REVERSING THE REVERSAL OF *ROE*: STATE CONSTITUTIONAL INCREMENTALISM

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Less than two years after the Supreme Court in Dobbs v. Jackson Women's Health Organization *overturned* Roe v. Wade*, the landmark decision recognizing a right to choose abortion, a campaign to reverse* Dobbs *and reestablish a new right to reproductive autonomy has taken shape. This emerging strategy deploys what this Article calls state constitutional incrementalism: an effort to chip away at a federal precedent by scoring wins in state supreme courts.*

This Article explores the promises and perils of state constitutional incrementalism, using reproductive rights, both past and present, as a critical case study. It traces the history of antiabortion incrementalism, with special attention to state courts, and then explores how contemporary abortion-rights advocates have drawn on the lessons of the past (among others) to reverse engineer this campaign in the present day. Two incrementalist strategies have emerged in state court as a result: efforts to secure state constitutional protections for abortion and to highlight the inadequacy of exceptions to state abortion bans. These efforts are incremental in more than one sense. None of them directly challenge federal precedent. In the short term, however, both promise to change the reality on the ground, state by state. And both can set the stage for a later challenge to a federal precedent.

A complicated picture of the costs and benefits of state constitutional incrementalism emerges from this study. State constitutional incrementalism can offer powerful evidence of the internal contradictions and unworkability of state precedents that echo a federal decision or state laws that a federal precedent permits. State constitutional incrementalism also facilitates experimentation with different jurisprudential foundations for constitutional rights. These experiments can afford a rare glimpse of the real-world efficacy of different approaches to liberty and equality. And a critical mass of state constitutional decisions can provide evidence of an "evolving," popular understanding of the constitutional protections that may also matter in the federal context.

At the same time, however, the success of state reproductive-rights incrementalism, much like the fight to reverse Roe*, will depend a great deal on the responsiveness of state courts to popular mobilizations for constitutional change. History shows that the incrementalist campaign to undo* Roe *owed as much to gerrymandering, efforts to deregulate campaign spending, and strategies to limit access to the vote than it did to lower court victories or incrementalist litigation. A new effort to restore reproductive rights will have to attend as closely to the same kinds of structural change.*

INTRODUCTION

In August 2023, a district court in Travis County, Texas, issued a temporary injunction preventing the state and its agents from enforcing a criminal abortion ban that would prevent Texas abortion patients from "receiving necessary abortion care in connection with an emergent medical condition."[1] A month later, plaintiffs in three additional states filed similar suits.[2] In Idaho, four patients (together with two physicians and the Idaho Academy of Family Physicians) challenged the adequacy of the state's abortion exception, insisting that it impermissibly required patients to be near death before they received care.[3] Patients filed a similar suit in Tennessee.[4] Other patients in Texas and Kentucky sought authorization for specific abortions.[5]

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[1] Zurawski v. Texas, No. D-1-GN-23-000968, 2023 WL 11815888, at *5 (Tex. Dist. Ct. Aug. 4, 2023) (temporary injunction order).

[2] *See infra* notes 3–5 and accompanying text.

[3] Complaint for Declaratory Judgment and Injunctive Relief at 5–12, Adkins v. Idaho, No. CV01-23-14744 (4th Jud. Dist. Idaho Sept. 11, 2023) [hereinafter Adkins Complaint].

[4] Plaintiffs' Complaint for Declaratory Judgment and Permanent Injunction at 3–11, Blackmon v. Tennessee, No. 2301196-I (Davidson Cnty. Dist. Ct. Sept. 11, 2023).

[5] *See In re* State, 682 S.W.3d 890 (Tex. 2023). On the Kentucky case, see Complaint at 24–52, Doe v. Cameron, No. 23-CI-007561 (Jefferson Cir. Ct. Div. Ky. Dec. 8, 2023).

At first, the resources and time committed to these state strategies may seem puzzling. Many abortions, many of them early in pregnancy, will not even arguably fall under any exception,[6] and skeptics have rightly questioned whether exceptions provide any meaningful access at all.[7] The upside of efforts to establish state constitutional rights, whether by court or ballot initiative, is more obvious, facilitating access in states or regions with hostile legislatures.[8] But even the most sweeping state constitutional right can be interpreted narrowly by a state supreme court—and may not affect what happens in other jurisdictions.

If state constitutional litigation promises to make at most a modest difference, why have state courts been at the center of post-*Dobbs* litigation around abortion rights? The answer may at first seem to be a simple one. If federal courts will likely be hostile to abortion rights—as the Supreme Court's recent decision overturning the right to choose abortion in *Dobbs v. Jackson Women's Health Organization* suggests[9]—state courts become the default option for any litigation intended to expand abortion access.

But this Article argues that a fresh focus on state courts is about more than a lack of alternatives. State courts have become the focal point of an emerging strategy to reverse *Dobbs* and reestablish a right to reproductive autonomy, drawing on what the Article calls state constitutional incrementalism. State constitutional incrementalism seeks constitutional wins in state court in a bid to ultimately transform *federal* constitutional law. State constitutional incrementalism prioritizes gradual change: modest victories that advance the agenda of social movements in the short term by softening the effects of a federal precedent. In the longer term, state court victories may expose the inadequacy of a federal precedent—its internal contradictions, unintended consequences, or harmful effects—and help to pave the way for recognition of a new right.

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6 Most procedures take place earlier in pregnancy, and in response to a range of complex factors beyond dire threats to life or health. *See, e.g.*, Margot Sanger-Katz, Claire Cain Miller & Quoctrung Bui, *Who Gets Abortions in America?*, N.Y. Times (Dec. 14, 2021), https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html [https://perma.cc/AP98-RCBA] (establishing that "nearly half of abortions happen in the first six weeks of pregnancy, and nearly all in the first trimester").

7 *See* Amy Schoenfield Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. Times (Jan. 21, 2023), https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html [https://perma.cc/L6N7-ECCY] (describing how few exceptions to abortion bans enacted post-*Dobbs* have been granted).

8 Editorial Board, Opinion, *A Promising New Path to Protect Abortion Access*, N.Y. Times (Jan. 7, 2023), https://www.nytimes.com/2023/01/07/opinion/abortion-rights.html [https://perma.cc/WA4Q-E96E] (describing ballot initiatives as offering a "clear political road map toward rescuing reproductive rights in states").

9 597 U.S. 215 (2022).

This Article explores the promises and perils of state constitutional incrementalism, using reproductive rights as a key case study. It traces the rise of two key state incremental strategies. One seeks recognition of state constitutional rights, narrow as well as broad.[10] A second reinterprets existing exceptions to broaden access while claiming that state constitutions afford some protection to patients with emergent conditions or fetuses unlikely to survive.[11] These strategies borrow from a variety of past social movement campaigns, including antiabortion incrementalism, which was one of the key approaches that contributed to the overturning of *Roe v. Wade*.[12] Antiabortion incrementalists, too, claimed to interpret rather than transform existing law, all while defining *Roe* in ways that would limit access and undermine the very coherence of a right to choose abortion.[13] On the abortion-rights side, state constitutional incrementalism seeks to expand access, create state abortion rights, offer a platform for the stories of those who have been harmed by state bans, and expose the futility of seeking to criminalize abortion.[14]

State constitutional abortion-rights incrementalism is ascendant, but what should we make of it? State constitutional incrementalism has clear benefits. It facilitates experimentation with different jurisprudential foundations for constitutional rights, allowing advocates to test different rationales, polish existing arguments, and ultimately carry forward the most effective claims to federal as well as state court.[15] State constitutional incrementalism also allows a social movement to see how well a right works in the real world and identify disconnects

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[10] *See infra* Section I.B.1.

[11] *See infra* Section I.B.2.

[12] *See* Mary Ziegler, After *Roe*: The Lost History of the Abortion Debate 59 (2015) (explaining how "incrementalism prevailed as a guiding strategy for the pro-life movement"). Abortion-rights supporters have also looked for inspiration from the incremental campaign to secure marriage equality. *See* Center for Reproductive Rights, The Constitutional Right to Reproductive Autonomy: Realizing the Promise of the Fourteenth Amendment 12 (2022), https://reproductiverights.org/wp-content/uploads/2022/07/Final-14th-Amendment-Report-7.26.22.pdf [https://perma.cc/9JFA-8WDF] (offering an example of how the campaign to secure marriage equality drew on international law and worked in state courts); Cynthia Soohoo, *Turning Away from Criminal Abortion Laws and Toward Support for Pregnant People and Their Families*, 104 B.U. L. Rev. Online 109 (2024) (exploring the example of international, incremental campaigns that moved from decriminalization to more capacious rights).

[13] *See* Ziegler, *supra* note 12, at 59, 62 (explaining how incrementalism was used to "hollow out any abortion right the Supreme Court still recognized").

[14] *See infra* Section I.B.

[15] Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitutional Law*, 115 Pa. St. L. Rev. 1035, 1038–39 (2011) ("States are often said to be 'laboratories' whose experimentation with law and policy should be encouraged, and federal borrowing of state constitutional law provides a relatively straightforward way for federal courts to learn from those lab experiments.").

between soaring constitutional rhetoric and meaningful change for the people that a right is supposed to protect.[16]

State constitutional incrementalism may also be more effective than the federal equivalent. Chipping away at a precedent in federal court requires the persuasion of a narrower set of decisionmakers, sometimes the very architects of a precedent that a social movement is seeking to undermine. Incrementalism, by definition, requires modest wins.[17] To persuade a hostile court, a social movement may have to seek changes so minor that the community the movement serves may experience little tangible benefit.[18] The sheer number and variety of state courts, by contrast, afford social movements more opportunities for a victory. To the extent a movement has succeeded in changing public attitudes or securing popular support—as appears to be the case with reproductive rights—state courts may also be more responsive to public demands, especially since so many state high courts have retention or partisan elections.[19]

State court decisions may also offer evidence of shifting democratic constitutional understandings.[20] Constitutional dialogue occurs outside of federal court, in state legislatures, state courts, and social movements.[21] But when actors outside the federal judiciary adopt a new

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16 *Cf.* Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 259 & n.6 (2005) (offering an overview of scholarship questioning "the effectiveness of that rights discourse as a means of changing the status quo").

17 *See infra* Section I.A.1.

18 *See infra* note 23 and accompanying text.

19 *See How State Supreme Court Judges Are Selected*, DEMOCRACY DOCKET (Mar. 21, 2023), https://www.democracydocket.com/analysis/how-state-supreme-court-justices-are-selected [https://perma.cc/E7UB-JX9K]; *see also* Michael Wines, *As Stakes Rise, State Supreme Courts Become Crucial Election Battlegrounds*, N.Y. TIMES (Nov. 2, 2022), https://www.nytimes.com/2022/11/02/us/state-supreme-court-races-campaigns.html [https://perma.cc/69K3-X8ER]. On polls demonstrating support for reproductive rights, see Julie Wernau, *Support for Abortion Is Near Record, WSJ-NORC Poll Finds*, WALL ST. J. (Nov. 20, 2023), https://www.wsj.com/politics/policy/support-for-abortion-access-is-near-record-wsj-norc-poll-finds-6021c712 [https://perma.cc/EYZ4-BAKE]; Shannon Schumacher et al., *KFF Health Tracking Poll March 2024: Abortion in the 2024 Election and Beyond*, KFF (Mar. 7, 2024), https://www.kff.org/womens-health-policy/poll-finding/kff-health-tracking-poll-march-2024-abortion-in-the-2024-election-and-beyond [https://perma.cc/P5UC-3GDA].

20 Marc Poirier, *"Whiffs of Federalism" in* United States v. Windsor*: Power, Localism, and Kulturkampf*, 85 U. COLO. L. REV. 935, 938 (2014) ("The understanding of individual liberty and dignity is evolving and is interpreted and furthered by some states' decisions . . . ."); *cf.* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 275 (2020) (detailing how constitutional "decisionmakers recognize protected liberty interests in ways that reflect evolving legal and societal understandings").

21 Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (describing the interplay of government response and resistance to popular engagement with "constitutional lawmaking, electoral politics, and the institutions of civil society" that have "historically shaped the meaning of our Constitution").

understanding or reject the conclusions of the Supreme Court, it may be hard to measure.[22] A critical mass of state constitutional decisions may offer concrete evidence of a clash between the Supreme Court's interpretation of the Constitution and one embraced by a majority of other stakeholders, including the people themselves.[23]

State constitutional incrementalism assumes that changes in state courts can build on one another—and can ultimately create pressure that will reshape federal constitutional law. For this reason, those pursuing such a strategy at times put great emphasis on the nuts and bolts necessary to achieve wins in state court, such as the possibilities inherent in the text or history of a particular state's constitution, the precedents that hint at the recognition of other rights, or the predilections of a court's members. But the success of any incrementalist campaign depends on structural changes and popular pressures that influence developments in the courts—and especially in *state* court.

Because voters, in most cases, have the power to remove or replace them, state judges may engage in a sort of popular constitutional dialogue with the electorate when an issue is especially salient, interpreting the state's constitution in the shadow of public expectations, and with the knowledge that voters can respond to interpretations with which they disagree.[24] And state courts at least in theory have the liberty to develop constitutional traditions that are not limited by federal precedent or by developments in other states.[25] But these advantages of state constitutional litigation may be illusory. To the extent popular views shape state approaches, voters must be able to effectively register their discontent with state constitutional rulings.[26] Structural changes,

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[22] *See* Griswold v. Connecticut, 381 U.S. 479, 519 (1965) (Black, J., dissenting) ("Our Court certainly has no machinery with which to take a Gallup poll.").

[23] Kenji Yoshino, Speak Now: Marriage Equality on Trial 43 (2015); *see also infra* notes 24–26, 29 and accompanying text.

[24] David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 Colum. L. Rev. 2047, 2066–67 (2010); *see also* Jane S. Schacter, *What Marriage Equality Can Tell Us About Popular Constitutionalism (and Vice-Versa)*, 52 Hous. L. Rev. 1147, 1176 (2015) ("Elected state court judges have also been offered up as appropriate conduits for the popular constitutional will.").

[25] Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1336 (2017) ("When a state court departs from Supreme Court precedent to secure greater protection for individual rights under a parallel provision of its state constitution, the state court 'registers a forceful and often very public dissent.'") (internal citations omitted).

[26] Pozen, *supra* note 24, at 2099 (canvassing concerns that state courts are not responsive to the people or are "captured by donors").

from state campaign finance rules[27] to limits on the right to vote,[28] can insulate courts from popular constitutional backlash.[29] Ensuring that a state democracy is responsive to popular understandings of a constitution, and that those in marginalized communities can fully participate in that democracy, is thus an essential ingredient of successful state constitutional incrementalism.

The success of state constitutional incrementalism, then, is necessarily a political as well as constitutional project. History teaches us that the end of *Roe* had far less to do with a clever litigation strategy than with structural change: a partnership forged between abortion opponents and the Republican Party,[30] efforts to gerrymander state elections,[31] fights to deregulate campaign spending at the state and federal level,[32] and strategies to limit access to the vote.[33] As the law of reproductive rights suggests, state constitutional incrementalism is the most effective when accompanied by a broader political mobilization—and when incremental changes pursued through litigation have as much to do with the health of the democracy as with the contours of a state reproductive right.

Part I begins by briefly developing a theoretical framework for understanding social movement incrementalism, studying past examples involving the desegregation of public schools and the recognition of

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[27] On money in state judicial elections, see Douglas Keith, *The Politics of Judicial Elections, 2021–2022*, Brennan Ctr. (Jan. 29, 2024), https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2021-2022 [https://perma.cc/YS65-Q5VW].

[28] Rachel Looker, *Rewriting the Rules: These States Have Passed New Voting Laws This Year. Here's How They Could Affect 2024*, USA Today (Nov. 19, 2023), https://www.usatoday.com/story/news/politics/elections/2023/11/16/these-states-passed-new-2023-voting-laws-heres-what-it-means-for-2024/70741734007 [https://perma.cc/KSD4-8QQV]; *see Voting Laws Roundup: 2023 in Review*, Brennan Ctr. (Jan. 18, 2024), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review [https://perma.cc/C3Y4-5CVM].

[29] Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 Stan. L. Rev. 1629, 1676 (2010) (observing that courts with election schemes were reluctant to recognize a right to same-sex marriage because of the risk of backlash).

[30] On political party realignment and abortion, see Ziegler, *supra* note 12, at 291–325.

[31] Adrian Horton, Tom McCarthy & Jessica Glenza, *How Gerrymandering Paved the Way for the U.S.'s Anti-Abortion Movement*, Guardian (June 18, 2019), https://www.theguardian.com/world/2019/jun/18/us-anti-abortion-bans-backlash-gerrymandering [https://perma.cc/F4ZQ-4PXL]; *see also* David A. Lieb, *Abortion Ruling Puts Spotlight on Gerrymandered Legislatures*, PBS NewsHour (July 3, 2022), https://www.pbs.org/newshour/politics/abortion-ruling-puts-spotlight-on-gerrymandered-legislatures [https://perma.cc/CAS5-XYSN].

[32] Mary Ziegler, Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment 3–12, 193–215 (2022).

[33] *See id.*; *see also* Megan O'Matz, *How an Anti-Abortion Law Firm Teamed Up with a Disgraced Kansas Attorney to Dispute the 2020 Election*, Propublica (Mar. 1, 2023), https://www.propublica.org/article/anti-abortion-activists-fighting-to-change-election-law [https://perma.cc/HG2G-ENXV].

rights to same-sex marriage. Part I then turns to the emergence of a state-driven strategy to undo *Dobbs*. It tracks two incrementalist litigation campaigns: those focused on recognizing state rights and those involving the inadequacy of exceptions to state bans.

Part II examines one ironic historical model from which contemporary supporters of reproductive rights have taken inspiration: antiabortion incrementalism. Antiabortion incrementalism was a defining feature of the fight to undo *Roe*, but existing scholarship has primarily studied its effects in federal court. This Part looks at the role played by both state and federal litigation, studying antiabortion lawyers' work in three critical contexts: state abortion restrictions, fetal homicide prohibitions, and wrongful death litigation. Incrementalism, in this context, defended state restrictions that would limit abortion access. At the same time, incrementalists in state court promoted ideas of fetal rights and protection intended to make the *Roe* decision appear unworkable or incoherent.

Part III analyzes the tradeoffs inherent in state constitutional incrementalism. Experimenting in state courts—and winning modest victories—offers the chance to test out different constitutional strategies both inside and outside of court. State constitutional incrementalism reduces the costs of unwise or erroneous decisions by limiting their effects because the decisions at issue are narrow, and their effects will be limited to one state. State constitutional incrementalism may also facilitate democratic engagement. One state decision does nothing to stall experimentation in other states or at the federal level. At the same time, however, state incrementalism can offer inspiration for fresh efforts in other states and at the national level.

But state constitutional incrementalism is effective only if it accounts for external factors—such as gerrymandering, voting, and campaign financing—that shape both state and federal courts and constitutional decisionmaking. Any effective form of abortion-rights incrementalism must focus as much on structural democratic change as on constitutional doctrine.

I
Abortion-Rights Incrementalism Defined

In 2022, in overturning *Roe*, Justice Samuel Alito proclaimed that the Court would return the abortion issue to the people and their elected representatives.[34] Justice Brett Kavanaugh, in his concurring opinion,

[34] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022) ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

made clear that Congress and the federal government would have a say about the post-*Dobbs* constitutional order.[35] To be sure, some federal abortion-rights initiatives have taken shape in the aftermath of *Dobbs*.[36] In June 2022, the Biden Administration issued guidance providing that the Emergency Medical Treatment and Labor Act (EMTALA) required that physicians provide abortions if they believed that the procedure was the treatment necessary to stabilize that condition.[37] The administration also brought suit in federal court against Idaho, arguing that EMTALA preempted the state's Defense of Life Act.[38] A group of progressive states have filed suit in federal court to expand access to mifepristone, a drug used in more than half of abortions in the United States, arguing that the Risk Evaluation and Mitigation Strategy issued for mifepristone violates the Administrative Procedure Act.[39] Another suit by several abortion providers asserts that the FDA's regulations of mifepristone preempt state abortion bans on the drug.[40] In May 2024, the Lawyering Project filed suit challenging the constitutionality of Idaho's overlapping abortion bans under the federal Constitution, which they claim protects access to medically induced abortion.[41]

Significantly, however, more of the action on the side of abortion rights has unfolded in *state* courts, which have become home to what the Article calls state constitutional incrementalism. Supporters of abortion rights may understandably be leery of federal litigation that could end at the same United States Supreme Court that decided *Dobbs*. But state constitutional incrementalism reflects more than the simple hostility of the federal courts. This Part begins by developing a definition of incrementalism as a social movement strategy. Incrementalists pursue

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[35] *Id.* at 338 (Kavanaugh, J., concurring) ("The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress . . . .").

[36] *See infra* notes 37–39 and accompanying text.

[37] Ctr. Medicare & Medicaid Servs., Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss, QSO-22-22-Hospitals (July 11, 2022), https://www.cms.gov/medicareprovider-enrollment-and-certification surveycertificationgeninfopolicy-and-memos-states-and/reinforcement-emtala-obligations-specific-patients-who-are-pregnant-or-are-experiencing-pregnancy-0 [https://perma.cc/YFB7-KBBB].

[38] United States v. Idaho, 83 F.4th 1130 (9th Cir. 2023), *vacated after rehearing en banc*, 82 F.4th 1296 (9th Cir. 2023). The Supreme Court initially granted Idaho's petition for certiorari before the Ninth Circuit heard the case en banc, but then ruled that the writ had been improvidently granted. Moyle v. United States, 144 S. Ct. 2015, 2015 (2024).

[39] Washington v. FDA, 668 F. Supp. 3d 1125 (E.D. Wash. 2023).

[40] Whole Woman's Health All. v. FDA, No. 3:23-cv-00019, 2023 WL 5401885 (W.D. Va. 2023).

[41] *Seyb v. Members of the Idaho Board of Medicine (Idaho)*, The Lawyering Project, https://lawyeringproject.org/our-work/seyb-v-idaho-bord-of-medicine [https://perma.cc/NHS2-ZX98].

small, realistic changes that benefit the community a movement serves. At the same time, however, incrementalists recognize that these small legal shifts can build toward more transformative rulings—and in federal as well as state court.

A. What Is Incrementalism?

In a pathbreaking 1959 article, *The Science of "Muddling Through,"* the scholar Charles Lindblom argued for the merits of what he called disjointed incrementalism.[42] Policymakers, Lindblom argued, had cognitive biases and limits that made sweeping decisions unwise.[43] Lindblom's idea of modest, gradual, iterative decisionmaking enjoyed significant influence in schools of public administration for several decades thereafter.[44] The idea of iterative decisionmaking is familiar to scholars of constitutional law, a theme in Cass Sunstein's minimalism[45] or Richard Posner's judicial pragmatism.[46]

In the 1950s and 1960s, incrementalism also emerged as a social movement tactic for achieving constitutional and cultural change. Social movements recognized that incremental litigation efforts might produce results when demands for a sweeping constitutional shift seemed futile.[47] Incremental wins could both improve conditions for the community that a movement represented and make the case that a broader constitutional change was needed.[48]

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[42] Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79, 85–88 (1959).

[43] *Id.* (explaining that a "wise policy-maker" "proceeds through a *succession* of incremental changes" and "avoids serious lasting mistakes") (emphasis in original).

[44] On the shifting influence of Lindblom's idea, see Jonathan Bendor, *Incrementalism: Dead Yet Flourishing*, 75 PUB. ADMIN. REV. 194, 195–205 (2015); *see also* Christian Adam, Steffen Hurka, Christoph Knill & Yves Steinebach, *On Democratic Intelligence and Failure: The Vice and Virtue of Incrementalism Under Political Fragmentation and Policy Accumulation*, 35 GOVERNANCE 525, 526–40 (2021).

[45] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–4 (1999) ("[Minimalism] is likely to reduce the burdens of judicial decision . . . . [It] is likely to make judicial errors less frequent and (above all) less damaging."); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT, at vii–viii (1996).

[46] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 87, 147 (2003).

[47] Douglas G. NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 900 (2013) (explaining that courts may be an advantageous site of contestation for some movements because they are "relatively open compared to other institutional arenas" and "relatively insulated from immediate political pressure").

[48] Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 307 (2001) (explaining that "during the 1970s, the federal judiciary adopted a new understanding of the equal citizenship norm, even though the amendment proposing this understanding was never ratified"); *see also* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1405 (2000) (reasoning that the "larger the gap

1. Brown *and Federal Court Incrementalism*

The Court's decision in *Brown v. Board of Education*[49] drew attention to incrementalism as a social movement strategy for undermining a federal precedent. The precedent in question, *Plessy v. Ferguson*, rejected a constitutional challenge to a race-based law segregating railway cars in 1896.[50] *Plessy* explained that separate but equal facilities satisfied the Equal Protection Clause of the Fourteenth Amendment.[51]

Following its founding in 1909, the National Association for the Advancement of Colored People (NAACP) did not initially prioritize a campaign to dismantle *Plessy*.[52] Many of the NAACP chapters founded in the 1910s originated from suits intended to challenge residential segregation,[53] a strategy that culminated in the 1917 decision of *Buchanan v. Warley*, which held that laws mandating residential segregation violated a Fourteenth Amendment freedom of contract.[54] In the interwar period, the NAACP challenged the spread of school segregation in the north while seeing a challenge to southern school segregation as politically futile, focusing instead on issues of criminal justice, from lynching to police brutality and unfair trials.[55]

In 1933, Charles Hamilton Houston and his young protégé, Thurgood Marshall, began to develop a plan to chip away at *Plessy* by challenging the conditions in Black professional schools and universities[56] and seeking to spotlight the "obvious inequality in denying [Black people] the same in-state opportunities afforded to whites."[57]

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between a new legal entitlement and prior social norms, the more likely it will be that people feel social endowments have been taken away").

49 347 U.S. 483, 491 (1954).

50 163 U.S. 537 (1896).

51 *Id.* at 543–46.

52 Michael Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 68–186 (2004); Megan Ming Francis, Civil Rights and the Making of the Modern American State 139–46 (2014); Susan D. Carle, Defining the Struggle: National Racial Justice Organizing 1880–1915, at 101–54 (2013).

53 On residential challenges in the era and the resulting pushback, see Klarman, *supra* note 52, at 78–94.

54 245 U.S. 60 (1917).

55 Klarman, *supra* note 52, at 141–62; Francis, *supra* note 52, at 161–76.

56 Rawn James Jr., Root and Branch: Charles Hamilton Houston, Thurgood Marshall, and the Struggle to End Segregation 65–66 (2014) (explaining that Houston would "seek to end segregation's scourge by arguing for fulfilment of its promise"); Mark V. Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925–1950, at 29, 42–68 (1987).

57 Klarman, *supra* note 52, at 163–64.

In 1938, the effort to chip away at *Plessy* produced a modest win in *State of Missouri ex rel. Gaines v. Canada*.[58] Because Missouri's only segregated Black professional school was not yet a full-fledged university, Missouri offered grants to eligible Black students to study at integrated schools out of state.[59] The Supreme Court in *Gaines* held that this scheme was unconstitutional.[60] But *Gaines* was surely an incremental win. It concerned professional schools—hardly the central concern of segregationists—and did not require any state to stop racial segregation at all.[61] At most, as Michael Klarman writes, "it required only that [Black people] be segregated within . . . state boundaries."[62]

Even after Marshall became the special counsel for the NAACP in 1939, and after the organization's board of directors agreed on the importance of an all-out attack on segregation, the NAACP continued focusing on graduate students, illustrating in case after case that facilities offered in Black schools were inevitably inferior.[63]

Sweatt v. Painter (1950)[64] and *McLaurin v. Oklahoma* (1950)[65] went considerably further. In both cases, the NAACP focused on what it described as the intangible disadvantages of attending Black versus white schools.[66] But to level up Black higher education in the way described by the Court in *Sweatt* and *McLaurin* seemed extremely difficult. The *Sweatt* Court dwelled on intangible differences, such as "the reputation of the faculty" and the "standing in the community."[67] The Court even observed that Sweatt had not had an equal opportunity at a Black law school because he had not had an adequate opportunity to interact with white people, who comprised eighty-five percent of the state's population and held most of the important positions in its legal community.[68] *Sweatt* and *McLaurin* met little resistance because they addressed professional schools and did not openly defy *Plessy*.[69] Yet

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58 305 U.S. 337, 352 (1938).

59 *Id.* at 342–43.

60 *Id.* at 350–52.

61 *See* KLARMAN, *supra* note 52, at 146.

62 *Id.* at 152.

63 JAMES, *supra* note 56, at 72–88; TUSHNET, *supra* note 56, at 42–68.

64 339 U.S. 629, 636 (1950).

65 339 U.S. 637, 642 (1950).

66 *See, e.g.*, GARY M. LAVERGNE, BEFORE BROWN: HERMAN MARION SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE 255–57 (2010); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1956–1961, at 147 (1994).

67 *Sweatt*, 339 U.S. at 634.

68 *Id.*

69 KLARMAN, *supra* note 52, at 219.

commentators observed that they unquestionably undermined the 1896 precedent.[70]

Both *Sweatt* and *McLaurin* suggested that creating substantively equal Black schools was all but impossible in the segregated South. Both offered the NAACP the chance to gather evidence to debunk the fearmongering of segregationists by illustrating that integration could work. And both tested the boundaries of what "separate but equal" required in terms of intangible benefits.

By the time the Court decided *Brown*, the NAACP's gradual litigation campaign had laid a solid foundation for the reversal of *Plessy*. Politically, public opinion on segregation had shifted such that *Brown* was only slightly ahead of popular opinion,[71] even in the more controversial context of primary schools. Strategically, in exposing the conditions at Black graduate schools, the NAACP had made the idea of "separate but equal" seem incoherent, if not dishonest.[72]

In this way, the fight to reverse *Brown* created a template for an incrementalist litigation strategy. Incrementalism dealt in the politics of the possible. In the short term, by eroding a precedent like *Plessy*, a movement could modestly change the situation on the ground, for example, by desegregating some graduate schools. At the same time, these small wins could expose the flaws of the precedent itself and facilitate its eventual overruling.

Incrementalism in federal court could serve to establish a new rule as well as dismantle an existing precedent. Under the guidance of Ruth Bader Ginsburg, the American Civil Liberties Union in the 1970s began working to establish that at least some sex classifications violated the Equal Protection Clause of the Fourteenth Amendment.[73] Ginsburg famously chose not to start with sex classifications that primarily harmed women, focusing on choosing male plaintiffs and showcasing the harms experienced by Americans of both sexes.[74] "Not all feminist

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[70] *See* Arthur Krock, *In the Nation; An Historic Day at the Supreme Court*, N.Y. TIMES, June 6, 1950, at 28 (describing the "separate but equal doctrine" as being in "a mass of tatters" in the aftermath of *Sweatt* and *McLaurin*); Joseph Ransmeier, *The Fourteenth Amendment and the Separate but Equal Doctrine*, 50 MICH. L. REV. 203, 240–41 (1951) (arguing that *Gaines*, *Sweatt*, and *McLaurin* had "wrought very substantial changes in segregation patterns in American education").

[71] KLARMAN, *supra* note 52, at 466–68.

[72] *Id.* at 208 (explaining that *Sweatt* and *McLaurin* "seemed to leave nowhere left for segregation to remain").

[73] *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 122–40 (2010) (overviewing how sex discrimination strategies developed in the late 20th century).

[74] *See id.* at 84–85 (explaining Ginsburg's "strategic choice" to focus on the harms to men); Jennifer Yatskis Dukart, Comment, Geduldig *Reborn:* Hibbs *as a Success (?) of Justice Ruth Bader Ginsburg's Sex-Discrimination Strategy*, 93 CALIF. L. REV. 541, 558, 574–75 (2005)

issues should be litigated now," Ginsburg explained, "because some are losers, given the current political climate, and could set back our efforts to develop favorable law."[75] Between the decision of *Reed v. Reed* in 1971, in which the Court held that a sex classification was constitutional so long as it satisfied rational basis[76] and *Craig v. Boren* in 1976,[77] Ginsburg's strategy successfully established heightened scrutiny for sex classifications.[78]

Ginsburg's campaign, like the NAACP's strategy in the pre-*Brown* years, have offered an important blueprint for state constitutional incrementalism. In the case of *Brown*, lawyers challenging segregation identified higher education as a promising safety valve for courts leery about the backlash that could follow a direct attack on *Plessy*. Striking down the segregation of graduate schools would be less politically divisive, all while eroding the logic of "separate but equal." In the context of reversing *Roe*, antiabortion lawyers would identify abortion *access* as a similar safety valve: While Americans consistently resisted the idea of undoing a right to abortion, and while courts might have worried about backlash had they reversed *Roe*, antiabortion lawyers might more easily convince the Court to uphold restrictions on the ability to have an abortion rather than the right to make a decision about the procedure.[79] Abortion-rights incrementalists today have begun identifying parallel escape hatches for courts: for example, exposing the tragic consequences of abortion *exceptions*, rather than on sweeping state or federal rights, and creating a platform for those harmed by those exceptions to tell stories about the profound harm done by the regime that *Dobbs* has ushered in.[80]

Just as Ginsburg identified plaintiffs more likely to win the sympathy of ambivalent voters or judges,[81] abortion-rights incrementalists have worked with a group of plaintiffs forced to endure health crises and the

(arguing that "the Ginsburg strategy of using male plaintiffs to redress sex discrimination" was designed to capitalize on the fact that "[n]ot only are male judges more likely to help . . . an ingroup member, they are also likely to show more concern and empathy for that person").

75 Linda Hirshman, Sisters in Law: How Sandra Day O'Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World 64 (2015).

76 404 U.S. 71, 76 (1971) (holding that a male preference for estate administration was illegal and providing the first example of the Equal Protection Clause being used to invalidate sex-based discrimination).

77 429 U.S. 190, 204 (1976) (holding that gender-based classification was subject to intermediate scrutiny and striking down a sex-based drinking age distinction on that basis).

78 *See* Franklin, *supra* note 73, at 122–40 (detailing the arc of sex discrimination claims and the establishment of heightened scrutiny for sex under the Equal Protection Clause).

79 *See infra* Section II.A.

80 *See infra* Section I.B.

81 *See supra* notes 73–75 and accompanying text.

potential loss of fertility as the result of abortion bans.[82] But abortion-rights incrementalism owes as much to past campaigns in state court. It is to these mobilizations that this Section turns next.

2. *State Constitutional Incrementalism*

Not all incrementalism has unfolded in federal court. Proponents of same-sex marriage equality, for example, pursued a hybrid model initially centered on state courts and state legislation.[83] When state courts began considering the issue of same-sex marriage in the 1990s, the prospect of a win in federal court seemed bleak. The Supreme Court had rejected a challenge to the constitutionality of same-sex marriage bans in *Baker v. Nelson* in 1972.[84] In 1976 and 1986, respectively *Doe v. Commonwealth's Attorney of Richmond* and *Bowers v. Hardwick*, the Court upheld sodomy laws criminalizing same-sex intimacy.[85] The Supreme Court did not overturn *Bowers v. Hardwick* until 2003, and even then, the Court's decision in *Lawrence v. Texas* distinguished the right to private, intimate conduct from the public recognition of any relationship.[86] Rather than litigating for a federal constitutional right to marry, groups like Lambda Legal and the Human Rights Coalition pursued stepwise change through local and state domestic partnership and civil union laws.[87]

Because federal incrementalism results in judicial decisions with nationwide effect, incrementalists may seek less sweeping changes, such as the desegregation of graduate versus public schools.[88] State decisions, by contrast, apply only within jurisdictional boundaries—and because

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[82] *See infra* Section I.B.

[83] On the state-by-state strategy for same-sex marriage, see SASHA ISSENBERG, THE ENGAGEMENT: AMERICA'S QUARTER-CENTURY STRUGGLE OVER SAME-SEX MARRIAGE 398, 453 (2021); NATHANIEL FRANK, AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA 111 (2017).

[84] 409 U.S. 810 (1972). On the significance of *Baker*, see ISSENBERG, *supra* note 83, at 49–54; GEORGE CHAUNCEY, WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 89–91 (2004); SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA 179–84 (2010).

[85] For the decision in *Commonwealth's Attorney*, see Doe v. Commonwealth's Att'y for City of Richmond, 425 U.S. 901 (1976). For the decision in *Bowers*, see Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (upholding Georgia's sodomy law). For more on the shadow cast by *Bowers*, see MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 37–42 (2013); WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003, 142–201 (2008).

[86] 539 U.S. 558, 578 (2003) (stressing that *Lawrence* did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

[87] *See* ISSENBERG, *supra* note 83, at 326, 398, 453 (providing a detailed overview of the state-by-state strategy and its supporters).

[88] *See supra* Section I.A.

state courts are the ultimate arbiters of the meaning of state constitutions and thus not subject to reversal on such questions in the U.S. Supreme Court. For this reason, incrementalists may seek broader, if local, victories in the states. Such was the case in the struggle for marriage equality. In *Baker v. Vermont*, for example, Mary Bonauto of the Gay and Lesbian Defenders, a prominent advocacy group, relied on the state constitution's Common Benefits Clause, arguing, as the state supreme court explained, that same-sex couples could not constitutionally be "deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry."[89] This strategy created an opening for the court to hold that the state constitution protected same-sex marriage, but if that step seemed too bold, offered the possibility of a narrower remedy—the guarantee of access to the benefits, but not official designation, of marriage.[90] At a time when no state had previously recognized a right under state equality or liberty guarantees for same-sex couples to marry, the *Baker* Court opted for the more cautious approach, holding that the state constitution required access to "the common benefits and protections that flow from marriage" but allowing the legislature to decide whether those benefits came from "inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent."[91]

Baker offered important lessons for Bonauto and her colleagues. Offering the court an escape hatch—requiring the benefits but not status of marriage—might have made sense as the first step in an incrementalist campaign, but Bonauto learned that focusing too heavily on the *tangible* benefits of marriage would tempt other courts to take the same out.[92] And so when Bonauto filed suit in Massachusetts on behalf of several same-sex couples, GLAD shifted its focus to the "unique cultural status" of marriage—and "respect for the choice of marital partner."[93] In 2003, the Massachusetts Supreme Judicial Court

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[89] Baker v. State, 744 A.2d 864, 868 (Vt. 1999) (summarizing the plaintiffs' argument).

[90] Indeed, when a same-sex couple sought a marriage license in 1990, the historian David Garrow has shown, GLAD decided against bringing such a claim because it was so unlikely to succeed. *See* David J. Garrow, *Toward a More Perfect Union*, N.Y. Times Mag. (May 9, 2004), https://www.nytimes.com/2004/05/09/magazine/toward-a-more-perfect-union.html [https://perma.cc/JQD4-PZN8].

[91] *Baker*, 744 A.2d at 867, 887.

[92] *See* Yvonne Abraham, *10 Years' Work Led to Historic Win in Court*, Bos. Globe (Nov. 23, 2003), https://archive.boston.com/news/local/articles/2003/11/23/10_years_work_led_to_historic_win_in_court [https://perma.cc/UEV8-GMJD] (reporting Bonauto's explanation that GLAD tried to avoid another *Baker*-style remedy by emphasizing "what marriage is in our culture").

[93] Plaintiffs' Motion for Summary Judgment at *13, 19, Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003) (No. 01-1647-A).

in *Goodridge v. Department of Public Health* echoed Bonauto's claim that "civil marriage" was a civil right and held that the state constitution recognized such a right for same-sex couples.[94]

Later cases stretched across the country from Iowa[95] to New Jersey.[96] The fact that the struggle for same-sex marriage unfolded in so many state courts in a relatively short period allowed those courts to look for inspiration in a wider range of jurisdictions, which themselves reached varying conclusions about the remedy required if judges chose to recognize the constitutional right to marry. In New Jersey, for example, Lambda Legal argued that only access to marriage would remedy a violation of the state constitution,[97] but the state supreme court was prepared to recognize only a right to access the benefits of marriage, citing *Baker*.[98] In Iowa, by contrast, the court heavily cited cases like *Goodridge* in reasoning that "the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective."[99] Because state incrementalism involved multiple, and sometimes simultaneous, lawsuits, courts—whether inclined toward broader or more limited interpretations of their constitutions—could draw inspiration from decisions made in sister jurisdictions.[100]

How did this form of state incrementalism influence any form of change outside the lines of a particular state? Most simply, this litigation had the effect of changing access to marriage for same-sex couples. By the end of 2012, nine states and Washington D.C. permitted same-sex marriage.[101] Immediately before *Obergefell*, in 2015, only fifteen states still had bans on same-sex marriage that were in place or stayed by court decision.[102] Couples from states without marriage access traveled to states that recognized marriage and tried to secure recognition of

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94 798 N.E.2d 941, 966 (Mass. 2003).

95 Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

96 Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

97 Reply Brief of Plaintiff-Appellants at *38–39, Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (No. 58,389) (arguing that the court should "end the constitutional violation once and for all" by granting the plaintiffs the right to receive marriage licenses).

98 *Lewis*, 908 A.2d at 221–22 (ordering the legislature to remedy "equal protection disparities" without dictating that same-sex unions be recognized as marriages).

99 *Varnum*, 763 N.W.2d at 906.

100 *See supra* notes 89–99 and accompanying text.

101 *See Overview of Same-Sex Marriage in the United States*, Pew Forum (Dec. 7, 2012), https://www.pewresearch.org/religion/2012/12/07/overview-of-same-sex-marriage-in-the-united-states [https://perma.cc/4Z5J-PRXU] (overviewing the national landscape).

102 *See Local Government Responses to* Obergefell v. Hodges, Ballotopedia (Jul. 1, 2015), https://ballotpedia.org/Local_government_responses_to_Obergefell_v._Hodges [https://perma.cc/6KT6-29YJ] (overviewing state and local government landscapes prior to the decision as well as attempts at resisting the implementation of the marriage equality ruling).

their own relationships.[103] While the federal baseline did not change, conditions on the ground did for a substantial number of queer couples.

At the same time, state constitutional litigation could create evidence of a new popular constitutional understanding of same-sex marriage.[104] As Kenji Yoshino explains, LGBTQ+ litigators steered clear of any federal litigation until they could establish that a "critical mass" of states had already recognized the right for same-sex couples to wed.[105] These state decisions left a mark on the Supreme Court's 2015 ruling in *Obergefell v. Hodges*.[106] In the majority's 5-4 opinion, Justice Anthony Kennedy spotlighted what he called an "ongoing dialogue" in which the states' highest courts figured prominently.[107] These state decisions stood at the center of the Court's narrative about marriage as an institution defined by both "continuity and change."[108] Changes in the meaning of marriage followed not only from substantial "cultural and political developments" but also from emerging constitutional ideas in the states.[109] These developments, the Court explained, revealed new understandings of equality under the law.[110] "The nature of injustice," the Court explained, "is that we may not always see it in our own times."[111]

State litigation could allow LGBTQ groups to experiment with various constitutional foundations for marriage equality.[112] At the same time, by pointing to a surge in state laws and decisions, movement litigators could suggest that Americans had come to understand the right to marry differently.[113] This evidence of popular change will not necessarily register with a hostile Court. But developing evidence of an evolving understanding of liberty or equality can matter as the Court's composition itself changes. A constitutional shift in the states, as struggles over same-sex marriage suggest, can matter to federal constitutional law, too.[114]

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103 On some of the legal questions raised by interstate marriage tourism, see William Baude, *Interstate Recognition of Same-Sex Marriage After* Windsor, 8 N.Y.U. J.L. & Liberty 150, 151 (2013); William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 Stan. L. Rev. 1371, 1381 (2012).

104 *See* Yoshino, *supra* note 23, at 43.

105 *Id.*

106 576 U.S. 644 (2015).

107 *Id.* at 663.

108 *Id.* at 659.

109 *Id.*

110 *Id.* at 663–70.

111 *Id.* at 664.

112 *See supra* notes 90–98 and accompanying text.

113 *See supra* notes 99–111 and accompanying text.

114 *See supra* notes 99–111 and accompanying text.

*B. Anti-*Dobbs *Incrementalism*

The reversal of *Dobbs*, like the reversal of *Plessy*, will not likely be a short-term project. The *Dobbs* Court went out of its way to close the door on any possible constitutional foundation for abortion rights, including an equality ground addressed by neither the petitioner nor the respondent.[115] Reversal of *Dobbs* will, at a minimum, require a substantial change in the Court's composition.

But if overturning *Dobbs* seems unlikely in the short term, eroding its value as precedent may be possible in the years to come. It is possible to imagine federal and state incrementalist strategies that undermine the Court's decision. The *Dobbs* Court held that abortion bans would be constitutional if they satisfied rational basis review.[116] A fresh federal-court strategy might test the boundaries of this rational basis approach. If a state were to eliminate all exceptions to a criminal abortion ban, might that fail rational basis review? What if a state substituted affirmative defenses for exceptions, as some states have begun to do? There is a strong historical precedent for an exception in cases of threats to life, which appeared in virtually every nineteenth-century ban and appear to have applied in cases of threats to health.[117] For a Court that professes to interpret the Constitution in line with the traditions established at the time of ratification,[118] bans without a robust life or health exception might fail to meet rational basis.[119] Still, other federal challenges leverage the Court's manifest concern for religious

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115 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022) (explaining that an equal protection theory for abortion rights is "squarely foreclosed" by the Court's precedents).

116 *Id.* at 301 (explaining that abortion regulations "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests").

117 *See* Leslie J. Reagan, When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973, at 13 (1997) (providing the historical backdrop for abortion ban exceptions); *see also* Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom and May Again Threaten It*, 134 Yale L.J. (forthcoming 2025) (documenting the expansiveness of life exceptions in the era in which the Comstock Act was first in effect).

118 *Dobbs*, 597 U.S. at 260 (reaffirming *Glucksberg*'s holding that the "established method of substantive-due-process analysis" requires an unenumerated right to be "deeply rooted in this Nation's history and tradition") (internal quotes omitted).

119 The Lawyering Project makes the related argument that the Constitution already protects a right to access medically needed abortion. *See supra* note 41 and accompanying text. Such a right might be identifiable even under the history-and-tradition test set forth in *Dobbs*. *See* Reva B. Siegel & Mary R. Ziegler, *Abortion's New Criminalization: A History-and-Tradition Right to Healthcare Access After* Dobbs *and the 2023 Term*, 111 Va. L. Rev. (forthcoming 2025) (manuscript at 22–57).

liberty.[120] Invoking the Free Exercise Clause or the federal Religious Freedom Restoration Act, litigants insist that some physicians, patients, and religious institutions have free exercise justifications for performing, assisting, or accessing abortions.[121]

For understandable reasons, however, abortion-rights incrementalism has developed in state court. The next Section focuses on two of the dominant incremental strategies that have emerged in the aftermath of *Dobbs*. First, Section B considers how the litigation to recognize broad rights in one state can influence developments in other jurisdictions. Next, this Section considers the potential spillover effects in other jurisdictions from the recognition of narrow state reproductive rights, such as rights to access abortion only in cases of threats to life or health. Section B closes by focusing on a second prominent strategy centered on the interpretation of abortion exceptions: interpreting, rather than challenging, bans while exposing the profound harms they do, even on the terms that *Dobbs* itself recognizes.

1. State Constitutional Abortion Rights

State constitutional abortion rights are not new. In the years between *Roe* and *Dobbs*, state courts recognized a wide variety of protections for abortion.[122] In the 1980s, some state courts spelled out protections broader than those articulated in *Roe*, especially when it came to the issue of Medicaid funding for abortion.[123] In the late 1980s, the Florida Supreme Court echoed ideas of autonomy similar to those

120 *See* Pam Belluck, *Religious Freedom Arguments Underpin Wave of Challenges to Abortion Bans*, N.Y. Times (June 28, 2023), https://www.nytimes.com/2023/06/28/health/abortion-religious-freedom.html [https://perma.cc/EG82-8KCF] (explaining that "clergy and members of various religions, including Christian and Jewish denominations, have filed about 15 lawsuits in eight states, saying abortion bans and restrictions infringe on their faiths").

121 *Id.*

122 On the complexity and tradeoffs of pre-*Dobbs* state constitutional abortion litigation, see Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. Rev. 175, 180–92 (2008); Dawn E. Johnsen, *State Court Protection of Reproductive Rights: The Past, the Perils, and the Promise*, 29 Colum. J. Gender & L. 41, 43–52 (2015).

123 Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 789–99, 789 n.19 (Cal. 1981) (holding that the denial of public funding for most abortion care, but not pregnancy or childbirth, violates state constitutional rights to privacy, equal protection, and due process); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 397–404 (Mass. 1981) (finding a right to abortion in the right to privacy guaranteed by the state constitution's due process provision and striking down a ban on Medicaid reimbursement for abortions except when necessary to prevent the death of a pregnant patient); Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982) (holding that the denial of public funding for most abortion care, but not pregnancy or childbirth, violates the state constitution's equal protection clause because the fundamental right to terminate a pregnancy outweighs the State's asserted interest in protecting potential life).

in *Roe*.[124] This decision, too, came at a time of predicted change in federal constitutional law, given that the Supreme Court was expected to undo a federal right to choose abortion.[125]

Other pre-*Dobbs* constitutional decisions experimented with different foundations for a state abortion right—and did so less obviously in response to developments in the federal courts.[126] Some, like the New Mexico Supreme Court's 1998 decision, looked primarily to equality guarantees in recognizing a right to abortion.[127] Others, like the high courts of Minnesota or Kansas, framed equality and liberty guarantees as interconnected.[128]

After *Dobbs*, abortion-rights attorneys have sought to expand state constitutional protections in states that otherwise apply abortion bans. With varying levels of success, plaintiffs in Michigan, Kentucky, Georgia, Iowa, Florida, Idaho, South Carolina, Oklahoma, Tennessee, Nebraska, North Dakota, South Carolina, Utah, Wisconsin, Wyoming, Texas, Pennsylvania, and Indiana have pursued recognition of a broad right to procreative autonomy, grounded in state provisions based on equality, privacy, or a right to life.[129]

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124 For an example, see *In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989), *rev'd*, Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67 (Fla. 2024).

125 *See* MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 129–35 (2020) (discussing the Hyde Amendment and other political efforts as the writing on the wall for the undoing of the federal right to an abortion).

126 Armstrong v. State, 989 P.2d 364, 377 (Mont. 1999) (recognizing that a "right of procreative autonomy" protects "a woman's moral right and moral responsibility to decide, up to the point of fetal viability, what her pregnancy demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation"); Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice, 948 P.2d 963, 965, 968 (Alaska 1997) (recognizing a right to abortion and reasoning that "few things are more personal than a woman's control of her body, including the choice of whether and when to have children") (internal quotations omitted); N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 857–58 (N.M. 1998) (holding that state Medicaid restrictions violated New Mexico's Equal Rights Amendment); Women of Minn. v. Gomez, 542 N.W.2d 17, 31 (Minn. 1995) (holding that a state Medicaid restriction infringed on a state constitutional right protecting the decision to abort); Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 35 (Ariz. 2002) (recognizing a state fundamental right to choose); Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 497 (Kan. 2019) (recognizing the relationship of abortion to an "inalienable natural right of personal autonomy" that "encompasses our ability to control our own bodies, to assert bodily integrity, and to exercise self-determination").

127 *N.M. Right to Choose/NARAL*, 975 P.2d at 851 (focusing its analysis on the New Mexico Constitution's Equal Rights Amendment).

128 *Women of Minn.*, 542 N.W.2d at 31 (discussing how freedom, financial and otherwise, interplays with the right to choose); *Hodes & Nauser*, 440 P.3d at 497 (asserting a higher level of scrutiny than the undue burden test would require).

129 *See State and Federal Reproductive Rights and Abortion Litigation Tracker*, KFF (Feb. 17, 2023), https://www.kff.org/womens-health-policy/report/state-and-federal-reproductive-rights-and-abortion-litigation-tracker [https://perma.cc/SGZ8-ZPKH] (overviewing the status of abortion litigation in state courts across the country).

Seeking to secure a sweeping new state abortion right, if anything, seems maximalist. But this strategy, like the one that led to *Obergefell*, seeks to expand state access, and build slowly toward eventual recognition of a federal right. In South Carolina, for example, Planned Parenthood challenged the constitutionality of a six-week ban. In January 2023, the state supreme court held that the state's constitutional privacy right encompassed a right to abortion—and that the state's six-week ban violated that right.[130] The membership of the state court changed between January and August, with the retirement of the court's only female justice, and the court subsequently upheld a virtually identical six-week prohibition.[131] But in the six months between the two decisions, South Carolina became a regional access hub, with an additional 1,000 procedures performed year-over-year in 2022, largely due to patients arriving from out of state.[132] State wins can lower access barriers to patients in regions with few states that recognize legal abortion.

Florida offers another potent example. Florida recognized a state right to abortion in 1989.[133] After *Dobbs*, Florida's role as a regional destination for out-of-state abortion seekers became still more obvious, with at least 9,000 out-of-state seekers arriving in 2023 alone.[134] Then in April 2024, the Florida Supreme Court overturned its 1989 decision, ensuring that the state's six-week ban would go into effect thirty days later.[135] Research from the Guttmacher Institute indicated that the

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130 Planned Parenthood S. Atl. v. State, 882 S.E.2d 770, 783–86 (S.C. 2023) [hereinafter *Planned Parenthood I*].

131 Kate Zernike, *South Carolina Supreme Court Upholds Abortion Law, Reversing Earlier Decisions*, N.Y. Times (Aug. 23, 2023), https://www.nytimes.com/2023/08/23/us/south-carolina-abortion-supreme-court.html [https://perma.cc/4QTF-U8QE].

132 *See* Mary Green, *Nearly 1,000 More Abortions Reported in SC in 2022 than 2021*, 5 WCSC (July 3, 2023), https://www.live5news.com/2023/07/03/nearly-1000-more-abortions-reported-sc-2022-than-2021 [https://perma.cc/J85Y-QUZK]; *see also* Emily Mikkelsen, *North, South Carolina Saw Spike in Abortion Rates Before Restrictions Signed into Law*, Fox News 8 (Sep. 8, 2023), https://myfox8.com/news/politics/nc/carolinas-saw-spike-in-abortion-rates-before-restrictions-signed-into-law [https://perma.cc/E9VD-DL39].

133 *In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989).

134 Deirdre McPhillips, *Florida's Six-Week Abortion Ban Could Displace Thousands Each Month in a Region Where Access Is Already Limited*, CNN (Apr. 4, 2024), https://www.cnn.com/2024/04/04/health/florida-abortion-trends-6-week-limit/index.html [https://perma.cc/8E3U-TUCF].

135 *Planned Parenthood of Cent. Fla.*, 2024 WL 1363525, at *15 (finding *T.W.* to be "clearly erroneous" and reversing it). The 2024 election saw Florida voters deciding whether to establish a state constitutional right to abortion that might lead to the invalidation of the six-week ban. *See* Kate Zernike, *Abortion Rights, on Winning Streak, Face Biggest Test in November*, (Aug. 23, 2024), https://www.nytimes.com/2024/08/23/us/abortion-ballot-measures-have-had-success-this-year-is-their-biggest-challenge.html [https://perma.cc/EKT4-33YV].

decision would have sweeping regional effects: abortion seekers in the Southeast may now have to travel as far as Virginia for access.[136]

State supreme court decisions recognizing broad rights also offer abortion-rights supporters a chance to experiment with and improve upon new articulations of liberty and equality. State courts have described reproductive rights as part of a broader antisubordination tradition "of affording persons on the periphery of society a greater measure of government protection and support than may be available elsewhere."[137] State judges have explored the connections between autonomy and "human dignity": while state judges skeptical of reproductive rights stress what they describe as the dignity of fetal life, other state judges have explained that recognizing a right to reproductive autonomy is at "the heart of human dignity."[138] Still others have articulated rights rooted clearly in state equality guarantees, reasoning that since "time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them."[139] These rulings and their progeny invite abortion-rights supporters to observe the evolution of different constitutional arguments and study how they actually play out on the ground. The privacy right recognized in *Roe* struck commentators as inadequate because it did not guarantee anyone, particularly low-income patients, the ability to actually secure an abortion.[140] State constitutional incrementalism allows movements to see if other constitutional approaches have unexpected pitfalls.

And just as important, abortion-rights supporters hope to replicate the success of *Obergefell* by accumulating state victories, demonstrating a popular understanding in states and state courts that the federal Constitution should recognize. Even in *Dobbs*, Justice Kavanaugh stressed the number of states that had sought to undermine *Roe* or called for its reversal.[141] State court decisions can produce the kind of democratic constitutional understanding that the justices sometimes consider in interpreting the Fourteenth Amendment.[142] A wave of state decisions alone will not convince an unchanged Supreme Court. But

136 *See* McPhillips, *supra* note 134 (documenting the regional abortion landscape).

137 Women of Minn. v. Gomez, 542 N.W.2d 17, 30 (Minn. 1995).

138 Hodes & Nauser v. Schmidt, 440 P.3d 461, 497 (Kan. 2019).

139 N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 854 (N.M. 1998) (quoting Doe v. Maher, 515 A.2d 134, 159 (Conn. Super. Ct. 1986)).

140 *See, e.g.*, Rachel Rebouché, Roe *Is as Good as Dead. It Was Never Enough Anyway.*, Bos. Rev. (May 11, 2022), https://www.bostonreview.net/articles/congress-could-legislate-roe-v-wade-and-still-fail-women [https://perma.cc/PF7X-PEM6].

141 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 344 (2022) (Kavanaugh, J., concurring) (noting that twenty-six states had asked for the overturning of *Roe* in *Dobbs*).

142 *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 664 (2015) ("The nature of injustice is that we may not always see it in our own times."); Lawrence v. Texas, 539 U.S. 558, 572–73 (2003)

state decisions can start the kind of popular dialogue that convinced the *Obergefell* Court to understand the nation's history and tradition differently, and to interpret the Constitution's guarantees of liberty and equality in a new light.[143]

But as the history of struggles over same-sex marriage suggest, not all state courts may embrace sweeping rights. The reasons for this are varied. Courts may *not* be responsive to popular constitutional pressure, because they have been captured by wealthy donors or interest groups.[144] Alternatively, state courts may gravitate to narrower rulings because of popular pressure, especially in a state where voters reject a sweeping reproductive right.[145] State constitutional incrementalists have thus sometimes pursued recognition of narrow rights, such as those applying in cases of threats to life. But as this Section shows next, these rights, too, can be a critical part of an incremental strategy.

2. Narrow Rights

To date, state constitutional incrementalism has not always produced sweeping state abortion rights. Instead, courts in South Carolina, Oklahoma, and Indiana have carved out narrow rights that apply in exceptional circumstances.[146] For example, when attorneys challenged the constitutionality of Oklahoma's abortion bans—a 1910 criminal law and a felony trigger ban set to go into effect the following August—their initial strategy centered on substantive due process rights under the state's constitution (separate claims, based on impermissible

(noting contemporary state approaches to private and consensual sexual conduct); Poe v. Ullman, 367 U.S. 497, 542 (1961) (discussing the dynamism of due process).

143 *See supra* notes 104–12 and accompanying text.

144 *See* David E. Pozen, *What Happened in Iowa?*, 111 COLUM. L. REV. SIDEBAR 90, 100–01 (2011) (summarizing concerns that "elections generate judges who are more likely to rule in ways that gratify their campaign supporters, as an incentive or reward for such support"); *see also* Nicole Mansker & Neal Devins, *Do Judicial Elections Facilitate Popular Constitutionalism; Can They?*, 111 COLUM. L. REV. SIDEBAR 27, 36–37 (2011) (noting issues in the judiciary with donor and interest group influence).

145 While state polling is sparse, the *New York Times* found that under forty percent of voters thought abortion should be "mostly legal" in certain states, such as Louisiana and Arkansas. Nate Cohn, *Do Americans Support Abortion Rights? Depends on the State*, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/upshot/polling-abortion-states.html [https://perma.cc/X6GN-BC8P].

146 *See* Planned Parenthood S. Atl. v. State, 892 S.E.2d 121, 131–32 (S.C. 2023) [hereinafter *Planned Parenthood II*] (recognizing a right to protection against unreasonable privacy invasions while upholding a six-week ban); Okla. Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1130 (Okla. 2023) (recognizing a narrow abortion right under the Oklahoma constitution); Med. Licensing Bd. v. Planned Parenthood Great Nw., 211 N.E.3d 957, 976 (Ind. 2023) (recognizing a right to abortion in cases of a threat of death or serious medical harm).

vagueness, targeted the state's entire statutory abortion scheme).[147] Without deciding whether the constitution protected a broader right, the state supreme court in *Oklahoma Call for Reproductive Justice v. Drummond* ruled that the state's constitution created "an inherent right of a pregnant woman to terminate a pregnancy when necessary to preserve her life."[148]

Significantly, the court upheld the old 1910 law while striking down the recent trigger law—and this despite the fact that the new ban still allowed for abortion in certain, narrowly defined medical emergencies.[149] The modern exception prohibited any abortion unless performed "to save the life of the woman in a medical emergency."[150] The law, in turn, defined medical emergency to include conditions that "cannot be remedied by delivery of the child in which an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness or physical injury including a life-endangering physical condition caused by or arising from the pregnancy itself."[151] The court interpreted the law "to require a woman to be in actual and present danger in order for her to obtain a medically necessary abortion."[152] Understood in this way, the court reasoned, the exception violated the state's constitutional right to life-saving abortion because it required a woman to be experiencing an immediate medical emergency in order to obtain a medically necessary abortion.[153] Months later, the court also invalidated a third ban, patterned on Texas's SB8, which allowed private citizens to bring a lawsuit against anyone performing an abortion after a certain point in pregnancy.[154]

Because the court upheld the 1910 ban, the result left abortion functionally inaccessible across the state.[155] But the Oklahoma decision has further incremental potential. The court was not satisfied with just any emergency exception that "require[d] a woman to be in actual and present danger in order for her to obtain a medically necessary

147 Petitioners' Corrected Brief in Chief at 11–12, *Drummond*, 526 P.3d 1123 (No. PR-120,543).

148 *Drummond*, 526 P.3d at 1130.

149 *See id.* at 1130–32.

150 Okla. Stat. Ann. tit. 63, § 1-731.4 (West 2022).

151 *Id.*

152 *Drummond*, 526 P.3d at 1131.

153 *Id.* (reading the modern medical exception to narrowly only allow for abortions in the case of an immediate medical emergency).

154 *See* Okla. Call for Reprod. Just. v. State, 531 P.3d 117, 122–23 (Okla. 2023). For SB8, see Tex. Health & Safety Code Ann. §§ 171.204(a), 171.205(a) (West 2021).

155 *See* Jacey Fortin, *Oklahoma Supreme Court Rules New Abortion Bans Unconstitutional*, N.Y. Times (May 31, 2023), https://www.nytimes.com/2023/05/31/us/oklahoma-supreme-court-abortion-bans.html [https://perma.cc/RQY9-GNJ3] (noting that the landscape of abortion accessibility was not materially altered by *Drummond*).

abortion."[156] A satisfactory exception, by contrast, would have to allow abortion when a "harmful condition is known or probable to occur in the future."[157]

Narrow wins like *Drummond* can establish the unworkability of abortion bans and the inadequacy of most exceptions. The Oklahoma decision, for example, contrasted an unconstitutional exception with a permissible one in the 1910 criminal law that allows for abortion "if it is necessary to 'preserve' [the patient's] life."[158] Suggesting that a life-preserving exception is vastly superior to a medical emergency exception defies logic. The court opined that an exception "'to save the life of a pregnant woman in a medical emergency' is much different from [one to] 'preserve her life.'"[159] How so? How will physicians know when an abortion is needed to protect life? Why would a life-saving abortion not need to address "an actual and present danger?"[160] One possibility is that physicians will simply turn a life-preserving exception into something broad enough to encompass a range of dangerous medical conditions. Perhaps any patient at risk of sepsis, eclampsia, or other dangerous conditions will be deemed to deserve life-preserving care. Another possibility is that physicians will interpret the exception narrowly and turn away most patients with "harmful conditions"[161]—effectively exposing that the exception in the 1910 law is just as problematic as those the Oklahoma Supreme Court has already struck down. Defending such a narrow right can expose the absurdity of exceptions regimes and possibly set the stage for the recognition of a more capacious liberty.

And even narrow-seeming rights are underdetermined and may have broader potential. For example, the Oklahoma Supreme Court subsequently weighed in on a challenge to the constitutionality of state regulations requiring abortion providers to be board-certified obstetrician-gynecologists, a requirement mandating that providers have admitting privileges at a nearby hospital, and a rule requiring doctors to perform an ultrasound and wait seventy-two hours before a procedure.[162] The state supreme court granted a preliminary injunction

156 *Drummond*, 526 P.3d at 1131.

157 *Id.*

158 *Id.* (quoting OKLA. STAT. ANN. tit. 21, § 861 (West 1999)).

159 *Id.* (quoting OKLA. STAT. ANN. tit. 63, § 1-731.4 (West 2022) and OKLA. STAT. ANN. tit. 21, § 861 (West 1999)).

160 *Drummond*, 526 P.3d at 1131.

161 *Id.*

162 Okla. Call for Reprod. Just. v. Drummond, 543 P.3d 110, 115 (Okla. 2023).

and blocked enforcement of the law.[163] The court reasoned that such restrictions "would increase the risk of harm to the woman and limit her access to necessary and timely healthcare to preserve her life" and in granting the injunction, did not require an imminent threat to life or health.[164]

Securing the recognition of narrow rights is an important dimension of abortion-rights incrementalism. State judges, as David Pozen writes, may be especially worried about triggering a popular backlash and thus may be more attracted to more minimalist rulings.[165] But recognizing a narrow right can make the case for further-reaching constitutional changes: A right that applies only in cases of a threat to life, for example, might be incoherent or have little practical effect. Alternatively, a narrow right might not remain so narrow—a court can interpret such a right to provide more meaningful protections over time.

Incrementalists have pursued a third and related approach to undermining *Dobbs*, one centered on exceptions to abortion bans. Focusing on exceptions might be even more modest. Historical and present-day evidence has called into question the efficacy of such exceptions; even interpreting exceptions more broadly may have little practical effect for the vast majority of abortion seekers.[166] But as this Section shows next, exceptions incrementalism can have potent political and constitutional effects.

3. Exceptions Incrementalism

Decisions like *Drummond* have inspired a second approach to abortion-rights incrementalism focused on the inadequacy of state exceptions. The litigation in *Zurawski v. State* offers a blueprint for what we might think of *exceptions incrementalism*.[167] In *Zurawski*, a group of plaintiffs challenged the validity of the exceptions to Texas's various abortion bans.[168] The state's health and safety code prohibits abortion

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163 *Id.* at 116 (reasoning that these regulations placed "unnecessary burdens" on the state right to life and observed that the "chilling effect of these new laws is such that no physician would likely risk providing constitutionally protected care").

164 *Id.*

165 *See* Pozen, *supra* note 24, at 2131 ("Elected judges generally lack the job security, the moral stature, and the professional self-conception to defy entrenched norms or strongly held preferences about constitutional meaning.").

166 *See, e.g.*, Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. Times, Jan. 21, 2023, https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html [https://perma.cc/679W-CEKT] (presenting evidence that "very few" abortion exceptions had been granted since *Dobbs* and explaining that this trend dated back to the application of exceptions in the Hyde Amendment).

167 State v. Zurawski, No. 23-0629, 2024 WL 2787913 (Tex. May 31, 2024).

168 *Id.* at *2.

unless there is "a serious risk of substantial impairment of a major bodily function of the pregnant female."[169] There is similar language in SB8.[170] The plaintiffs in *Zurawski* argue that the existing exceptions are far broader than may at first appear to be the case, giving physicians significant discretion in determining the applicability of an abortion exception (even permitting them to weigh threats to fertility), and allowing them to proceed despite no current, imminent risk to life.[171] If the exception does not permit abortion access in such scenarios, the *Zurawski* plaintiffs assert, it violates the state's constitution.[172] While the Texas Supreme Court rejected a facial challenge to the state's law,[173] the strategy underlying the suit holds considerable promise. A separate suit in Kentucky challenges the scope of that state's exceptions.[174] Similar lawsuits have been filed in other states.[175] *Zurawski* and cases like it offer a perfect window into the workings of exceptions incrementalism. While focusing on sympathetic plaintiffs experiencing serious pregnancy complications, the suit sets out to expand the grounds for legal abortion, suggests that bans lack a rational basis, and points to the existence of at least narrow state abortion rights.

Superficially, the strategy at work in *Zurawski* looks quite modest in its aims. The *Zurawski* plaintiffs qualify as what Cynthia Godsoe calls perfect plaintiffs[176]: all of them lost wanted pregnancies.[177] All had long-term partners, and most were married.[178] All experienced fetal conditions incompatible with life or a serious risk to their own safety.[179]

Substantively, aspects of the litigation in cases like *Zurawski* also appear quite pragmatic and cautious. The plaintiffs in *Zurawski* took aim

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169 Tex. Health & Safety Code Ann. § 170.A.002(b)(2)(B) (West 2022).

170 Tex. Health & Safety Code Ann. §§ 171.008, 171.205 (West 2022) (containing language such as "if the abortion is performed . . . to preserve the health of the pregnant woman, execute a written document that: . . . provides the medical rationale for the physician's conclusion that the abortion is necessary . . ." and "Sections 171.203 and 171.204 do not apply if a physician believes a medical emergency exists that prevents compliance . . .").

171 *See* Plaintiffs' Original Petition for Declaratory Judgment and Application for Permanent Injunction at 49, 51–52, Zurawski v. State, No. D-1-GN-23-000968 (Travis Cnty. Dist. Ct. Mar. 6, 2023) [hereinafter Zurawski Complaint].

172 *Id.* at 76 ("To the extent Texas's abortion bans bar the provision of abortion to pregnant people to treat medical conditions that pose a risk to the pregnant person's life or a significant risk to their health, the Bans violate pregnant people's fundamental rights.").

173 *See Zurawski*, 2024 WL 2787913.

174 On the Kentucky case, see Complaint for Injunctive and Declaratory Relief, Doe v. Cameron, No. 23-CI-007561 (Jefferson Cir. Ct. Dec. 8, 2023).

175 *See supra* notes 1–5 and accompanying text.

176 *See* Cynthia Godsoe, *Perfect Plaintiffs*, 125 Yale L.J.F. 136, 137–38 (2015).

177 Zurawski Complaint, *supra* note 171, at 4–19 (presenting plaintiffs' factual backgrounds).

178 *Id.*

179 *Id.*

at the particulars of the state's exceptions regime, including the unclear and nonmedical nature of the language of the state's medical emergency exceptions.[180] Texas's exceptions draw on language that is common in many contemporary state bans, permitting abortion when the patient suffers "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed."[181] The plaintiffs stressed that the state did not distinguish "risk" versus "serious risk"; "insubstantial impairment" versus "substantial impairment"; "minor bodily function" versus "major bodily function"; or "a serious risk of a substantial impairment" versus "a substantial impairment of a major bodily function."[182] Without demanding a broader right, the plaintiffs contended that Texas's definition of a medical emergency is not good enough.[183]

But claiming to seek minor legal changes and making a show of deference to the legal status quo conceals the broader ambitions at work in cases like *Zurawski*. State constitutional incrementalism, the case shows, seeks to transform the status quo while paying lip service to it. For example, the *Zurawski* plaintiffs claimed to *interpret* the current law, all while asserting that it applies to some patients that the state may deem undeserving under the existing exceptions regime.[184] The plaintiffs, for example, insisted that the exceptions in the state's various emergency exceptions encompass conditions that makes "a pregnancy unsafe for the pregnant person," any issue that "cannot be effectively treated during pregnancy, or that requires recurrent invasive intervention," and any "fetal condition where the fetus is unlikely to survive the pregnancy and sustain life after birth."[185]

Perhaps more significantly, the plaintiffs advanced an interpretation of the law that puts interpretive and practical authority in the hands of physicians, who, the plaintiffs argue, must use "good faith" discretion to determine whether any such emergent condition exists.[186] Antiabortion

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180 *See* Tex. Health & Safety Code Ann. § 171.002(3) (West 2017); *see also* Tex. Health & Safety Code Ann. § 170A.002(b) (West 2022).

181 Tex. Health & Safety Code Ann. § 171.002(3) (West 2017); *see also* Tex. Health & Safety Code Ann. § 170A.002(b) (West 2022) (providing for similar medical exception).

182 Plaintiffs' Application for Temporary Injunction at 7, Zurawski v. State, No. D-1-GN-23-000968 (Travis Cnty. Dist. Ct. May 22, 2023) [hereinafter Plaintiffs' Application].

183 *See id.* at 10–12 (discussing the inadequacies of the Texas law).

184 *See id.* at 11–12 (using the text, language, and legislative intent of the statute).

185 *Id.* at 6.

186 *Id.* at 12 ("'Good faith' is a critical component of physician discretion to ensure that physicians understand they have wide discretion to determine the appropriate course of treatment, including abortion care.").

lawyers long argued that physicians interpreting a health exception would allow for any abortion for any reason.[187] It was *Roe* and its progeny that centered the physician's "best medical judgment."[188] Texas's scheme, by contrast, relies on distrust of physicians and concern about broad definitions of health—and reassigns interpretive authority to prosecutors, who are statutorily allowed to second-guess doctors.[189] The *Zurawski* plaintiffs practiced a classic form of incrementalism in reinterpreting the state's emergency exception. In interpreting an existing law, the plaintiffs looked to carve out new justifications for legal abortion and to claw back deference to physicians' medical decisions.[190]

The *Zurawski* plaintiffs also introduced a new constitutional argument through the back door, suggesting that if the statute does not mean what it says, it violates the state constitution.[191] The Texas constitution guarantees that citizens will not be denied "life, liberty, property, privileges or immunities . . . except by the due course of the law of the land."[192] The *Zurawski* plaintiffs aimed for recognition of a right similar to but broader than the one set forth in *Drummond*: a right to access abortion for plaintiffs to protect their "lives, health, and/or fertility."[193]

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187 *See* Mary Ziegler, *Why Exceptions for the Life of the Mother Have Disappeared*, Atlantic (July 25, 2022), https://www.theatlantic.com/ideas/archive/2022/07/abortion-ban-life-of-the-mother-exception/670582 [https://perma.cc/6YAQ-VGZ8]; *see also* United Conference of Catholic Bishops, *Medically Necessary or "Health" Abortions: Abortion on Demand by Another Name*, U.S. Conf. of Cath. Bishops, (Nov. 13, 1995), https://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/medically-necessary-or-health-abortions-abortion-on-demand-by-another-name [https://perma.cc/56DW-6W7D] (arguing that "'health' or 'medically necessary' abortions . . . are merely terms of art for abortion on demand"); *Abortion for the Life of the Mother Cases*, Students for Life of Am., https://studentsforlife.org/learn/abortion-for-life-of-the-mother [https://perma.cc/B29R-CVDF] ("Actual life-threatening issues involving pregnancy are vastly different than generic 'health' issues.").

188 Doe v. Bolton, 410 U.S. 179, 192 (1973); *see also* Roe v. Wade, 410 U.S. 113, 163 (1973) ("[T]he attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.").

189 *See* Tex. Health & Safety Code Ann. § 171.002(3) (West 2017); *see also* Tex. Health & Safety Code Ann. § 170A.002(b) (West 2022).

190 *See* Plaintiffs' Application, *supra* note 182, at 12 (insisting that law had to ensure that physicians "understand they have wide discretion to determine the appropriate course of treatment, including abortion care, for their patients who present with emergent medical conditions—without being second guessed by the Attorney General, the Texas Medical Board, a prosecutor, or a jury").

191 *See* Plaintiffs' Application, *supra* note 182, at 13 (discussing the unconstitutionality of Texas's abortion prohibitions).

192 Tex. Const. art. I, § 19.

193 Plaintiffs' Application, *supra* note 182, at 13.

While the Texas Supreme Court upheld the disputed law, *Zurawski* has nevertheless created a roadmap for exceptions incrementalism in other states. In *Adkins v. Idaho*, abortion-rights attorneys take aim at the medical exceptions written into several Idaho bans, arguing that they should be interpreted to afford "discretion to determine the appropriate course of treatment, including abortion care, for their patients who present with emergent medical conditions."[194] In the alternative, the *Adkins* plaintiffs maintain that the state constitution protects a right to abortion for those "who present with emergent medical conditions."[195] And the plaintiffs contend that as applied to patients with emergent conditions, or certain fetal conditions, state bans do not serve even a rational basis, "particularly where a pregnancy will not or is unlikely to result in the birth of a living child with sustained life."[196] Plaintiffs in Tennessee have raised similar claims.[197]

Exceptions incrementalism offers two independent routes for expanding abortion rights. First, suits like *Zurawski* seek to cement more expansive interpretations of existing law. Second, these suits advocate for the recognition of *Drummond*-style rights that protect an ill-defined class of plaintiffs with emergent health conditions. What if such a suit fails? Exceptions incrementalism is designed to tell a political story about the kind of laws that *Dobbs* permits. If laws like Texas's or Idaho's require patients to give birth to stillborn children or to risk their lives or future fertility, their stories will make the case that *Dobbs* permits cruel and unacceptable results.

Post-*Dobbs* state constitutional incrementalism may seem familiar to anyone who closely followed the campaign to erode the right to choose in *Roe*. Part II revisits the history of antiabortion incrementalism. Excavating this history, in turn, illuminates the benefits of state constitutional incrementalism and its role in seeking constitutional change.

II
The Unmaking of *Roe v. Wade*

What can the history of *Roe*'s undoing tell us about state constitutional incrementalism? Section II.A begins by sketching the

194 Adkins Complaint, *supra* note 3, at 61.

195 *Id.*

196 *Id.* at 82.

197 Plaintiffs' Complaint for Declaratory Judgment and Permanent Injunction, *supra* note 4, at 3–11. The *Blackmon* plaintiffs also pursue an additional incremental strategy, arguing that the state's medical exception is impermissibly vague and thus denies physician plaintiffs of their rights to liberty and property by failing to notify them of what is prohibited or by inviting selective enforcement of the laws against them. *Id.* at 51–52.

rise and evolution of an antiabortion incremental strategy. Section II.A.1 turns to incrementalist litigation that unfolded in federal court. Section II.A.2 studies the evolution of antiabortion incrementalism in state court. Section II.B examines the limits of this litigation strategy in achieving the ambitions of abortion opponents and chronicles the other tactics—involving structural democratic changes—that the movement pursued.

A. Inventing Antiabortion Incrementalism

Immediately after *Roe*, few antiabortion activists focused on litigation, instead searching for ways to advance fetal personhood, which had been the movement's central goal since the 1960s.[198] "Unborn children too are 'humans, live, and have their being,'" wrote the leading antiabortion theorist Robert Byrn in 1968, who declared that "no public opinion poll, no popular vote [could] overcome [the] constitutional hurdle" of the personhood of unborn children.[199] Before *Roe*, antiabortion litigators in state and federal court asked to be named guardians ad litem for fetuses scheduled for abortion and asserted that the fetus enjoyed federal and state constitutional rights.[200] Other antiabortion attorneys suggested that there could be no right to abortion because the framers of the Constitution intended for the word "person" in the Fourteenth Amendment apply to the unborn child.[201]

Roe explicitly rejected the idea of Fourteenth Amendment personhood, but interest in constitutional fetal rights persisted.[202] In the aftermath of *Roe*, antiabortion groups rallied around the idea of

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[198] On the importance of fetal personhood, see ZIEGLER, *supra* note 12, at 85–89; Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 884 (2015) ("In the mid-1960s, anti-abortion constitutionalists assumed that the public would automatically support the right to life if they understood what abortion really was. For this reason, early anti-abortion constitutional theories served primarily as a vehicle for evidence of the personhood of the fetus.").

[199] Robert M. Byrn, *Demythologizing Abortion Reform*, 14 CATH. LAW. 180, 183 (1968) (quoting Levy v. Louisiana, 391 U.S. 68, 70 (1968)).

[200] *See, e.g.*, Motion of Appellant, Dr. Bart Heffernan, to Consolidate and Brief in Support at 10–11, Heffernan v. Doe, 410 U.S. 950 (1973) (No. 70-106); Motion for Leave to File a Brief and Brief of Ferdinand Buckley as Amicus Curiae in Support of Appellees at i–iii, Doe v. Bolton, 410 U.S. 179 (1973) (No. 70-40); Roe v. Wade, 410 U.S. 113, 162 (1973) (noting that unborn children have been represented by ad litem guardians to obtain property rights); Judy Klemesrud, *He's the Legal Guardian for the Fetuses About to Be Aborted*, N.Y. TIMES, Dec. 17, 1971, at 48.

[201] *See* Brief Amicus Curiae on Behalf of Association of Texas Diocesan Attorneys, in Support of Appellee at 17–22, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18) (hypothesizing on Locke, Hamilton, and Jefferson's views on the personhood status of the unborn).

[202] *Roe*, 410 U.S. at 158 (reasoning that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn").

an Article V amendment that would recognize fetal personhood and prohibit abortion, even when performed by non-government actors.[203]

In the mid-1970s, advocates working in Americans United for Life (AUL), a recently formed group, worried that a constitutional amendment may not get through Congress—and even if the amendment campaign were effective, lawyers would need to litigate the amendment's meaning and enforce it.[204] Dennis Horan, former AUL Chairman, explained the importance of establishing a "National Public Interest lawfirm[sic], which would provide a spearhead for litigation toward the ultimate goal of reversing *Roe v. Wade*."[205]

1. Antiabortion Incrementalism in Federal Court

From the beginning, AUL lawyers like Horan envisioned a campaign that would unfold in state and federal court. The better-known dimension of this strategy relied on state legislatures and federal courts.[206] AUL and other groups like it drafted model legislation intended to limit abortion access and transform the definition of abortion rights and then lobbied state lawmakers to pass it.[207] Then, AUL attorneys would defend the constitutionality of the laws in federal court, encouraging the Court to rethink what *Roe* permitted.[208]

Antiabortion incrementalists, for example, perfected this technique in advocating for the Hyde Amendment and its state equivalents.[209] Rather than arguing that *Roe* was wrongly decided, or that the Court had wrongly failed to recognize fetal rights, antiabortion litigators stressed that *Roe* at most recognized a right to make decisions about

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203 *See* ZIEGLER, *supra* note 12, at 84–89.

204 *See id.* at 83 (noting AUL's recognition that antiabortion legislation would require "sound legal argumentation in the courts" to support and enforce it).

205 Memorandum from Dennis J. Horan to NRLC Pol'y Comm. (Sept. 5, 1973) (on file with American Citizens Concerned for Life, Box 6, 1973 ACCL Folder) (also accessible at https://www.fordlibrarymuseum.gov/library/document/0048/004800066.pdf) [https://perma.cc/22EC-4GY8].

206 *See* Ximena Bustillo, *Who and What Is Behind Abortion Ban Trigger Law Bills? Two Groups Laid the Groundwork*, NPR (July 8, 2022, 5:01 AM), https://www.npr.org/2022/07/08/1110299496/trigger-laws-13-states-two-groups-laid-groundwork [https://perma.cc/8X6B-PV28].

207 *Id.*

208 *See* Wendy Long, *Victor G. Rosenblum and the Path to Victory Over Roe*, NAT'L REV. (Mar. 15, 2006, 4:27 AM), https://www.nationalreview.com/bench-memos/victor-g-rosenblum-and-path-victory-over-roe-wendy-long [https://perma.cc/D5ZD-FE69] (discussing former AUL president Victor G. Rosenblum's role in post-*Roe* Supreme Court litigation).

209 On the significance of the Hyde Amendment in antiabortion strategy, see MARY ZIEGLER, *ROE*: THE HISTORY OF A NATIONAL OBSESSION 38–41 (2023).

abortion, not to actually access the procedure.[210] "The privacy right is a right to be free from unduly burdensome state interference in seeking an abortion," explained AUL.[211] "The government has no obligation to fund even the most 'basic economic needs' in any case."[212] In practice, the Hyde Amendment had a significant impact: A disproportionate number of abortion seekers in the 1970s and 1980s relied on Medicaid, and some studies estimated that more than 200,000 patients who might have had an abortion did not because the Hyde Amendment changed their financial circumstances.[213] Nevertheless, those defending the Hyde Amendment claimed to be interpreting *Roe*, not questioning its validity.

Federal court incrementalism continued in the 1980s with the crafting of new state and local laws and a major strategy conference hosted by AUL.[214] New plans targeted viability, the point under *Roe* at which states could ban abortion or pursue an interest in protecting fetal life.[215] Sandra Day O'Connor, Ronald Reagan's first nominee to the Court, had written a 1983 dissent in *City of Akron v. Akron Center for Reproductive Health Services* flagging viability as a weakness of the *Roe* framework.[216] AUL leaders saw an attack on viability as a way to chip away at the very idea of an abortion right.[217] In principle, lifting the viability limit might seem modest because such a small fraction of abortions took place that late in pregnancy. In practice, if viability were called into question because it appeared more like a medical question than a constitutional question, the same criticism could be raised for the entirety of *Roe*'s trimester framework.

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210 *See* Brief of Intervening Defendants-Appellees James L. Buckley, Jesse A. Helms, Henry J. Hyde, and Isabella Pernicone in Support of Appellant Harris at 8–9, Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268) [hereinafter Brief of Intervening Defendants-Appellees]; *see also* Brief of Intervening Defendants-Appellants at 42, Williams v. Zbaraz, 448 U.S. 358 (1980) (No. 79-4) (arguing that there is no constitutional right for indigent individuals to receive medical care, nor is there a constitutional obligation for governments to cover indigents' medical expenses).

211 Brief of Intervening Defendants-Appellees, *supra* note 210, at 35.

212 *Id.* at 4 (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

213 James Trussel, Jane Menken, Barbara L. Lindheim & Barbara Vaughan, *The Impact of Restricting Medicaid Financing for Abortion*, 12 Fam. Plan. Persps. 120, 120 (1980).

214 *See 45 Reasons to Celebrate 45 Years of Americans United for Life*, Americans United for Life (Aug. 5, 2017), https://aul.org/2017/08/05/45-reasons-to-celebrate-45-years-of-americans-united-for-life [https://perma.cc/53VC-YJU9] (discussing AUL's innovations in model legislation).

215 *See* E. R. Shipp, *Foes of Abortion Examine Strategies of N.A.A.C.P.*, N.Y. Times, Apr. 2, 1984, at A15 (describing an attack on viability as the "launching point" of a new strategy).

216 *See* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting).

217 *See* Shipp, *supra* note 215 (arguing that an attack on viability would allow "the 'humanness' of the unborn child [to] be proven" while seeking to establish that with "the medical technology of today, a fetus was 'viable' very early in the second trimester").

Federal court incrementalism, when successful, could preserve restrictions that made abortions far harder to access, especially to those with fewer resources. At the same time, by upholding restrictions, the Court would narrow what *Roe* stood for—perhaps until there seemed to be less of an abortion right left to defend. Litigating restriction cases could also introduce inconsistencies into the case law. If, for example, courts began to question the logic of viability, it would be easier to question other dimensions of the trimester framework.

2. Antiabortion Incrementalism in State Court

An understudied dimension of antiabortion incrementalism also unfolded in state court, one more reminiscent of the tactical plan used in the leadup to *Obergefell*. Antiabortion lawyers turned to federal court to address one of the movement's key beliefs: the claim that the word "person" in the Fourteenth Amendment applies from the moment of fertilization.[218] The Court in *Roe* had explicitly rejected this argument.[219] And so, to gradually build toward a reversal of this conclusion, antiabortion lawyers turned to state courts and state legislation to secure recognition of fetal rights.[220] By securing the recognition of fetal protections *outside* the context of abortion, antiabortion attorneys in state court hoped to make *Roe*'s conclusions appear anomalous.[221] Furthermore, state litigation could inspire rulings in other states or even legislation; these legal changes, in turn, could build toward the kind of critical mass recognized by the Court in *Obergefell*.[222]

AUL's effort to create a "critical mass" of decisions on fetal rights began in state court when Melvin Moore, an Illinois man, was accused of shooting at the locked door of his girlfriend's apartment when she refused to let him in, causing her to miscarry.[223] Prosecutors charged Moore with assault based on the injuries to his girlfriend.[224] AUL drafted and sent a forty-five page memorandum demanding homicide charges based on the death of the fetus.[225] A jury ultimately acquitted Moore, but antiabortion groups looked for other opportunities in state court to bolster the case for fetal personhood.[226]

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218 *See supra* Section II.A.

219 *See* Roe v. Wade, 410 U.S. 113, 158 (1973) ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

220 *See infra* notes 248–58 and accompanying text.

221 *See id.*

222 *See id.*

223 *See* ZIEGLER, *supra* note 12, at 64.

224 *Id.*

225 *Id.* (detailing the strategy behind the memo).

226 *Id.*

AUL and other antiabortion groups sought to undermine *Roe*'s conclusion about fetal personhood by making it an outlier, litigating in state court to establish that a fetus was a rights-holding person in *non-abortion* settings. In the early 1980s, antiabortion lawyers filed briefs challenging the validity of suits for wrongful life or wrongful birth in state court.[227] The movement challenged the logic of the born-alive rule, which allowed for fetal homicide prosecutions only in the event that a fetus was born alive.[228] Movement lawyers submitted briefs in the case of Angela Carder and other patients in cases of forced Cesarean sections.[229]

Perhaps the most successful efforts involved the reinterpretation of existing laws on child abuse, neglect, and endangerment. Antiabortion groups like AUL lobbied for prosecutions of women who took illegal drugs during pregnancy, arguing that this constituted abuse, neglect, or endangerment of a person with rights. "Here's a class of people who aren't getting any protection," explained Ann-Louise Lohr of AUL, "and it's the unborn."[230] These prosecutions surged in the late 1980s and 1990s.[231] State courts in Alabama, Kentucky, and South Carolina endorsed such a personhood-adjacent interpretation of state criminal laws.[232] Prosecutors continued bringing such prosecutions even in other states where convictions were almost always overturned.[233] Antiabortion lawyers presented these prosecutions as setting a precedent for the recognition of personhood.[234] "A clear, high standard should be placed on the prosecutor to determine willful, malicious child abuse before any woman is charged," reasoned Clarke Forsythe of AUL in 1988.[235] "[T]he principal [sic] that the unborn child in the criminal law is a person

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227 *See, e.g.*, Hickman v. Grp. Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986) (AUL attorney Maura K. Quinlan appearing on behalf of AUL arguing against remedy for wrongful birth).

228 For an overview of arguments against the born alive rule, see Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563 (1987).

229 SARA DUBOW, OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA 115–19 (2010).

230 *Drug-Using Moms Pose Dilemma*, J. & COURIER (Lafayette, Ind.), Jan. 7, 1990, at 13.

231 On the surge, see Dorothy E. Roberts, *Creating and Solving the Problem of Drug Use During Pregnancy*, 90 J. CRIM. L. & CRIMINOLOGY 1353 (2000) (reviewing LAURA E. GOMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE (1997)). For further discussion, see generally MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 118–36 (2020); DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997).

232 Linda C. Fentiman, *In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (and Other Countries Don't)*, 18 COLUM. J. GENDER & L. 647, 649 (2009).

233 *Id.* at 651.

234 *See infra* Section II.B.2.

235 Marney Rich, *A Question of Rights*, CHI. TRIB., Sept. 18, 1988 (§ 6), at 8.

should be upheld."[236] Securing recognition of fetal rights in state courts could introduce more inconsistency into the law and make *Roe* appear more of an outlier. At the same time, if enough states recognized at least some fetal rights, groups like AUL could present those conclusions to the Court as evidence of an evolving understanding of the Constitution in *Roe*'s aftermath.

Well before the *Dobbs* decision, abortion had become inaccessible across large swaths of the country, especially after the Supreme Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which held that abortion restrictions violated the Constitution only if they unduly burdened the patient's abortion decision.[237] The work of incrementalist litigators also informed the Court's reasoning in *Dobbs*.[238]

But understood in historical context, incrementalist litigation strategies succeeded partly because of broader structural changes. Section II.B, *infra*, considers the developments that made incrementalist litigation campaigns more resonant in the federal courts.

B. Structural Change

This Section explores the structural changes pursued to secure *Roe*'s demise. This history offers important context for understanding the future of state constitutional incrementalism. While state incrementalism can yield tangible results for specific plaintiffs or certain states, perhaps its greatest power may be to inspire broader political mobilization. In this way, cases like Amanda Zurawski's matter as much because they inspire other women to come forward with their own experiences under post-*Dobbs* bans—or because of the story these cases tell about how the bans *Dobbs* made possible work in the real world. In a word, the history of antiabortion incrementalism—in the context of attacking *Roe* and seeking to establish personhood—reflects the limits facing even the most successful litigation campaigns absent a broader political mobilization.

1. Roe *and the Limits of Antiabortion Incrementalism*

In the aftermath of *Casey*, the leaders of the National Right to Life Committee, one of the nation's largest antiabortion groups, concluded

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[236] *Id.* For more on concern about "crack babies" in the era, see DUBOW, *supra* note 229, at 148–58.

[237] *See* 505 U.S. 833, 857–58 (1992) (plurality opinion) (describing how the State has a lesser interest in protecting fetal life than in preserving individual liberty claims).

[238] *See* Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 2149, 2152 (2024) (tracing the influence of antiabortion argument and mobilization on the reasoning of *Dobbs*).

that state and federal constitutional incrementalism rested on a key miscalculation.[239] Antiabortion groups had assumed that working toward the election of Republican senators and presidents would ensure the selection of sympathetic judges, while incrementalist litigation would guarantee a steady supply of test cases and make it easier for a sympathetic judge to make the case against *Roe*.[240]

But this plan underestimated structural factors that would make *Roe* hard to dislodge. Republican presidents tended to choose Supreme Court nominees who would be easy to confirm and would increase popular support for the president's party.[241] These Justices, in turn, might have been reluctant to damage their own popularity, the institutional legitimacy of the Court, or their own legacies.[242] Leaders of the National Right to Life Committee concluded after *Casey* that their movement lacked real power in the Republican Party.[243] If the movement did not have enough pull, Republican leaders would prioritize other concerns—such as their own electability—and select Justices who saw overturning *Roe* as unnecessary or even unwise.

As the 2000s began, antiabortion lawyers began redefining incrementalism as something more than a litigation strategy. Convincing the Court to reverse *Roe*, it seemed, would require the Republican Party to choose different kinds of Justices. This, in turn, would require a fundamental change in the partnership between the GOP and the antiabortion movement. Some antiabortion groups responded by throwing themselves into projects involving campaign finance and voting prioritized by the leaders of the Republican National Committee and other party organs.[244] James Bopp, the general counsel of the National Right to Life Committee, launched a separate center, with support from GOP super donor Betsy DeVos, dedicated to challenging the constitutionality of virtually any campaign finance regulation.[245] Antiabortion lawyers like Bopp hoped that more money in politics would mean more Republican victories, and that the more antiabortion lawyers became experts in campaign finance law, the more useful the

239 *See* ZIEGLER, *supra* note 32, at 105–23 (describing the NRLC's change in strategy).

240 *Id*.

241 *See id.* at 58 (describing how President Reagan's choice of Sandra Day O'Connor in 1981 was done to ensure a smooth confirmation that was uncontroversial).

242 *Id.*

243 *See id.* at 84 (describing the NRLC's rage after its efforts did not result in any meaningful change post-*Casey*).

244 *See id.* at 115–23 (describing the move to a focus on campaign finance and voting).

245 *See id.* at 112 (describing the DeVos family's funding of campaign finance litigation).

movement would appear to Republicans who questioned the wisdom of aligning with an often-unpopular cause.[246]

But working to change the ground rules of elections did more than make antiabortion leaders appear to be useful allies. Bopp and his colleagues were particularly committed to lifting limits on outside spending by groups like super PACs and nonprofits.[247] In the past, traditional party leaders, the committeemen, and veteran politicians who comprised the proverbial "establishment," had controlled the levers of election spending, particularly the flow of so-called soft money, a term once used for unregulated spending nominally used for party-building purposes. Antiabortion leaders believed that if outside groups had more financial pull, they might be able to promote candidates less concerned about electability or more dependent on the goodwill of socially conservative primary voters.[248] It was for this reason that key antiabortion figures were involved with much of the litigation in critical cases on outside spending, including *Citizens United v. Federal Election Commission*,[249] which opened the door to unlimited independent expenditures by corporations and unions.

Antiabortion lawyers, particularly those like Bopp, closely involved in Republican politics, also came to see redistricting and gerrymandering as key to state incrementalism. In 2010, when Bopp was serving as the vice chairman of the Republican National Committee,[250] the Republican Party launched Project REDMAP, which ran negative ads in low-salience state races funded by outside spending groups in jurisdictions set to redistrict that year.[251] Republicans flipped twenty-two state legislatures and took control of redistricting in much of the nation.[252] By 2015, after two elections under the new maps, Republicans controlled thirty state legislatures and Democrats fewer than a dozen.[253] Gerrymandering has never been unique to Republicans. Research

246 *See id.* at 111 (explaining Bopp's strategy).

247 *See id.* at 207 (explaining how Bopp hoped to use *Citizens United* to open the door to increased spending from these groups).

248 *See id.* (describing how these groups hoped to gain greater influence and shift the balance of power in the GOP).

249 558 U.S. 310 (2010).

250 *James Bopp, Jr.*, Bopp L. Firm, https://www.bopplaw.com/james-bopp [https://perma.cc/5272-WZRA].

251 On Project REDMAP, see Jane Mayer, *State for Sale*, New Yorker (Oct. 3, 2011), https://www.newyorker.com/magazine/2011/10/10/state-for-sale [https://perma.cc/82JP-CKT8].

252 Tim Storey, *GOP Makes Historic State Legislative Gains in 2010*, Rasmussen Reps. (Dec. 10, 2010), https://www.rasmussenreports.com/public_content/political_commentary/commentary_by_tim_storey/gop_makes_historic_state_legislative_gains_in_2010 [https://perma.cc/HF56-FDMD].

253 Nathaniel Rakich, Aaron Bycoffe & Ryan Best, *How Redistricting Affects the Battle for State Legislatures*, FiveThirtyEight (Apr. 5, 2022, 6:00 AM), https://fivethirtyeight.

suggests that it has not given either party an insurmountable advantage in elections to the House of Representatives.[254] But polarization, together with gerrymandering, made a significant number of state legislative races less competitive. In Florida and Georgia, for example, Democrats would have to win the statewide popular vote to be favored to win in either the state senate or house.[255] More safe seats, in turn, made it easier for legislators to pass sweeping and unlikely unpopular abortion bans.[256] If antiabortion lawmakers had little concern about a general election and worried primarily about primary challengers, it would be easier for activists like Bopp to champion extreme laws that could be used to test *Roe* or move toward fetal personhood.

Antiabortion lawyers also became involved in laws limiting access to the vote. Bopp, for example, worked closely with the leaders of groups like Judicial Watch, True the Vote, and the American Legislative Exchange Council as early as 2012 on what they called ballot integrity measures, launching lawsuits to strip ineligible voters from the rolls and promoting voter identification laws in key jurisdictions across the country.[257] Bopp initially led cases across four states on behalf of Donald Trump seeking to overturn the results of the 2020 election.[258] The Thomas More Society, another prominent antiabortion group, worked to convince state legislatures to delay certifying electors after Joe Biden's election and promoted the independent state legislature theory, which might have allowed state legislatures to override the will of voters on election day.[259] Antiabortion lawyers have challenged the ease of access to military absentee ballots, sought to strip ineligible voters from the rolls, and proposed model legislation that could fund

com/features/how-redistricting-affects-the-battle-for-state-legislatures [https://perma.cc/GU5D-HALL].

254 Nate Cohn, *Gerrymandering Isn't Giving the Republicans the Advantage You Might Expect*, N.Y. Times (Sept. 30, 2022), https://www.nytimes.com/2022/09/30/upshot/midterms-gerrymandering-republicans.html [https://perma.cc/MQK9-AN79].

255 *See* Rakich, Bycoffe & Best, *supra* note 253 (describing the electoral prospects in Florida and Georgia).

256 Horton, McCarthy & Glenza, *supra* note 31.

257 *See* Eliza Newlin Carney, *Conservative Veterans of Voting Wars Cite Ballot Integrity to Justify Fight*, Roll Call (Sept. 25, 2012, 11:00 PM), https://rollcall.com/2012/09/25/conservative-veterans-of-voting-wars-cite-ballot-integrity-to-justify-fight [https://perma.cc/G3CG-AJKA].

258 *See* Tony Cook & Johnny Magdaleno, *Top Indiana Election Attorney Rushes to Defend Trump's Fraud Claims, Then Quietly Retreats*, Ind. Star (Nov. 17, 2020, 1:40 PM), https://www.indystar.com/story/news/politics/2020/11/17/top-indiana-election-drops-lawsuits-challenging-trump-loss-4-states/6258104002 [https://perma.cc/ML6A-S3US] (describing Bopp's lawsuits on behalf of Trump in Pennsylvania, Michigan, Georgia, and Wisconsin).

259 *See* O'Matz, *supra* note 33 (chronicling the society's efforts in this area).

audits by disappointed candidates and even place jurisdictions into receivership if their elections are not deemed to run properly.[260]

What changed between *Casey* and *Dobbs*, as antiabortion leaders recognized, was not the sophistication of antiabortion incrementalist arguments made in court. Consider the claims made in *Dobbs*. The Court described *Roe*'s historical reasoning as deeply faulty.[261] But the dissenting historical narrative on which the Court relied was published in 2006.[262] As Melissa Murray and Katherine Shaw have shown, the argument in *Dobbs* that *Roe* undermined democratic deliberation also reached back decades.[263]

New forms of state and federal incrementalism, the Court suggested, had also established the incoherence and unworkability of the *Roe* framework.[264] This strategy sought to expose that the undue burden test, the guiding standard in *Casey*, was hopelessly underdetermined and in fact caused chaos in other doctrinal areas, from the rules governing standing to those on facial challenges. But there is no reason to think that the *Dobbs* Court was responding to fresh insights about unworkability. Indeed, many of the arguments about what made *Roe* or *Casey* problematic, or the doctrinal chaos they caused, had circulated in the antiabortion movement for some time.[265] Antiabortion lawyers had bemoaned what they called abortion distortion—changes they identified in other doctrinal areas—for decades.[266]

Justice Kavanaugh, for his part, pointed to a surge in conservative states challenging, undermining, and questioning *Roe* as a reason that the case had failed to settle the abortion issue—and that *Roe* and *Casey*

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260 *See id.* (describing the society's tactics).

261 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 241 (2022) ("Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion.").

262 *See* Joseph W. Dellapenna, Dispelling the Myths of Abortion History xii (rev. ed. 2023) (arguing that abortion was always viewed with disfavor, if not criminalized, throughout pregnancy in the United States).

263 *See* Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 Harv. L. Rev. 728, 731 (2024) (discussing how some viewed the original decision in *Roe* as being egregious judicial overreach for nearly fifty years).

264 *Dobbs*, 597 U.S. at 286 (explaining that *Roe* and *Casey* proved "to be unworkable" and "led to the distortion of many important but unrelated legal doctrines").

265 Tsai & Ziegler, *supra* note 238, at 2195–96 (describing the grassroots movement criticizing *Roe*'s history).

266 *See* James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. Pub. L. 181, 183 (1989) (outlining how *Roe* affected laws related to abortion such as privacy rights and medical regulation); James Bopp, Jr. & Richard E. Coleson, Webster*, Vagueness and the First Amendment*, 15 Am. J. L. & Med. 217, 217–19 (1989) (claiming that the vagueness principle in abortion jurisprudence has extended to areas of law including economic regulation and criminal penalties).

were ripe for reversal.[267] Surely here, state and federal incrementalism made a difference by building a critical mass of restrictive laws and skeptical voices.

But this evidence, too, cannot explain the different results in *Dobbs* and *Casey*. Kavanaugh remarked on partisan opposition to abortion and the number of states that called for *Roe*'s reversal—a majority, as he noted.[268] But by the early 1990s, the antiabortion movement had already forged an alliance with the Republican Party that allowed it to find sympathetic voices in the Bush White House and state legislatures.[269] Conservative states had already passed laws that seemed inconsistent with *Roe*, such as bans on abortion for reasons of sex selection.[270] Popular skepticism of *Roe* was evident on the right before *Casey* as much as before *Dobbs*.

Abortion opponents needed a new Court, not new arguments. For state incrementalism to work, as abortion opponents learned, it required changes to party politics, voting laws, and campaign finance.

2. The Limits of State Personhood Incrementalism

Antiabortion incrementalism has also had a limited effect in the context of fetal personhood. Incrementalists have fought for the recognition that a fetus is a person under the Fourteenth Amendment.[271] Working in state courts and state legislatures, they have sought to establish the kind of "critical mass" pursued by LGBTQ litigators in the lead-up to *Obergefell*: creating popular constitutional pressure for change.[272]

It is true that abortion foes have succeeded in writing fetal personhood into a variety of state laws.[273] The most successful such

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267 *See Dobbs*, 597 U.S. at 344 (Kavanaugh, J., concurring) (claiming that state abortion restrictions "collectively represent the sincere and deeply held views of tens of millions of Americans who continue to fervently believe that allowing abortion up to 24 weeks is far too radical").

268 *See id.*

269 *See* ZIEGLER, *supra* note 32, at 61–67 (explaining the relationship between the movement and President Bush).

270 *See* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2063–70 (2021) (detailing the spread of trait-based abortion bans).

271 *See supra* notes 224–34 and accompanying text.

272 *See supra* Section I.A.2.

273 *See generally* PREGNANCY JUSTICE, WHEN FETUSES GAIN PERSONHOOD: UNDERSTANDING THE IMPACT ON IVF, CONTRACEPTION, MEDICAL TREATMENT, CRIMINAL LAW, CHILD SUPPORT, AND BEYOND (Aug. 17, 2022), https://www.pregnancyjusticeus.org/resources/when-fetuses-gain-personhood-understanding-the-impact-on-ivf-contraception-medical-treatment-criminal-law-child-support-and-beyond [https://perma.cc/3V43-UWT6].

effort involved feticide laws.[274] Where the common-law born-alive rule once permitted feticide prosecutions only if a fetus was later born alive, twenty-one states now treat zygotes, embryos, and fetuses as persons for the purpose of homicide prosecutions (while generally exempting pregnant people themselves).[275] Some states have more expansive, if vague, personhood language that could be interpreted to apply to all civil and criminal laws in the jurisdiction.[276]

But to date, there have been no state supreme courts willing to interpret these laws as evidence that fetuses are persons under the state constitution.[277] Structural obstacles likely explain this phenomenon. The impact of recognizing state constitutional personhood would be unclear, but many possible impacts would be deeply unpopular. Since the decision of *Roe*, many have assumed that recognizing constitutional personhood would make liberal abortion laws—and perhaps many abortion exceptions—unconstitutional.[278] Very few Americans believe abortion should be illegal in so many circumstances.[279]

And recognizing state constitutional personhood might have effects on more than abortion. The 2024 decision of the Alabama Supreme Court in *LePage v. Center for Reproductive Medicine*, which interpreted personhood-adjacent language in the state's wrongful death of a minor act, suggested that in vitro fertilization, at least as currently practiced, might violate the rights of fetal or embryonic persons.[280] Since common contraceptives are believed by some opponents of abortion

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274 *See* Pregnancy Justice, Who Do Fetal Homicide Laws Protect? An Analysis for a Post-*Roe* America at 2, Aug. 18, 2022, https://www.nationaladvocatesforpregnantwomen.org/resources/who-do-fetal-homicide-laws-protect-an-analysisfor-a-post-roe-america [https://perma.cc/4ZJ8-WQ5J] (describing the effectiveness of feticide laws).

275 *Id.* at 3.

276 Some states dictate that the term "person" or "human being" or individual applies to fetuses. Pregnancy Justice, *supra* note 273, at 6. Others include expansive personhood language in their abortion bans. *Id.* at 6–7. Still others have abstract personhood language a court could repurpose or reinterpret. *Id.* at 7–8.

277 The Alabama Supreme Court recognized that fetuses qualified as persons for the purpose of state wrongful death law, but did not reach the question of state constitutional personhood. LePage v. Ctr. for Reprod. Med., No. SC-2022-0579, slip op. (Ala. Feb. 16, 2024).

278 *Roe* itself reinforced this perception. *See* Roe v. Wade, 410 U.S. 113, 156–57 (1973) ("If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.").

279 Only thirteen percent of Americans polled by Gallup in 2023, for example, believed that abortion should be illegal in all circumstances. *Where Do Americans Stand on Abortion?*, Gallup (July 7, 2023), https://news.gallup.com/poll/321143/americans-stand-abortion.aspx [https://perma.cc/2QKF-JKWU].

280 *LePage* held frozen embryos qualified as persons under the state's wrongful death of a minor law. *LePage*, slip op. at 2–3. But the logic of *LePage* seemed to reach beyond the issue of wrongful death, and it raised questions about whether embryos could be destroyed, donated for research, or even indefinitely stored. *See* Michelle J. Bayefsky, Arthur L. Caplan & Gwendolyn P. Quinn, *The Real Impact of the Alabama Supreme Court Decision in*

to function as abortifacients, state constitutional recognition of fetal personhood could affect them too.[281] State judges who often face retention or partisan elections, may be reluctant to stake out such a sweeping position absent structural changes, such as additional barriers to voting or changes to the method by which state judges are selected, that would insulate judges from popular backlash.[282]

III
Structural Obstacles to Abortion-Rights Incrementalism

Structural changes will also likely be needed to advance state constitutional incrementalism for abortion rights. Some, built into state constitutional litigation, are evident in developments in South Carolina. In January, as Part I observes, the South Carolina Supreme Court interpreted a part of the state constitution governing "unreasonable invasions of privacy" to protect a right to abortion.[283] The court in *Planned Parenthood of South Atlantic v. South Carolina* maintained that the "decision to terminate a pregnancy rests upon the utmost personal and private considerations imaginable"—and stressed that a six-week ban did not permit women a reasonable choice because "women typically do not realize they are pregnant until around six weeks."[284] The South Carolina legislature responded by passing a virtually identical law.[285] Citing witness testimony on "the development of the unborn early in pregnancy," the legislature decided that women would have "ample" time to make an abortion decision in the at most two weeks between discovering a pregnancy and the point at which a six-week ban could kick in.[286]

LePage v. Center for Reproductive Medicine, 331 J. Am. Med. Ass'n 1085, 1085–86 (2024) (hypothesizing the impact of *LePage* on different types of theoretical patients).

281 *See Contraception*, Students for Life, https://studentsforlife.org/learn/contraception [https://perma.cc/4VPW-TZ6D] (describing birth control pills, IUDs, and emergency contraceptives as "abortifacients"); Project 2025, Mandate for Leadership: The Conservative Promise 485 (2023) (arguing that emergency contraceptives "can prevent a recently fertilized embryo from implanting in a woman's uterus").

282 *See* Pozen, *supra* note 24, at 2131 (discussing how popular opinion can influence the rulings of elected state judges).

283 S.C. Const. art. I, § 10.

284 882 S.E.2d 770, 774, 784 (S.C. 2023).

285 *Compare* S.C. Code Ann. §§ 44-41-610–660 (2023) (making it a felony for anyone to perform or aid and abet an abortion when the "unborn child's fetal heartbeat has been detected") *with* S.C. Code Ann. §§ 44-41-60, 44-41-330, 44-41-660 (2021) (making it a felony for anyone to perform or aid and abet an abortion when "the human fetus the pregnant woman is carrying has a detectable fetal heartbeat").

286 *Hearing on S. 474*, 125th Sess. (S.C. 2023) (statement of Sens. Massey, Campsen, and Grooms).

When the case returned to the court, a reconfigured state court upheld the new six-week ban.[287] Even though the court had invalidated an identical law less than a year before, the court in *Planned Parenthood of South Atlantic v. State* (*Planned Parenthood II*) reasoned that *stare decisis* held little power in determining the fate of the next six-week ban.[288] The court stressed that the state constitution permitted reasonable privacy violations.[289] The reason was simple: the court owed deference to the state's "compelling interest in protecting the lives of unborn children."[290]

The South Carolina experience showcases some of the state obstacles facing abortion rights incrementalism. First, *Planned Parenthood II* is a reminder that voters do not always have a say about the composition of state supreme courts: only thirty-eight states use elections to select justices.[291] Even those that do might ultimately give voters little say. In Florida, for example, if a state supreme court justice loses a retention election, the governor will select a replacement.[292] Governors may agree with an unpopular ruling and replace judges who lost their jobs with very similar nominees. This means that even in principle, some state courts experience little popular constitutional pressure. Indeed, some courts may answer to quite different stakeholders. In South Carolina, for example, the state legislature elects the judges based on a pool of judges preselected by the Judicial Merit Selection Commission.[293] Such systems threaten judges with the loss of their jobs if they anger lawmakers invested in the constitutionality of particular laws.

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287 *See Planned Parenthood II*, 892 S.E.2d at 132 (noting that the court had to defer to the legislature as it was a reasonable policy decision to protect the unborn).

288 *See id.* at 128–29 (stressing that *Planned Parenthood I* was a fragmented opinion and that stare decisis was not an "inexorable command").

289 *See id.* at 132 ("Because the 2023 Act is within the zone of reasonable policy decisions rationally related to the State's interest in protecting the unborn, we are constrained to defer to the legislature's policy prerogative.").

290 *Id.*

291 *See* Michael Waldman, *Money Pours Into State Judicial Elections*, Brennan Ctr., (Jan. 25, 2022), https://www.brennancenter.org/our-work/analysis-opinion/money-pours-state-judicial-elections [https://perma.cc/5V3N-JAXB]; Amanda Powers & Douglas Keith, *Key 2022 State Supreme Court Election Results and What They Mean*, State Court Rep. (Nov. 19, 2022), https://statecourtreport.org/our-work/analysis-opinion/key-2022-state-supreme-court-election-results-and-what-they-mean [https://perma.cc/ZL6F-9Z24].

292 *See Merit Selection, Retention & Mandatory Retirement of Justices*, Fla. Sup. Ct., https://supremecourt.flcourts.gov/Justices/Merit-Selection-Retention-Retirement [https://perma.cc/WW63-BZX5] (outlining the process).

293 *See Factsheet: Judicial Elections in South Carolina*, S.C. Bar Ass'n, https://www.scbar.org/lawyers/sections-committees-divisions/committee-on-judicial-independence-and-impartiality/factsheet-judicial-elections-in-south-carolina/?edit_off=true [https://perma.cc/2DD8-6TW8] (describing South Carolina's process).

Even where elections do determine the composition of state supreme courts, a variety of structural obstacles may make those contests less than representative. Changes to campaign finance rules have seen big money flood into judicial elections—and all the more so in the aftermath of *Dobbs*.[294] In Kentucky, for example, a single conservative political action committee spent more than $1.6 million in an ultimately unsuccessful attempt to place its favored candidates on the state's supreme court.[295] Wisconsin's partisan state supreme court election drew more than $45 million in spending.[296] Spending in 2024 in contested races like the one for control of the Ohio Supreme Court are predicted to break records.[297] The surge of money in judicial elections opens the door to distorted results—more in keeping with the preferences of big donors—and to interest group capture.[298]

Another barrier involves obstacles to voting itself. Between 2021 and 2022, states passed twenty-three new restrictions on voting;[299] in the first three months of 2023 alone, states added a further eighteen restrictions.[300] These efforts reflect the ambitions of antiabortion-aligned groups like True the Vote[301] and well-funded advocacy groups like the Honest Elections Project, which is funded partly by the 85 Fund,

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294 *See infra* notes 295–97 and accompanying text.

295 Deborah Yetter & Joe Sonka, *Hard-Right PAC Forms 'Battle Plan' to Take on 'Radical Left' Judges in 3 Kentucky Races*, Louisville Courier J. (Oct. 7, 2022, 1:03 PM), https://www.courier-journal.com/story/news/politics/2022/10/07/fair-courts-america-pac-spend-millions-key-kentucky-judicial-races/69546396007 [https://perma.cc/TH6J-3VES].

296 Inci Sayki, *Wisconsin Supreme Court Race Was the Most Expensive State Judicial Election in U.S. History*, Open Secrets (Apr. 10, 2023, 5:54 PM), https://www.opensecrets.org/news/2023/04/wisconsin-supreme-court-race-was-the-most-expensive-state-judicial-election-in-u-s-history [https://perma.cc/SF8E-7DAS].

297 Julie Carr Smyth & Christine Fernando, *Ohio Primary: Open Seat on State Supreme Court Could Flip Partisan Control*, AP (Mar. 17, 2024, 7:59 AM), https://apnews.com/article/election-2024-ohio-supreme-court-abortion-primary-0f2b7df8332a52a804e2a1a7ac177773 [https://perma.cc/JGF6-UCF7].

298 *See* Pozen, *supra* note 24, at 2099 ("[T]here is a growing risk that elected judges will play favorites not only with donors but also with important interest groups . . . , political parties . . . , political incumbents . . . , and popular litigants and legal positions generally . . . .").

299 For the 2022 restrictions, see *Voting Laws Roundup: December 2022*, Brennan Ctr. (Feb. 1, 2023), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2022 [https://perma.cc/63TM-Y968]. For the 2021 restrictions, see *Voting Laws Roundup: December 2021*, Brennan Ctr. (Jan. 12, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021?ms=gad_voting%20laws_572836936998_8626214133_130570618446 [https://perma.cc/7CAG-J8FN].

300 Nick Corasaniti & Alexandra Berzon, *Under the Radar, Right-Wing Push to Tighten Voting Laws Persists*, N.Y. Times (May 8, 2023), https://www.nytimes.com/2023/05/08/us/politics/voting-laws-restrictions-republicans.html [https://perma.cc/WTF3-33EM].

301 On the relationship between True the Vote and the antiabortion movement, see Ziegler, *supra* note 32, at 200–01.

a nonprofit affiliated with Leonard Leo,[302] a prominent member of the Federalist Society who sits on the board of directors of the prominent antiabortion group Students for Life.[303] A new wave of restrictions on voting limit same-day registration, ban vote drop boxes, shorten early voting, impose stricter voter ID requirements, defund offices charged with overseeing elections, and bar third parties from working to register voters.[304] These restrictions may be especially consequential in some judicial elections, which tend to have lower turnout and stronger incumbent advantages than do other races.[305]

As important, there are limits on state constitutional incrementalism *because* state courts are sometimes responsive to popular pressure.[306] State judges who face some kind of election generally handle low-salience issues that are unlikely to motivate the electorate.[307] But decisions on reproductive rights tend to command the public's attention, increasing the odds of public outcry in the event of a sweeping and unpopular decision.[308] In high-salience contexts like reproductive liberty, state judges are thus far more likely to interpret state constitutions in line with what they

302 Corasaniti & Berzon, *supra* note 300.

303 *See* Heidi Schlumpf, *Leonard Leo, Architect of Conservative Supreme Court, Takes on Wider Culture*, Nat. Cath. Rep. (Jan. 4, 2024), https://www.ncronline.org/news/leonard-leo-architect-conservative-supreme-court-takes-wider-culture [https://perma.cc/GVB2-L634] (discussing Leo's background).

304 *See* Corasaniti & Berzon, *supra* note 300 (describing the methods of voter suppression used by these groups); *see also Voting Laws Roundup: 2023 in Review*, Brennan Ctr. (Jan. 18, 2024), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review [https://perma.cc/6Y3M-ZKYD] (listing the various types of restrictive laws passed in 2023).

305 *See* Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 Ohio St. L.J. 43, 53 (2003) (explaining how eighty percent or more of voters typically fail to vote in these elections). On incumbents' advantage, see generally Michael P. Olson & Andrew R. Stone, *The Incumbency Advantage in Judicial Elections: Evidence from Partisan Trial Court Elections in Six U.S. States*, 45 Pol. Behav. 1333 (2022) (describing the advantages of incumbency, especially for those holding judicial office). A study from 2007 likewise found that only one percent of incumbents lost their bid for reelection. Larry Aspin, *Judicial Retention Election Trends 1964–2006*, 90 Judicature 208, 210 (2007).

306 *See* Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 J. Const. L. 455, 455 (2010) (explaining that justices have significant incentives to take backlash into account).

307 *See id.* at 469 ("[T]here are relatively few issues of sufficient salience to pose electoral risks to these justices.").

308 Some commentators predict that the salience of the abortion issue has decreased since *Dobbs*. *See, e.g.*, Rachel M. Cohen, *Why Abortion Politics Might Not Carry Democrats Again in 2024*, Vox (Mar. 15, 2024, 1:30 PM), https://www.vox.com/politics/24101209/abortion-reproductive-freedom-biden-2024-election [https://perma.cc/W3VM-FT6U]. But even if this is correct, abortion will likely remain among the more high salience issues facing state courts, as was the case in Kentucky and Wisconsin. *See supra* notes 295–96 and accompanying text.

perceive to be the views of the public.[309] That means that abortion-rights incrementalism will be effective only if advocates pursue popular support outside of court. "*Goodridge* likely never would have happened," Pozen observes of this phenomenon, "if the Massachusetts polling numbers in support of same-sex marriage had been in the single digits."[310]

None of this means that state constitutional incrementalism is not worth pursuing. What is clear is that state constitutional litigation can lead only so far without broader social and political mobilization. The history of state constitutional incrementalism is a reminder not only that courts still matter, but also that courts form part of a broader political dialogue about liberty and equality.

Conclusion

Incrementalism has emerged as a major social movement litigation strategy throughout a half-century of struggle over issues from racial justice to reproductive rights. Under adverse conditions, when the Court is skeptical and elected lawmakers are indifferent or hostile, litigation may offer modest changes unachievable in other venues. Incrementalism has enjoyed particular attention in the aftermath of *Dobbs*, which some credit to an incremental strategy sharpened by antiabortion advocates over the course of fifty years. Incrementalism produces short-term gains—such as more or less access to abortion—that advance a movement's goals. Incrementalism can destabilize a federal precedent by suggesting an evolving state consensus against it or by exposing inconsistencies, unintended consequences, and incoherence in the regime a federal court has ushered in.

The rise of state constitutional incrementalism testifies to its past power in struggles over reproductive rights. State courts will almost certainly be a major site of contestation in the next half-century of struggle over reproductive rights, but any state litigation strategy on its own will almost certainly require robust adjacent strategies focused on how our democracy works. A precise recipe for change has yet to emerge. It may require court reform, campaign finance reform, or a renewal of meaningful protections for voting rights. What is clear is that the reversal of *Roe* required more than state or federal constitutional incrementalism. The same will almost certainly be true of the overturning of *Dobbs*.

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309 *See* Devins & Mansker, *supra* note 306, at 469–70 (describing how electoral pressures can be strong on salient issues like abortion, capital punishment, and tort reform, among other issues).

310 Pozen, *supra* note 24, at 2131.