-take-all elections, single-member districts, and geographically clustered populations can lead to outright minority-party con-

mandering, mapped along state level urban-rural partisan divides,[146] can affect the relationship between public opinion and state abortion policy at the state level.[147] Nationally, those residing in urban areas are more likely to favor abortion rights than those in rural areas.[148] With Republican control of districting, Republican-dominated rural areas are disproportionately represented in many state legislatures and residents exercise greater power than those residing in urban areas.[149] Studies show that this partisan gerrymandering has an effect not just on representation (who wins an election), but on policymaking.[150] These dynamics can contribute to state-level abortion bans

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trol of state legislatures . . . [and] is well-known to exaggerate majority control, giving bare majorities an inflated margin. Legislators with such artificial cushions may be less responsive to the concerns of both the median voter and partisan minorities.").

[146] *See, e.g.*, Paul Diller, *Toward Fairer Representation in State Legislatures*, 33 STAN. L. & POL'Y REV. 135, 139 (2022) (noting that apart from partisan gerrymandering, "[a]nother significant cause of unrepresentative state legislatures in many states is the effect that the geographic distribution of each major political party's voters has on the legislature's makeup"). On how cities and their more progressive voters are typically underrepresented at the state level as compared to conservative and Republican voters, see JONATHAN A. RODDEN, WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE (2019).

[147] *See* Lemieux, *supra* note 53 ("States like Wisconsin, Pennsylvania, Michigan, North Carolina, and Georgia are so heavily gerrymandered that it is essentially impossible for Democrats to win control of the state legislature even if a clear majority of the state's voters prefer them.").

[148] Kim Parker et al., *Urban, Suburban and Rural Residents' Views on Key Social and Political Issues*, PEW RSCH. CTR. (May 22, 2018), https://www.pewresearch.org/social-trends/2018/05/22/urban-suburban-and-rural-residents-views-on-key-social-and-political-issues/ [https://perma.cc/56LS-YE7W] ("61% of those in urban areas compared with 46% in rural areas say abortion should be legal in all or most cases."). These differences are attributable to partisan composition of urban, suburban, and rural areas. *See id.*; *see also* John Molinaro & Solveig Spjeldnes, *The Electoral College and the Rural-Urban Divide*, ASPEN INST. (Feb. 1, 2021), https://www.aspeninstitute.org/blog-posts/the-electoral-college-and-the-rural-urban-divide/ [https://perma.cc/62FF-L2XA] (speaking to reasons why rural residents have abandoned the Democratic Party in the last two election cycles).

[149] *See* Diller, *supra* note146, at 150 (describing partisan gerrymandering in Michigan and Wisconsin in the 2010s in which Republicans "that lost outright the cumulative vote share in state legislative elections [won] a majority of legislative seats nonetheless"); Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2117, 2120 (2018) (describing the harm of partisan gerrymandering as "the ideological skewing of representation—and, with it, the policies that shape people's lives").

[150] *See* Devin Caughey et al., *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 ELEC. L. J. 454, 465 (2017) (analyzes how the "efficiency gap"—a key measure of partisan gerrymandering that measures the severity of partisan gerrymandering by quantifying the difference in the parties' wasted votes, divided by the total number of votes—affects "the median ideology of members of the state legislature" and "has a significant effect on state policy"). On the "efficiency gap" generally, see Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 834, 838 (2015) (introducing the "efficiency gap," a new measure of partisan symmetry as "the difference between the parties' respective wasted votes in an election—where a vote is wasted if it is cast (1) for a losing candidate, or (2) for a winning candidate but in excess of what she needed to prevail," and advocating its use in law and policymaking).

that reflect a more conservative position than that held by the general electorate.[151]

Ohio provides an example of these dynamics. Pre-*Dobbs* public opinion in Ohio slightly favored abortion access prior to twenty-two weeks, but in April 2019,[152] the conservative legislature passed legislation that banned abortion after a fetal heartbeat is detected, as early as six weeks into a pregnancy.[153] A recent analysis suggests that partisan gerrymandering explains this gap between public opinion and legislative output in Ohio.[154] Partisan gerrymandering provided Republicans with super-majority control of the state legislature, allowing the legislature to enact an abortion ban more restrictive than those supported by the general public.[155]

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In sum, structural design features, spatial arrangements, intentional gerrymandering, and restrictions on voting complicate the *Dobbs* Court's contention that state level political processes can produce legitimate democratic outcomes regarding abortion.[156]

B. Gender and Determinants of U.S. State Abortion Policy

As detailed in Part I, the *Dobbs* Court relies on a conception of the political process in which pluralism functions to permit resolution of abortion and other issues and in which women are equal (or active) participants. Yet evidence from the state level shows that even if women are participating in equal measure as voters, they are grossly underrepresented as members of the legislature. The data both from the United States state legislatures, and other global legislatures, presented below, shows that the percentage of female legislators correlates positively with the permissiveness of abortion policy. Both global and domestic data is presented to demonstrate the uni-

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[151] *See* Sam Levine, *How Republicans Pass Abortion Bans Most Americans Don't Want*, GUARDIAN (June 8, 2022), https://www.theguardian.com/world/2022/jun/07/gerrymandering-abortion-roe-v-wade-ohio [https://perma.cc/CE8Q-YM54] (describing how partisan gerrymandering in Ohio contributed to abortion bans in that state); *see also* Sabra Ayres, *Exclusive Spectrum News/Ipsos Poll: Two-Thirds of Texans Oppose How State's Abortion Law is Enforced*, SPECTRUM NEWS (Dec. 1, 2021), https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2021/12/01/poll--two-thirds-of-texans-oppose-how-state-s-abortion-law-is-enforced [https://perma.cc/LH9F-9K9P].

[152] *See* Pew Survey, *supra* note 109.

[153] *See* Levine, *supra* note 151.

[154] *Id.*

[155] *Id.* (showing Ohio lawmakers' increasingly restrictive abortion policies "have consistently remained out of line with what most Ohioans believe").

[156] *Cf.* Devins, *supra* note 54, at 946 (arguing that "[j]udicial minimalism's critique of *Roe* had some force at the time of *Roe*, but now seems misplaced" because of party polarization); *cf. id.* at 987–90 (arguing that current conditions of polarization make a case for a more maximalist decision).

versal connection between women's representation and legislative outcomes. The global data reinforces the claim that especially in abortion policy, women's presence acts as a significant determinant. This underrepresentation of women might even be one of the reasons behind the misalignment between public opinion and policy output.

It is empirically established that there is a significant connection between the presence of female representation and the types of policies made, the issues found on the legislative agenda, and the substantive representation of interests of female constituents.[157] In the United States, women of both parties, more than their male counterparts, tend to promote and vote for policies that promote women's welfare.[158] Women politicians are more likely than their male counterparts to promote and pass policies for more permissive access to abortion services.[159] In other words, women's descriptive representation in legislatures leads to the substantive representation of issues that directly relate to women's specific needs, or areas of interest that tend to be of greater concern to women.[160] This link between women's representation and greater access to abortion has been established both globally, and at the state level in the US.

C. International abortion policy and women's representation

We establish the relationship between women's representation and permissive abortion policy internationally running a linear regression on data from 192 countries. The regression analysis estimates to what extent a given increase in women's presence will impact policy. It shows the strength of the relationship between the presence of female legislators and state abortion policy.

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[157] *See* Anne Marie Cammisa & Beth Reingold, *Women in State Legislatures and State Legislative Research: Beyond Sameness and Difference*, STATE POL. & POL'Y Q. 181, 205 (2004) ("Women have changed legislatures by setting agendas on women's issues, increasing the visibility and importance of such issues for both men and women."); TRACY L. OSBORN, HOW WOMEN REPRESENT WOMEN: POLITICAL PARTIES, GENDER AND REPRESENTATION IN THE STATE LEGISLATURES 96 (2012) ("One of the most consistent empirical conclusions in studies of women's behavior in legislatures is that women legislators sponsor more bills dealing with women's issues than men do.").

[158] *See* Sue Thomas & Susan Welch, *The Impact of Women in State Legislatures*, *in* THE IMPACT OF WOMEN IN PUBLIC OFFICE 166 (Susan J. Carroll ed., 2001); Amy Caiazza, *Does Women's Representation in Elected Office Lead to Women-Friendly Policy? Analysis of State-level Data*, 26.1 WOMEN & POL. 35, 59 (2004).

[159] *See* Aliza Forman-Rabinovici & Udi Sommer, *Can the Descriptive-Substantive Link Survive Beyond Democracy? The Policy Impact of Women Representatives*, 26(8) DEMOCRATIZATION 1513, 1515 (2019).

[160] *See* Lena Wängnerud, *Women in Parliaments: Descriptive and Substantive Representation*, 12.1 ANN. REV. POLIT. SCI. 62, 65–66 (2009) (finding that "female politicians contribute to strengthening the position of women's interests"). *But see* Kimberly Cowell-Meyers & Laura Langbein, *Linking Women's Descriptive and Substantive Representation in the United States*, 5.4 POL. & GENDER 491, 513 (2009) (finding that "increasing the numbers of women in states legislatures was not related to the majority of . . . women-friendly public policies").

In order to measure international abortion policy, we use an index of international abortion policy, which reflects the number of conditions under which a woman may legally access abortion services.[161] This differs from the index used in the previous section. As it measures permissiveness of policy around the world, it considers different aspects of policy more relevant for a comparative scale.[162] The previous scale, measuring only U.S. policy, accounted for nuances unique to abortion policy found in the United States. Full details of how both indexes were calculated can be found in Appendix A. The index ranges from zero (most restrictive) to seven (most permissive). A country in which a woman cannot legally access an abortion under any circumstances gets a score of zero. A country in which a woman may access an abortion under all conditions, including on request, receives a score of seven. The presence of female legislators is measured as the percentage of seats in the national legislature held by women.[163]

Table 2 displays the results of the regression analysis. The results reveal a highly significant correlation between women's representation in legislatures and the degree of permissiveness of state abortion policy. The model would imply that with every one percentage point increase in female legislators, there is a 0.056 point increase in state abortion scores. In other words, our model would predict that a ten-percentage point increase in women's share of the legislature would correlate with just more than a half-point increase in our abortion scale. This represents close to one additional legal ground on which women might receive an abortion, out of the possible seven grounds. Figure 2 illustrates that countries with more female legislators also tend to have more permissive abortion scores. In fact, countries that have a score of 0-1 had on average 16.2% legislators, while countries with scores of 6-7 had on average 25.2% female legislators.

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[161] *See generally* Aliza Forman-Rabinovici & Udi Sommer, *Reproductive Health Policy-Makers*: *Comparing the Influences of International and Domestic Institutions on Abortion Policy*, 96 PUB. ADMIN. 185 (2018) (using an original index to comparatively measure abortion policies).

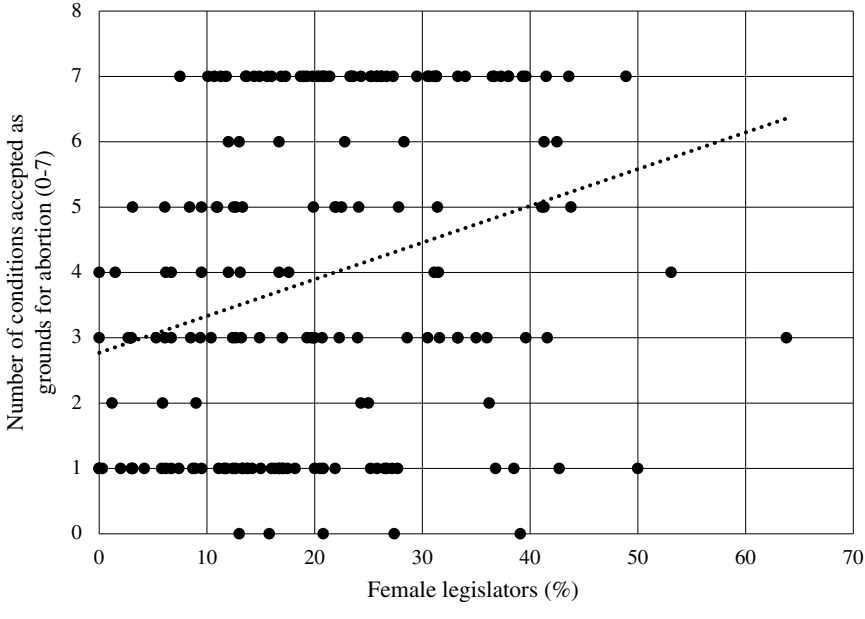
[162] *Id.*

[163] Data was taken from the IPU Parline. *Monthly Ranking of Women in National Parliaments*, IPU PARLINE, https://data.ipu.org/women-ranking?month=5&year=2022 [https://perma.cc/G2M8-GMYQ].

TABLE 2: RELATIONSHIP BETWEEN WOMEN'S REPRESENTATION IN LEGISLATURES AND DEGREE OF PERMISSIVENESS OF STATE ABORTION POLICY

Women in parliament (%)	0.056 (0.014)***
Constant	2.771 (0.341)***
N	182
R^2	0.078
Adjusted R^2	0.073
*p < .05 **p < .01 ***p < .001	

FIGURE 2 - RELATIONSHIP BETWEEN THE RATE OF FEMALE LEGISLATORS (%) AND THE PERMISSIVENESS OF ABORTION POLICY GLOBALLY



1. *Parallel correlation in the U.S.*

Parallel to the global situation, data from the United States shows a connection between women's representation in state legislatures and the permissiveness of abortion policy. The presence of female legislators, in particular, is influential in determining the nature of abortion policy, although the influence of a policymaker's gender in interaction with partisan identity is unclear. Some studies have found that only democratic female legislators

correlate with more permissive abortion policy[164] and that Republican women either have no effect on the passage of anti-abortion laws,[165] or even increase the odds of the passage of anti-abortion bills.[166] Other studies have found that even when controlling for which party controls the legislature, an increased number of female legislators correlates with more permissive abortion policy.[167]

Even when considering partisan alignment, gender has been found to be significant for both Republicans and Democrats in defining support for abortion policy. Female Republican and Democrat representatives in Congress have been found to be less likely than their male counterparts to support restrictive abortion legislation.[168]

To examine the relationship between female legislators and abortion policy in the United States, we again use linear regression models. For these models, observations were at the state level, and therefore taken from different data sources than our international data. The index used accounts for a large number of potential restrictions and hurdles to abortion, as well as rules relating to time limits on accessing abortion services. We use the same 0-7 scale found in previous sections of this paper. The lowest score is found in Oklahoma, which has a ban on abortion from the moment of fertilization, except for cases of life endangerment, incest, or rape. The highest score can be found in Vermont, where there are no major restrictions on abortion, and abortion can be obtained at any point in a pregnancy.[169] All states were included, as well as Washington D.C.[170]

We use a number of measures of female representation. First, we use the overall percentage of female-identifying individuals in the state legislature in the state legislature and test its correlation with permissiveness of state abortion policy. Next, we use the percentage of female-identifying Democrats in the state legislature in the state legislature. Finally, we use the overall percentage of female-identifying Republicans in the state legislature in the legislature. The aim is to control for how partisan identity might affect women's behavior.

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[164] *See* Michael B. Berkman & Robert E. O'Connor, *Do Women Legislators Matter? Female Legislators and State Abortion Policy*, 21.1 AM. POL. Q. 102, 115 (1993).

[165] *See id.*

[166] *See* Keith Gunnar Bentele et al., *Rewinding* Roe v. Wade*: Understanding the Accelerated Adoption of State-Level Restrictive Abortion Legislation, 2008–2014*, 39.4 J. OF WOMEN, POL. & POL'Y 490, 512 (2018).

[167] *See* Barbara Norrander & Clyde Wilcox, *Public Opinion and Policymaking in the States: The Case of Post-*Roe *Abortion Policy*, 27.4 POL'Y STUD. J. 707, 716–18 (1999).

[168] *See* OSBORN, *supra* note 157, at 83.

[169] While in the past scholars have used other methods to index abortion policy, we chose to create an original index. This allowed us to both use the most contemporary data, as well as account for nuances in policy, and methods of restricting access to abortion, that may not have been in us when earlier indexes were created.

[170] Data is based on abortion policies as of the beginning of June 2022. They do not always account for laws that were activated as a result of the Supreme Court decision.

The findings shown in Table 3 demonstrate the connection between women's representation in United States state legislatures and the permissiveness of abortion policy. In general, there is a very significant relationship between women's presence in the legislature and the degree of permissiveness of abortion policy. As our first model would imply, for every one percentage point increase in female legislators, the degree of permissiveness on our scale increases by 0.109 points. In other words, for every ten-percentage point increase in female legislators, you could expect an increase of one point on the permissiveness of abortion, meaning one less restriction on abortion access. Similar results are seen in Model 2, which looks at the impact of Democratic women legislators. As for Model 3, the number of Republican female legislators seems to have no significant effect on abortion policy. Their presence may marginally contribute to more restrictive policy but not enough to achieve statistical significance. In other words, our model didn't find a consistent and identifiable connection. The R-squared result implies that the rate of female Republican representation contributes very little as an explanatory factor of either permissive or restrictive abortion policy.[171] Figures 3a, 3b, and 3c visually demonstrate these results. This lends support for our assumption that women's descriptive presence is an important determinant of the representation of women's interests, which cannot be overlooked when considering the definition of political equality. The fact that an increase in Republican women did not have a significant effect on abortion policy strengthens this claim. Had an increase in Republican women led to more restrictive policy, we would conclude that there is not a general female influence or interest when it came to abortion policy. The insignificant results imply that there are distinct gender interests that counteract the power of partisan identity. A series of robustness tests can be found in Appendix C.

These tests lend support to the claim that women representatives, regardless of partisan affiliation, have a positive effect on the permissiveness of abortion policy. They show that as the rate of women within the group of Republican legislators rises, so, too, does the permissiveness of policy. This further supports the claim that Republican women differ from their male counterparts and have a role in promoting permissive policy, or in deterring the passage of restrictive policy.

[171] The R-squared measurement is a statistical measure that indicates the proportion of variance of the dependent variable that can be explained by the independent variable. In the regression models presented here, the R-squared value can range from zero to one. The higher the value, the greater the explanatory power of the independent variable.

TABLE 3: RELATIONSHIP BETWEEN WOMEN'S REPRESENTATION IN US LEGISLATURES AND DEGREE OF PERMISSIVENESS OF STATE ABORTION POLICY

	Model 1 (s.e.)	Model 2 (s.e.)	Model 3 (s.e.)
Women in legislature (%)	0.109 (0.026)***	-	-
Democratic women in legislature (%)	-	0.114 (.023)***	-
Republican women in legislature (%)	-		-0.102 (0.062)
Constant	-0.111 (0.852)	.924 (.565)	4.43 (0.710)***
N	51	51	51
R^2	0.2700	0.3422	0.0532
Adjusted R^2	0.2551	0.3288	0.0338

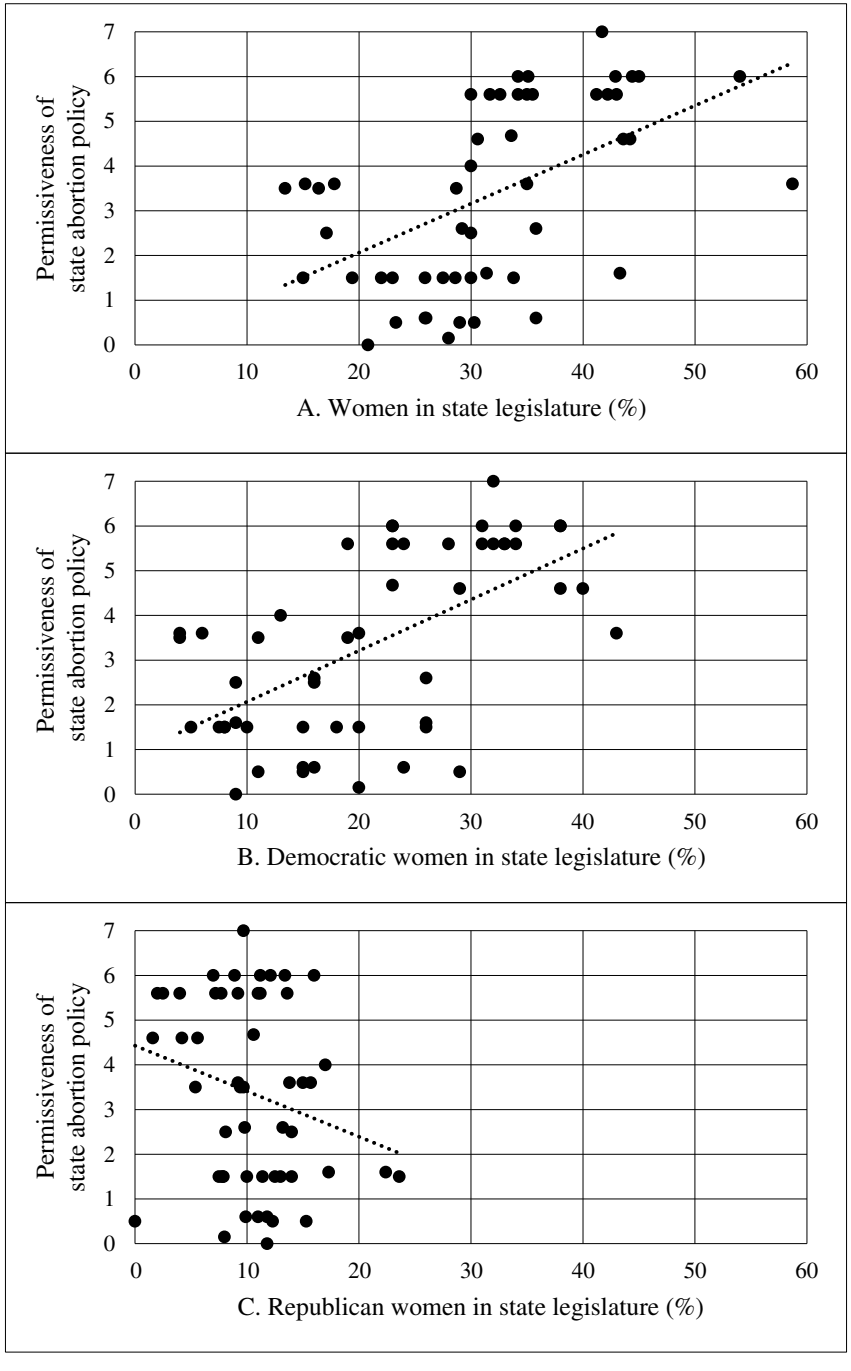

Figure 3 - Relationship between women's presence in state legislatures (0/0) and permissiveness of state abortion policy

III. Advancing Reproductive Justice and Political Equality

The first implication of our analysis of the political process is for *Dobbs* on its own terms. With a richer conception of political equality and the role of women in legislatures, the *Dobbs* majority's invocation of the relative merits of resolution through the political process becomes less persuasive.[172] Rather than legitimatizing the Court's decision, understanding the full measure of abortion politics and women's political inequality and its effects on reproductive rights casts a harsher light on *Dobbs's* reliance on historical laws that women did not participate in enacting and on the Court's rejection of reliance interests in reversing a half-century of precedent. It exposes, in effect, a legitimacy gap at the heart of the Court's constitutional analysis.

In addition, the insights and data offered in Part I and II matter beyond a critique of the *Dobbs* majority's reasoning. Despite the *Dobbs* Court's suggestion that the end of the *Roe* and *Casey* era augurs a potential end to national division on abortion, contestations over abortion rights are likely to continue for some time.[173] In this Part, we present the implications of our analysis on advancing reproductive rights, political equality, and democratic legitimacy.

A. The Equal Protection Doctrine

A richer understanding of the role that women play in the legislative process can inform doctrine going forward. The immediate aftermath of *Dobbs* makes clear that courts will remain involved in reproductive rights questions, such as the constitutionality of total and near total abortion bans.[174] While a full doctrinal analysis is beyond the scope of this paper, we note that data and information about the political process surrounding the adoption of abortion limitations can play a role in equal protection-based legal challenges. Individuals and social movements have long framed reproductive rights and bodily autonomy as important components of sex equal-

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[172] *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 65 (June 24, 2022).

[173] *See id.* at 68–69. *See generally* Cohen, Donley & Rebouché, *supra* note 52 (arguing that rather than make abortion law simpler, "overturning *Roe* and *Casey* will create a complicated world of novel interjurisdictional legal conflicts over abortion").

[174] For a list of some of the cases being litigated in state and federal courts as of this writing, see *Recent Case Highlights*, Ctr. for Reprod. Rts., https://reproductiverights.org/our-work/case-highlights/ [https://perma.cc/45WW-QGVH]. Additional issues include statutory interpretation questions over the status of conflicting "trigger" and state laws, see, for example, Complaint at 41–44, Oklahoma Call for Reproductive Justice v. O'Connor, No. 120543 (Okla., filed July 1, 2022), and conflicts between federal administrative regulations allowing abortions for medical emergencies and access to abortion medication and state laws, see Complaint at 6, State of Texas v. Xavier Becerra, No. 5:22 CV 185 (N.D. Tex., filed July 14, 2022) (challenging U.S. Department of Health and Human Services guidance requiring state hospitals receiving certain federal funds to allow abortions when necessary for emergency medical treatment).

ity. Women of color especially have connected access to abortion to a broader framework of reproductive justice that includes meaningful access to contraception, reproductive health care, supports for new parents, and freedom from coercive birth control.[175]

Doctrinally, the *Dobbs* majority dismisses arguments for grounding abortion based on federal equal protection, rejecting arguments cogently offered by several amici which connect reproductive rights to sex equality.[176] For the majority, an equal protection grounding for abortion is a non-starter: *Roe* and *Casey* did not rely on equal protection, and this basis for abortion rights is "squarely foreclosed by precedents" because abortion is not a "sex-based classification."[177] With this cursory analysis, the Court declines to grapple with *Casey's* invocation of equality principles (that women's ability "to participate equally in the economic and social life of the Nation" is dependent on "their ability to control their reproductive lives"),[178] as well as other precedent that emphasizes that government decision-making based on sex-stereotyping about women's roles violates equal protection.[179] Instead,

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[175] *See* Murray, *supra* note 25, at 2053 (describing tri-patriate framework used by reproductive justice advocates that, by including reproductive health, reproductive rights (access to contraception and abortion), and reproductive justice, draws "attention to the social, political, and economic systemic inequalities that impact women's reproductive health and their ability to control their reproductive lives"); *id.* at 2054 (The reproductive justice framework "has been embraced by traditional abortion rights groups."); *see also* Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT (Fall 2015), https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights [https://perma.cc/RJ4S-XE9R] (detailing the development by black feminists in 1994 of the "reproductive justice framework" which "includes not only a woman's right not to have a child, but also the right to have children and to raise them with dignity in safe, healthy, and supportive environments"); Keeanga-Yamahtta Taylor, *How Black Feminists Defined Abortion Rights*, NEW YORKER (Feb. 22, 2022), https://www.newyorker.com/news/essay/how-black-feminists-defined-abortion-rights [https://perma.cc/4W27-LQAY] (Black feminists of the late 1960s "argued that real equality could be achieved only by expanding the parameters of what constituted 'reproductive justice' to include the entire context within which decisions about having or not having children were made"); Loretta Ross, *What is Reproductive Justice?*, *in* REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE & SOCIAL CHANGE 4 (2007).

[176] *See* Brief of Equal Protection Constitutional Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Organization, No. 19-1392, at 10–11 (Sept. 20, 2021) ("Taken together, *United States v. Virginia* and *Hibbs* establish that laws regulating pregnancy are sex-based classifications that violate the Equal Protection Clause when they are rooted in sex-role stereotypes that injure or subordinate."); *see also* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 157–63 (2010) (discussing how the anti-stereotyping principle within equal protection doctrine may increasingly provide a "new vantage point" for examining the constitutionality of laws limiting reproductive rights).

[177] *See Dobbs*, slip op. at 10 ("Neither *Roe* nor *Casey* saw fit to invoke this [equal protection] theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications.").

[178] *Casey*, 505 U.S. at 856.

[179] *See, e.g.*, United States v. Virginia, 518 U.S. at 533–34 (requiring "exceedingly persuasive justification" for sex-classifications and laws based on sexual stereotyping and on "overbroad generalizations," "that create or perpetuate the legal, social, and eco-

the Court relies on its infamous holding in *Geduldig v. Aiello* that pregnancy is not a sex-based classification,[180] a case whose statutory analogue[181] was effectively disavowed when Congress enacted the Pregnancy Discrimination Act[182] and has not been relied on by a Supreme Court majority since it was decided.

Arguments about women's inequality in the political process can serve to buttress equal protection arguments that abortion bans stem from sex stereotyping and relegate women to second-class citizenship. The absence of women's participation in the legislature is part of the "legislative and administrative" background from which one can draw an inference of an intent to delimit women's role and status.[183] A richer set of data about the state legislative composition and process can also strengthen equal protection arguments that are based on race and ethnicity. Women of color are among the most affected by laws criminalizing abortion and these bans are part of a much longer history of controlling black women's bodies that includes sexual assault, criminalization of pregnancy, and coercive sterilization.[184] In addition, contemporary and historic discrimination affects black women's ability to access reproductive health care that would prevent pregnancy and ensure healthy pregnancy outcomes.[185] The absence of women of color and

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nomic inferiority of women"); Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (1993) (justifying congressional authority to enact section 5 on the ground that ideology about women's roles had been used to justify discrimination against women particularly when they were "mothers or mothers-to-be").

[180] *See* Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.").

[181] *See* General Electric v. Gilbert, 429 U.S. 425 (1976) (applying *Geduldig*'s reasoning to Title VII of the 1964 Civil Rights Act).

[182] *See* Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2018) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.").

[183] *Cf.,* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266–68 (1977) (considering a range of direct and circumstantial evidence in proving intent, including: disproportionate impact of the policy on a particular group, the historical background of the decision, the specific sequence of events leading up to the challenged decision, "departure from the normal procedural sequence" of events, and substantive departures). *See generally* Aziz Z. Huq, *What is Discriminatory Intent?*, 103 Cornell L. Rev. 1211, 1274 (2018) (describing proof of intent using circumstantial evidence and noting that "Arlington Heights' list is unfinished"). If pregnancy is considered a sex classification proof of intent, *Arlington Heights* may not be necessary, but the administrative and legislative background may still be relevant to the state interests at stake. *See infra* notes 176, 177 and accompanying text.

[184] *See* Michele Goodwin, *Pregnancy and the New Jane Crow*, 3 Conn. L. Rev. 543, 561 (2021) (terming the recent criminal justice turn in reproductive rights restrictions the "New Jane Crow" which "symbolizes the connection between the blatant disregard of civil liberties and constitutional protections of African Americans during the post-Reconstruction period and the current plight of" low-income women of color).

[185] *See* Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2020*, Nat'l Ctr. for Health Stat. 1 (Feb. 2022), https://www.cdc.gov/nchs/data/hestat/maternal-

women in the legislative process, the disproportionate harm of abortion bans on women of color, defects in the legislative process leading up to the adoption of the law, and the failure to consider less discriminatory outcomes can inform an equal protection challenge.[186] Equal protection challenges could also draw on the notion that heightened judicial review of legislation is justified when women are not full participants as key decision-makers in the legislative process.[187]

As mentioned above, the *Dobbs* court gave a cursory discussion of equal protection while reviewing a limited record—which may result in lower federal courts not considering these arguments, even with a fuller record. However, these arguments could also be made under state equal protection clauses.[188] Though not all states have directly addressed reproductive rights under state constitutional law, some have equal protection clauses that are more expansive than the federal equal protection clause,[189] including allowing for disparate impact claims.[190] Additionally, some states ground re-

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mortality/2020/E-stat-Maternal-Mortality-Rates-2022.pdf [https://perma.cc/QNW8-2J7Y] ("In 2020 the maternal mortality rate for non-Hispanic Black women was 55.3 deaths per 100,000 live births, 2.9 times the rate for non-Hispanic White women (19.1)."); Helen Hershkoff & Elizabeth Schneider, *Sex, Trump and Constitutional Change*, 34 CONST. COMMENT. 43, 64 (2019) ("Black women also experienced the highest rates of unintended pregnancies, which were attributed in part to disparities in access to contraceptive care and counseling.") (citing Adam Sonfield, *What Women Already Know: Documenting the Social and Economic Benefits of Family Planning*, GUTTMACHER POL. REV. 8 (Winter 2013), https://www.guttmacher.org/sites/default/files/article_files/gpr160108.pdf. [https://perma.cc/X3JH-CBD5]).

[186] *Cf.* Olatunde C.A. Johnson, *The Future of Labor Localism in an Age of Preemption*, 74 INDUS. & LAB. REL. REV. 1179, 1193–95 (2021) (relying on *Arlington Heights* and *Romer v. Evans* to argue for an equal protection analysis that attends to process defects including the absence of deliberation, the role of monied interest groups, the structural underrepresentation of urban interests at the state level through gerrymandering or other distortions).

[187] *See* Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973) (plurality opinion) ("It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government.").

[188] *See, e.g.*, N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 856 (N.M. 1998) (finding under state constitution's equal protection provision that state was required to provide funding to medically necessary abortions); *State Constitutions and Abortion Rights*, CTR. FOR REPROD. RTS. (July 2022), https://reproductiverights.org/wp-content/uploads/2022/05/State-Constitutions-Report-5.12.22.pdf#page=6 [https://perma.cc/7TMD-HC43] (providing an overview of ten states with state constitution abortion protections).

[189] *See* In re McLean, 725 S.W.2d 696, 698 (Tex. 1987) (reasoning that the "[Texas] Equal Rights Amendment is more extensive and provides more specific protection than both the United States and Texas due process and equal protection guarantees").

[190] *See* Snider v. Thornburg, 496 Pa. 159, 176 (1981) (quoting Gen. Elec. Corp. v. Hum. Rel. Comm'n, 469 Pa. 292, 309 (1976)) that the court has previously held that "facially neutral . . . policies which have the practical effect of perpetuating . . . discriminatory practices constitute discrimination by sex").

productive rights and bodily autonomy in state constitutional provisions guarding privacy.[191]

Even if courts decline to review abortion bans and restrictions under the strict scrutiny approach, judicial recognition of a woman's or pregnant person's equality or autonomy interest might lead courts to more closely evaluate states' proffered reasons. Rather than the exceedingly lax rationality review that the *Dobbs* majority engages in, that appears to sustain a variety of state interests,[192] state courts might be able to provide a more rigorous rationality review, or a "proportionality review," that more closely examines the means-end relationship between the abortion restriction and the state's justification.[193] Therefore, state justifications for banning abortion that center on improving maternal health might not survive a means-end analysis given the safety of early abortion, the risks of pregnancy, and the reality that many states with the most restrictive abortion policies have not adopted evidence-based social welfare interventions that would decrease maternal and infant mortality or lower abortion rates.[194] A more rigorous means-end analysis

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[191] *See, e.g.*, Hodes & Nauser v. Schmidt, 440 P.3d 461, 497 (Kan. 2019) (reasoning that the state constitution protects "personal autonomy" and "the heart of human dignity," which "encompasses our ability to control our own bodies, to assert bodily integrity, and to exercise self-determination" and "[f]or women, these decisions can include whether to continue a pregnancy"); Armstrong v. State, 989 P.2d 364, 377 (Mont. 1999) (finding right to privacy under state constitution protects personal autonomy which includes right to an abortion).

[192] *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 78 (June 24, 2022) (applying rational basis review and concluding that legitimate state interests could include "respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability") (internal citation omitted).

[193] *See* Jud Mathews & Stephen J. Ross, *Proportionality Review in Pennsylvania State Courts*, 92 PENN. BAR Q. 109, 110 (2021) (advocating that the Pennsylvania State Court employ a proportionality review applied by constitutional courts outside the United States that balance competing rights by asking whether government action is "(1) aimed at legitimate objectives, (2) suitable for achieving those objectives, (3) no more intrusive than necessary (a 'least restrictive means' or 'minimal impairment' test), and (4) finally, proportionate to the ends the government seeks to achieve"); GREENE, *supra* note 20, at xxii-xxiii (introducing arguments for proportionality review by American courts to counter current emphasis on strong rights claims); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L. J. 3094, 3100–01 (2015) (describing "structured proportionality" in Canada which applies a judicial check to "assure appropriate attention to rights within a framework of constitutional justice"); *id.* at 3148 n.250 (offering that "in any system respecting women's equality, application of proportionality analysis will impose constraints on whether and how aggressively abortions can be prohibited"). *But cf. id.* at 3105 (describing the "undue burden" standard in *Casey* as a type of proportionality review).

[194] *See generally Evaluating Priorities: Measuring Women's and Children's Health and Well-being Against Abortion Restrictions in the States*, IBIS REPROD. HEALTH & CTR. FOR REPROD. RTS. 1, 4 (2017), https://www.reproductiverights.org/sites/default/files/documents/USPA-Ibis-Evaluating-Priorities-v2.pdf [https://perma.cc/3T96-JPL5] (explaining how "the more abortion restrictions a state has passed, the fewer evidence-based supportive policies exist, and the poorer the health and well-being outcomes for women and children"); Nina Liss-Schultz, *New Study Shows that States With the Most Anti-Abortion*

might also lead to closer judicial examination of disparate burdens placed on women as a result of race, ethnicity or national origin, or of the failure to grant health exceptions.

B. Legitimacy and Abortion Politics

Courts will not decide the full content of reproductive justice; legislatures and politics will now be the fora. In many states, the initiative and referendum process will be an important arena for influencing abortion policy and securing state constitutional rights.[195] Our analysis is limited to the legislative process, which we note presents an opportunity to secure a broader range of reproductive rights, including access to effective contraception, and a fuller set of supports for pregnancy, childbirth, and parenting. Women—in all their intersectional identities—will need to be a meaningful part of the legislative process in order to ensure just democratic decision-making based on inclusion and political equality.

The Court and some commentators speculate that returning abortion to the states will lead to less division and contestation on abortion as an issue.[196] The reality depends on a number of factors including the extent to which citizens perceive the process as legitimate. Such perception of legitimacy may depend on the inclusion and participation in the legislative process of women and other people who can or have experienced pregnancy. For abortion policy, researchers have found that the presence of female representation is necessary for the democratic process to be perceived as legitimate.[197] Citizens are much more likely to perceive legislation that limits access to abortion as legitimate when made with female representative presence.[198] Beyond the specific issue of reproductive rights, women representa-

Laws Also Have the Worst Women's Health, MOTHER JONES (Aug. 1, 2017), https://www.motherjones.com/politics/2017/08/abortion-womens-health-outcomes-maternal-mortality [https://perma.cc/K2N4-9ZXY] (establishing the correlation between restrictive abortion laws and poor health outcomes).

[195] *See, e.g.*, *Kansas Abortion Election Amendment Results*, N.Y. TIMES (Aug. 3, 2022), https://www.nytimes.com/interactive/2022/08/02/us/elections/results-kansas-abortion-amendment.html [https://perma.cc/E3QR-R34J] (reporting that, on August 2, 2022, fifty-nine percent of Kansas voters voted no on amending the Kansas constitution to remove protections of abortion rights).

[196] *See* Michael Wear, *20 Ways the Supreme Court Just Changed America*, POLITICO MAG. (June 25, 2022), https://www.politico.com/news/magazine/2022/06/25/post-roe-america-roundup-00042377 [https://perma.cc/FV2C-45JD] ("The *Dobbs* decision offers an opportunity for Democrats to establish a position on abortion that respects the more nuanced views on abortion of their growing non-white base and the majority of Americans and frees millions who are morally conflicted about abortion."); *id.* ("Due in large part to the issue of abortion, Christianity has become identified as a partisan force in the imagination of many Christian and non-Christian Americans alike. With *Dobbs*, pro-life Christians should reassess their policy preferences and priorities. Single-issue voting on abortion may no longer be justified, if it ever was.").

[197] *See* Amanda Clayton et al., *All Male Panels? Representation and Democratic Legitimacy*, 63 AM. J. OF POL. SCI. 113, 126–27 (2019).

[198] *See id.* at 124.

tives are also critical for providing symbolic representation. Increased female representation improves the public's sense of institutional trust[199] and belief in the democratic legitimacy of elected institutions[200] and fosters greater political engagement and improves attitudes towards democratic institutions.[201] This symbolic significance of women's in decision-making committees and bodies is especially important when the policy issue might be perceived as going against women's interests. This suggests that women's participation as legislators is a crucial component for building public acceptance of reproductive policy.

C. Towards Political Equality

Given the importance of women's representation in the political and policy-making process as a means of equally serving citizens, a key way to ensure democratic inclusion is to increase the role of women, not just as voters but as legislators. However, currently, women are underrepresented in almost every legislature in the world, with women in the United States having less representation than their counterparts in many democracies such as those in Europe.[202] While women's representation in U.S. legislative bodies has increased over the last decade,[203] women remain underrepresented in Congress and in almost every state legislature.

Increasing women's representation is undoubtedly a complex task, and a full discussion of causes and strategies is beyond the scope of this Article. Structural features in American elections contribute to women's underrepresentation, including single-member districting, lack of public financing,

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[199] *See* Hasan Muhammad Baniamin & Ishtiaq Jamil, *Women's Representation and Implications for Fairness, Trust, and Performance in Local Government: A Survey Experiment in Sri Lanka*, 75 POL. RES. Q. 1229, 1232 (2021).

[200] *See* Jessica C. Smith, *Where Are The Women? Descriptive Representation and Covid-19 in UK Daily Press Briefings*, 16 POLITICS & GENDER 991, 992 (2020).

[201] *See generally* MAGDA HINOJOSA & MIKI CAUL KITTILSON, SEEING WOMEN, STRENGTHENING DEMOCRACY: HOW WOMEN IN POLITICS FOSTER CONNECTED CITIZENS (2020) (finding that women express greater satisfaction with democracy when they see more women in politics).

[202] *See* SASKIA BRECHENMACHER, TACKLING WOMEN'S UNDERREPRESENTATION IN U.S. POLITICS: COMPARATIVE PERSPECTIVES FROM EUROPE 3 (2018), https://carnegieendowment.org/2018/02/20/tackling-women-s-underrepresentation-in-u.s.-politics-comparative-perspectives-from-europe-pub-75315 [https://perma.cc/BW35-HCJ9] ("The United States lags behind most established democracies with respect to women's representation in politics.").

[203] *See* Robin Bleiweis & Shilpa Phadke, *The State of Women's Leadership—and How to Continue Changing the Face of U.S. Politics*, CTR. FOR AMER. PROGRESS (Jan. 15, 2021), https://www.americanprogress.org/article/state-womens-leadership-continue-changing-face-u-s-politics/ [https://perma.cc/W7ZV-DQLA] ("There are a record 2,276 women—including 552 women of color—state legislators in 2021. These women represent 30 percent of state legislators nationwide.").

and first past the post (FPTP) election systems.[204] In addition, women's underrepresentation in the legislature is a function of other dimensions of inequality in social and economic life that produce long-standing systematic and structural barriers to women's participation in politics.

A key barrier is that there are fewer women candidates. While women are as likely to win elections as men[205] and as capable of raising campaign funds, women are less likely to present themselves as candidates than men.[206] Women's inability or unwillingness to run reflects structural inequities in women's status. In particular, the unequal distribution of care responsibilities and domestic tasks within families limit women's opportunities to run. Women with political ambition are much more likely to cite family responsibilities as a reason they do not pursue office compared to men.[207] Because of the unequal distribution of unpaid care work within the family, women have both less free time to develop a political campaign and less ability to take on a demanding campaign and political position.[208]

Another barrier to women's candidacy is that women have, on average, lower incomes compared to men even within a given field—a product of long-standing systemic inequality. People with lower incomes tend to consider running for office less often, and, on average, women who make significant contributions to their family income are more likely to consider their financial obligations as a deterrent to launching a campaign. This "breadwinner" constraint is more pronounced for women than men.[209]

A third barrier to women's candidacy is a lack of external cues encouraging candidacy relative to those received by men. Women are more likely than men to express political ambition and interest in launching a campaign only after they have been suggested to do so by a third party. Party elites often recruit from male networks and discourage female candidates when

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[204] BRECHENMACHER, *supra* note 202 ("[I]n many European democracies, proportional representation rules, party-driven candidate selection, and public election financing have provided a more conducive institutional context for women's advancement.").

[205] *See* Barbara Burrell, *Women Candidates in Open-Seat Primaries for the US House: 1968–1990*, 17 LEGIS. STUD. Q. 493, 493 (1992).

[206] *See* Richard L. Fox & Jennifer L. Lawless, *Entering the Arena? Gender and the Decision to Run for Office*, AM. J. OF POL. SCI. 264, 265, 275 (2004). *See generally* KIRA SANBONMATSU, WHERE WOMEN RUN: GENDER AND PARTY IN THE AMERICAN STATES (2010) (studying how informal recruitment practices impact the gender gap in political office).

[207] *See* Sarah Fulton et al., *The Sense of a Woman: Gender, Ambition, and the Decision to Run for Congress*, POL. RES. Q. 235, 237, 239 (2006); Laurel Elder, *Why Women Don't Run: Explaining Women's Underrepresentation in America's Political Institutions*, 26 WOMEN & POL. 27, 31, 41 (2004).

[208] Elder, *supra* note 207, at 41–43.

[209] *See* Richard L. Fox et al., *Gender and the Decision to Run for Office*, 26 LEGIS. STUD. Q. 411, 419, 425 (2001); SANBONMATSU, *supra* note 206; Rachel Bernhard et al., *To Emerge? Breadwinning, Motherhood, and Women's Decisions to Run for Office*, 115 AM. POL. SCI. REV. 379, 386–88 (2021).

elections are considered competitive or close.[210] Given that women's political ambition is more dependent on external cues, it might be very significant to the number of women who run for office that women are less likely than men to be recruited to run for office.[211]

Finally, women are affected by gendered socialization which depresses political ambition and contributes to fewer candidates.[212] Researchers have shown that as a result of gendered socialization, women are less likely than men to think they are qualified to run for office or to see themselves as viable and worthy candidates.[213] Girls frequently exposed to male-only images and conceptions of politicians are socialized to see politics as a masculine field and experience suppressed political ambitions.[214] The more women and girls are exposed to traditional gender stereotypes, the less they believe in their own ability to run for office.

In summation, women's legislative participation barriers are, in part, structural inequalities in the division of household labor and care work, economic forces, lack of external support from party elites, and cultural gender stereotypes. Indeed, women's underrepresentation in the legislature is connected to the same underlying substantive inequities that produce abortion-restrictive regulation. An increasing number of groups have begun to address these barriers in the United States,[215] but disparities remain. Women do not yet have the same opportunities to participate in the political process as political candidates and elected officials as men have. And there is much more to be done to provide the health and family supports that would make it possible for those who are pregnant or who have children to run for office.[216]

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[210] *See* Jennifer M. Piscopo, *The Limits of Leaning In: Ambition, Recruitment, and Candidate Training in Comparative Perspective*, 7 POL. GRPS. & IDENTITIES 817, 819 (2019).

[211] *See* JENNIFER L. LAWLESS & RICHARD L. FOX, IT STILL TAKES A CANDIDATE: WHY WOMEN DON'T RUN FOR OFFICE 96–103 (2010).

[212] *See* Rasmus T. Pedersen & Jens Olav Dahlgaard, *Political Candidacy and Sibling Sex Composition: Your Sister Will Not Make You Run For Office*, POL. BEHAV. (Apr. 2021); Angela Frederick, "*Who Better to Do It Than Me!": Race, Gender & the Deciding to Run Accounts of Political Women in Texas*, 37 QUALITATIVE SOCIO. 301, 318–19 (2014).

[213] Elder, *supra* note 208, at 39–40. This has been shown in other contexts. For example, in a study of women lawyers, the less feminist views a woman held, the less likely she was to consider running for office, even when accounting for experience and seniority within the profession. *See* LAWLESS & FOX, *supra* note 211, at 272–74.

[214] *See* Angela L. Bos et al., *This One's for the Boys: How Gendered Political Socialization Limits Girls' Political Ambition and Interest*, 116 AM. POL. SCI. REV. 484, 484 (2022).

[215] *See, e.g.*, SHE SHOULD RUN, https://sheshouldrun.org [https://perma.cc/KD3U-25BN] (organization dedicated to tackling the barriers to public leadership for women); SUPERMAJORITY, https://supermajority.com/winning-elections/ [https://perma.cc/ZJ7Y-DAFV] (organization promoting "women-to-women" organizing strategy to mobilize voters).

[216] For instance, states and the federal government could provide or mandate paid family leave and increase subsidies for childcare. *See* Hershkoff and Schneider, *supra* note 185, at 59–60 ("The United States is the only industrialized country without a national paid family leave policy. Even unpaid leave under the Family Medical Leave Act is

Ironically, Mississippi—the state whose abortion ban was at issue in *Dobbs*—has declined to expand Medicaid or use federal money for childcare that would greatly help women with children run for public office and pursue other economic opportunities.[217]

In sum, *Dobbs*'s contention that women participate equally as voters at the state legislative level[218] ignores other important dimensions of political equality. In particular, women's representation in politics as legislators also determines the extent to which women's interests are granted substantive representation. So long as barriers exist to equal participation as representatives and women remain underrepresented in legislatures, women will be a politically disadvantaged group.[219]

Conclusion

This Article has examined the limits of the *Dobbs* majority's appeal to political equality as a basis for its reversal of *Roe* and *Casey* and has shown how gender and the particularities of the political process shape political outcomes. Our analysis has important implications for those who wish to challenge state level reproductive restrictions and suggests that commentators and advocates should encourage a greater legislative role for women and other people with the capacity for pregnancy in policymaking. As we argue in this Article, women's participation is necessary for inclusive and legitimate policymaking on reproductive rights and beyond.

Our argument is not an essentialist point. While women as individuals may hold varying and complex views on abortion, on the aggregate, legisla-

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available to only 60% of workers."); *id*. at 61 (In the United States, childcare assistance reaches "only one in six eligible children.").

[217] *See* Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 Colum. J. of Gender & L. (forthcoming 2023), at 26, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4115569 [https://perma.cc/UJ5L-KL88] ("Mississippi could have provided care and supports for individuals who seek to avoid pregnancy or who wish to bear children while preserving their health, dignity, and ability to provide for existing family members" but instead has some of the "lowest levels of [Temporary Aid to Needy Families] support, even as it has the highest levels of infant mortality in the nation."); *see also id.* at 20 (showing that the state rejected Medicaid expansion for 200,000 additional residents even though the federal government would covered 90% of the cost); Geoff Pender & Bobby Harrison, *12,000 Poor Mississippi Kids Slated to Lose Child Care, Welfare Chief Warns Lawmakers*, Miss. Today (Oct. 5, 2022), https://mississippitoday.org/2022/10/25/mississippi-child-care-poor-families/ [https://perma.cc/Z78U-JCGT] (noting that "Mississippi is currently leaving about $18 million in available TANF funds on the table").

[218] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 65 (June 24, 2022).

[219] Our examination of women's underrepresentation in the legislature is not offered as an exhaustive account of the relationship between abortion rights and women's full political participation. For instance, some commentators have argued that reproductive autonomy is a necessary "*precondition* of full citizenship for women." Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender & the Constitution*, 18 Harv. J. L. Pub. Pol'y 419, 424 (1995) (emphasis added).

tures in which women are participants are more protective of reproductive rights. Nor does our argument limit the domain of politics to the legislature. Other political processes, such as elected state courts and direct democracy, will play a role. In addition, social movements and non-statist networks of support and activism will profoundly shape the discourse on reproductive rights on terms that are only just emerging.[220] Still, the legislative branch will remain a crucial arena of lawmaking—enacting abortion bans or ensuring abortion access, determining the nature of exceptions for health, rape, and incest, and addressing whether to provide the full range of reproductive justice supports including access to contraception, health care, and support for families. While all in society should have a stake in these questions, women and others who can become pregnant will need to participate and be a prominent voice. Indeed, women's political inequality, measured by their descriptive representation in legislatures, risks compounding the conditions that sustain other dimensions of women's inequality.

Our analysis also has implications for current debates about the scope of courts and the role of rights constitutionalism in the United States at a time of increased attention to the legitimacy and design of the Supreme Court. An increasing number of commentators are arguing for shrinking the role of courts and of constitutional law in U.S. democracy and increasing the role of legislatures.[221] These arguments, which take various forms, are offered both as a pragmatic response to the current Supreme Court, and as a matter of first principles—that democracy is most fully expressed in the political branches, not by unelected judges.[222] Whether one can fully sideline courts given the role that courts play in setting the ground rules of our democracy, any turn to politics needs to ensure that this arena is in fact operating in a democratic manner.[223] This requires continued attention to

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[220] *See generally* Jennifer Nelson, *Women of Color and the Movement for Reproductive Justice: A Human Rights Agenda*, *in* MORE THAN MEDICINE: A HISTORY OF THE FEMINIST WOMEN'S HEALTH MOVEMENT 193–220 (2015); JAEL SILLIMAN ET AL., UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE 42–43 (2004) (describing work of the SisterSong Collective for Women of Color and its organizing for reproductive freedom and connection to global women's health movement).

[221] *See supra* notes 18–21 and accompanying text. The arguments for diminishing the role of courts and rights discourse are not new to the reproductive rights movement. *See* Mary Ziegler, *Reproducing Rights: Reconsidering the Costs of Constitutional Discourse*, 28 YALE J.L. & FEMINISM 103, 113 (2016) (In the late 1980s, "with the Court's support in question, activists committed to legal abortion began concluding that they had invested too much in protecting abortion rights through the courts."); *id.* at 114 ("Although NARAL leaders still sought to preserve *Roe* in the courts, leaders of the group argued that the courts were part of, not removed from, ordinary politics. To win in court, NARAL would have to maximize popular support for its cause.").

[222] *See* Doerfler & Moyn, *supra* note 19; Bowie & Renan, *supra* note 19.

[223] *See* Sherilynn Ifill, *Stealing the Crown Jewels*, N.Y. REV. OF BOOKS (May 12, 2022), https://www.nybooks.com/online/2022/05/12/stealing-the-crown-jewels-ifill-roe/ [https://perma.cc/FG4N-S5PG] (discussing how states that adopted voter restrictions after the Supreme Court found the Voting Rights Acts coverage formula (Section 4(b)) unconstitutional in Shelby County v. Holder, 570 U.S. 529 (2013) are also restricting abortion, affecting Black women and Latina voters who support abortion access);

antidemocratic actions by state legislatures,[224] the structures of legislative deliberation, and steps to ensure that legislatures include those most affected by policymaking.

NeJaime & Siegel, *supra* note 72, at 1900 ("Democracy requires majoritarian procedures in which all adults have an equal right and an opportunity to participate.").

[224] *See* Seifter, *supra* note 145, at 1735 (arguing that "distortions and accountability draw-backs of winner-take-all, single-member districts" often render state legislature's the least majoritarian branch); Bulman-Pozen & Seifter, *supra* note 130, at 907–32 (recommending ways in which "the democracy principle" can limit anti-democratic state practices such as partisan gerrymandering).