

EQUAL PROTECTION IN *DOBBS* AND BEYOND: HOW STATES PROTECT LIFE INSIDE AND OUTSIDE OF THE ABORTION CONTEXT

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Abstract

In two paragraphs at the beginning of Dobbs v. Jackson Women’s Health Organization, the Supreme Court rejected the Equal Protection Clause as an alternative ground for the abortion right. As the parties had not asserted an equal protection claim on which the Court could rule, Justice Alito cited an amicus brief we co-authored demonstrating that Mississippi’s abortion ban violated the Equal Protection Clause, and, in dicta, stated that precedents foreclosed the brief’s arguments. Yet, Justice Alito did not address a single equal protection case or argument on which the brief relied. Instead, he cited Geduldig v. Aiello, a 1974 case decided before the Court extended heightened scrutiny to sex-based state action—a case our brief shows has been superseded by United States v. Virginia and Nevada Department of Human Resources v. Hibbs. Justice Alito’s claim to address equal protection precedents without discussing any of these decisions suggests an unwillingness to recognize the last half century of sex equality law—a spirit that finds many forms of expression in the opinion’s due process analysis.

Equality challenges to abortion bans preceded Roe, and will continue in courts and politics long after Dobbs v. Jackson Women’s Health Organization. In this Article we discuss our amicus brief in Dobbs, demonstrating that Mississippi’s ban on abortions after fifteen weeks violates the Fourteenth Amendment’s Equal Protection Clause, and show how its equality-based arguments open up crucial conversations that extend far beyond abortion.

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Our brief shows how the canonical equal protection cases United States v. Virginia and Nevada Department of Human Resources v. Hibbs extend to the regulation of pregnancy, providing an independent constitutional basis for abortion rights. As we show, abortion bans classify by sex. Equal protection requires the government to justify this discrimination: to explain why it could not employ less restrictive means to achieve its ends, especially when using discriminatory means perpetuates historic forms of group-based harm. Mississippi decided to ban abortion, choosing sex-based and coercive means to protect health and life; at the same time the state consistently refused to enact safety-net policies that offered inclusive, noncoercive means to achieve the same health- and life-protective ends.

Our brief asks: could the state have pursued these same life- and health-protective ends with more inclusive, less coercive strategies? This inquiry has ramifications in courts, in legislatures, and in the court of public opinion. Equal protection focuses the inquiry on how gender, race, and class may distort decisions about protecting life and health, within and outside the abortion context. There are many forms of equal protection argument, and this family of arguments can play a role in congressional and executive enforcement of constitutional rights, in the enforcement of equality provisions of state constitutions, and in ongoing debate about the proper shape of family life in our constitutional democracy. Equal protection may also have the power to forge new coalitions as it asks hard questions about the kinds of laws that protect the health and life of future generations and that enable families to flourish.

INTRODUCTION

In two paragraphs at the beginning of *Dobbs v. Jackson Women’s Health Organization*,¹ the Supreme Court rejected the Equal Protection Clause as an alternative ground for the abortion right.² As the parties had not asserted an equal protection claim on which the Court could rule, Justice Alito cited an amicus brief we co-authored demonstrating that Mississippi’s abortion ban violated the Equal Protection Clause, and, in dicta, stated that precedents foreclosed the brief’s arguments.³ Yet, Justice Alito did not address a single

¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

² *Dobbs*, 142 S. Ct. at 2245.

³ Justice Alito pointed to an amicus brief arguing that abortion rights are grounded in equal protection as well as liberty and said that the brief’s arguments were “squarely foreclosed by our precedents.” *Id.* at 2245 (citing Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, & Reva Siegel as Amici Curiae Supporting Respondent, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) No. 19-1392, 2021 WL 4340072 (2021) (available [here \[https://perma.cc/L35M-K3WA\]](https://perma.cc/L35M-K3WA)) [hereinafter *Brief of Equal Protection Scholars*].

equal protection case or argument on which the brief relied. Instead, he cited *Geduldig v. Aiello*,⁴ a 1974 case decided before the Court extended heightened scrutiny to sex-based state action—a case our brief shows has been superseded by *United States v. Virginia*⁵ and *Nevada Department of Human Resources v. Hibbs*.⁶ Justice Alito’s claim to address equal-protection precedents without discussing any of these decisions suggests an unwillingness to recognize the last half century of sex equality law—a spirit that finds many forms of expression in the opinion’s due process analysis.⁷

This Article explains the brief’s equal-protection arguments for abortion rights, shows how these arguments open up crucial conversations that extend far beyond abortion, and explains how equality claims provide a rich resource for advocacy in many arenas—in courts, in legislatures and in popular debate. As post-*Dobbs* electoral results vividly demonstrate, equality rationales for reproductive rights can support constitutional change through the political process as well as litigation.⁸

Justice Alito asserted that equal protection was not an independent ground for abortion rights even though he knew that there was no equal protection claim in the case. District Court Judge Carlton Reeves pointed out that the plaintiffs had amended their complaint to drop their equal protection challenge to Mississippi’s statute. *Jackson Women’s Health Org. v. Carrier*, 349 F. Supp. 3d 536, 538 (S.D. Miss. 2018).

⁴ *Geduldig v. Aiello*, 417 U.S. 484 (1974).

⁵ *United States v. Virginia*, 518 U.S. 515 (1996).

⁶ *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003).

⁷ For a critical analysis of *Dobbs*, see Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEXAS L. REV. (forthcoming 2023); Reva B. Siegel, *How “History and Tradition” Perpetuates Status: Dobbs on Abortion’s Nineteenth-Century Criminalization*, 60 HOU. L. REV. (forthcoming 2023). For a broader discussion of the Court’s role in cultivating a jurisprudence that is less solicitous of women’s rights, see Melissa Murray, *Children of Men: The Roberts Court’s Jurisprudence of Masculinity*, 60 HOU. L. REV. (forthcoming 2023).

⁸ See *infra* Part V.

Equality challenges to abortion bans preceded *Roe*,⁹ and continued in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁰ Yet unlike these earlier arguments, our brief reasons from equal protection cases decided *after Casey*, beginning with the landmark case *United States v. Virginia*.¹¹ This application of *Virginia* is new. As late as 2016, the Supreme Court strongly reaffirmed *Roe* and *Casey*;¹² accordingly, there has been little reason to consider how *Virginia* applies to abortion restrictions. Until now. Our brief shows that *Virginia* and subsequent equal protection cases apply to laws regulating pregnancy, and that equal protection provides independent grounds for analyzing the constitutionality of abortion restrictions. As Part I of our brief and Part I of this Article make clear, laws that regulate pregnant women’s conduct are subject to equal protection scrutiny, just like any other sex-based state action.¹³

⁹ *Roe v. Wade*, 410 U.S. 113 (1973). In the years before *Roe*, women argued that abortion restrictions violated the Constitution’s liberty and equality guarantees, enforcing double standards in sex and parenting. Litigants challenged abortion bans on equal protection grounds of class and race as well as sex, protesting the bans’ disparate and intersectional health harms. See Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2044-45 (2021) [hereinafter *Race-ing Roe*]; Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims that Engendered Roe*, 90 B. U. L. REV. 1875, 1889-91 (2010). Nancy Stearns, who played a key role in several of the earliest movement-based challenges to abortion bans, filed an amicus brief in *Roe* that challenged abortion bans on equality grounds. Brief of New Women Lawyers et al. as Amicus Curiae Supporting Appellants, at 25–33, 33–43, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 134283 (asserting sex equality arguments in sections on equal protection and cruel and unusual punishment). See generally Linda Greenhouse & Reva B. Siegel, *The Unfinished Story of Roe v. Wade*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 53, 63–65 (Melissa Murray, Kate Shaw & Reva B. Siegel eds., 2019) (describing claims in mass-plaintiff cases at time of *Roe*).

¹⁰ 505 U.S. 833 (1992). Before *Casey*, a growing number of prominent legal scholars expressed the view that the abortion right was also protected by the Constitution’s equality guarantees. See *Casey*, 505 U.S. at 918 n.4, 928 (Blackmun, J., concurring in part) (observing that the “assumption—that women can simply be forced to accept the ‘natural’ status and incidents of motherhood—appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause” and citing scholarship); see also Serena Mayeri, *Undue-ing Roe: Constitutional Conflict and Political Polarization in Planned Parenthood v. Casey*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES, *supra* note 9, at 137, 150–52 (describing role of sex equality principles in academic and judicial discourse leading up to *Casey*).

¹¹ 518 U.S. 515 (1996).

¹² See *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582 (2016).

¹³ People of all gender identities may become pregnant, seek abortions, or bear children. Yet, as our brief showed, today and in the past state actors enacting abortion restrictions are concerned with controlling the conduct of women. In justifying the restrictions, they expressly or implicitly reason from sex-role stereotypes about women.

State actors can act on the basis of sex-role stereotypes of various kinds, reflecting ideas about who may, or should, or should not become pregnant. Social response to a single woman of

Abortion bans expressly target women and require them to continue pregnancy, imposing motherhood over their objections. We show a variety of grounds on which abortion bans can be understood to be sex-based. When the government regulates by sex-based means—as Mississippi and other states do in banning abortion¹⁴—equal protection doctrine requires the state to show reasons for singling out a group for coercive regulation that do not rely on traditional suspect generalizations about that group.¹⁵

Mississippi claimed its ban on abortion after fifteen weeks protected the health of women and the life of the unborn.¹⁶ Our brief subjects these protectionist rationales to “skeptical scrutiny.”¹⁷ Following the Court’s practice in *Virginia*, we examine the state’s reasons for banning abortion in both historical and policy context.¹⁸ The brief shows how Mississippi’s claim that coercing motherhood promotes women’s “health” echoes antiquated sex-role stereotypes that underpinned the first abortion bans, enacted in the mid-nineteenth century. And, to show how sex-role stereotypes support the state’s claim that coerced motherhood protects unborn life, the brief locates Mississippi’s choices about abortion in a wider policy context. Mississippi decided to ban abortion, choosing sex-based and coercive means to protect life, even as the state consistently refused to enact safety-net policies that offered inclusive, noncoercive means to achieve the same life-protective ends. Equal protection analysis asks: did Mississippi endeavor to protect life by helping those who seek the state’s assistance—either in avoiding pregnancy or in raising families—before singling out for coercion those who violated sex-role stereotypes? Was the state’s choice of means influenced by the race, gender, or poverty of the group the state targeted for regulation?

color who is pregnant or a man who is pregnant may be quite different than response to a married woman of means, for example. We discuss how equal protection analysis can combat the intersectional forms of sex-role stereotyping directed at pregnancy. *See infra* text accompanying notes 51–53.

¹⁴ *See infra* notes 59–62 and accompanying text (discussing how abortion bans expressly classify by sex).

¹⁵ *See* *United States v. Virginia*, 518 U.S. at 533 (holding that government may classify by sex only if the sex-based means are substantially related to important government ends, and government can make this showing without relying on “overbroad generalizations about the different talents, capacities, or preferences of males and females”).

¹⁶ *See infra* text accompanying note 66.

¹⁷ *See* *United States v. Virginia*, 518 U.S. at 531 (“Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.”).

¹⁸ *See infra* note 65 and accompanying text.

We apply the brief's arguments to the facts of *Dobbs*. Yet we wrote the brief with the understanding that its arguments might, in different vernacular, speak to different audiences in different venues, over time. Equality arguments against abortion restrictions extend beyond *Dobbs*, to other federal cases, to congressional and executive enforcement of constitutional rights, to state governments enforcing state constitutions, and, of course, to ongoing intergenerational debate about the best understanding of our constitutional liberty and equality guarantees.¹⁹

Equality arguments are engines of critique and of coalition building. Expanding the frame to ask equality questions matters in efforts to litigate and to legislate continuing protections for abortion rights. And posing equality questions about abortion can also have effects *outside* the abortion context. An equality frame might strengthen support for policies such as Medicaid expansion and child-care assistance by demonstrating how these acts of social provision—of community and care—change the background conditions in which individuals and families make decisions about whether to carry a pregnancy to term.²⁰ In short, if one asks what is the point, or the power, or the reach of equality-based constitutional arguments of this kind, one can only answer that question by considering a range of audiences, across settings, and over time.

Part I of this Article sets out the doctrinal foundation of our brief by explaining how equal protection doctrine on the regulation of pregnancy evolved into the framework announced in *Virginia* and subsequent cases. Part II discusses how our brief applies *Virginia*'s framework to Mississippi's ban on abortion after fifteen weeks; the section offers a brief account of reasons why abortion bans classify by sex, and how such laws, analyzed in larger historical and policy context, enforce sex-role stereotypes. Part III shows how examining a state's claims about protecting health and life within this broader framework

¹⁹ See *infra* Part V.

²⁰ Even as opponents of abortion have opposed providing social assistance at levels provided in "blue" states, see Amy Joyce & Lauren Tierney, *What it's Like to Have a Baby in the States Most Likely to Ban Abortion*, WASH. POST, May 6, 2022, <https://www.washingtonpost.com/parenting/2022/05/06/support-in-states-banning-abortion/> [https://perma.cc/KB96-8PSF], there are at least possibilities for purple coalitions around safety net programs, as there have been around pregnant-worker fairness laws. For one current example see Patrick T. Brown, *The Pro-Family Agenda Republicans Should Embrace After Roe*, N.Y. TIMES, May 7, 2022, <https://www.nytimes.com/2022/05/07/opinion/republican-policy-after-ro.html>. [https://perma.cc/KB96-8PSF]. Kate Shaw shows how left-right coalitions have come together to secure passage of laws prohibiting discrimination against pregnant workers. See Katherine Shaw, "Similar in Their Ability or Inability to Work": Young v. UPS and the Meaning of Pregnancy Discrimination, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES, *supra* note 9, at 205, 216–17, 222.

allows a decisionmaker to probe the strength of the state's reasons for employing sex-based coercive means, while rejecting inclusive noncoercive means, to achieve the state's indisputably important ends. Part IV considers the state's effort to justify the abortion ban as promoting equality interests; specifically, we examine the claim that controlling women's exercise of abortion rights is necessary to prevent abortion from fulfilling its "eugenic potential" to limit reproduction among minority groups. This Part exposes the fatal flaws of arguments that attempt to link abortion with eugenics and explains how abortion *restrictions* are part of a long history of reproductive control that targets individuals and groups based on race, sex, and poverty. Part V concludes by considering applications of the brief's equality arguments in legislative and judicial contexts beyond *Dobbs*.

I. Laws Regulating Pregnant Women Classify by Sex

The Court's decision in *United States v. Virginia* ordering the admission of women to the historically sex-segregated Virginia Military Institute ("VMI") sets out the basic framework in equal protection cases involving sex discrimination.²¹ *Virginia* famously affirms the equality of the sexes even as the sexes may differ.²² We built our brief on an under-appreciated feature of Justice Ginsburg's landmark opinion: in discussing the application of its framework, *Virginia* reasons about laws regulating pregnancy as classifying by sex and thus subject to heightened scrutiny.²³

Few have focused on the language in *Virginia* that we discuss, or on questions of equal protection and pregnancy. This is because, for decades, the question has been buried under the substantive due process doctrines regulating

²¹ See *United States v. Virginia*, 518 U.S. at 515, 531–34 (1996).

²² *Id.* (“‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”).

²³ *Id.* See *Brief of Equal Protection Scholars*, *supra* note 3, at 9; Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167, 204–06 (2020) [hereinafter *Pregnant Citizen*].

abortion (*Casey*²⁴ is itself rooted in equality values²⁵), and under federal statutes that prohibit pregnancy discrimination, including by government actors.²⁶

There is of course a 1974 case, *Geduldig v. Aiello*,²⁷ that famously doubts the possibility that discrimination based on pregnancy is discrimination based on sex. *Geduldig* predates the Court's 1976 decision to apply heightened scrutiny to sex-based state action under the Equal Protection Clause.²⁸ In what follows, we briefly describe the context in which *Geduldig* was decided and then show how it is superseded by subsequent case law. Specifically, we show how, with the development of modern sex discrimination law, the Justices, both liberal and conservative, came to understand and to hold that equal protection prohibits "discrimination against women when they are mothers or mothers-to-be."²⁹

In the early 1970s, the Court's sex discrimination decisions prohibited sex-based state action enforcing traditional sex-role stereotypes, especially the sex-role stereotypes associated with the male breadwinner/female caregiver ideal.³⁰ Feminist lawyers called upon the Court to analyze laws regulating pregnancy in this same equality framework.³¹ But just as the Court was beginning to proscribe practices of sex-role stereotyping, perhaps fearful of too-rapid change, the

²⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

²⁵ See Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on June Medical*, 2020 SUP. CT. REV. 277, 281 (2021).

²⁶ See Siegel, *Pregnant Citizen*, *supra* note 23, at 210–11 (discussing appellate cases recognizing § 1983 sex-stereotyping claims of pregnancy discrimination under the Equal Protection Clause). See also, *e.g.*, *infra* note 34 (discussing the Pregnancy Discrimination Amendment).

²⁷ 417 U.S. 484 (1974).

²⁸ The Court first applied heightened scrutiny in sex discrimination cases in *Craig v. Boren*, 429 U.S. 190 (1976). Scholars in the field are divided about whether *Geduldig* has been superseded. See Siegel, *Pregnant Citizen*, *supra* note 23, at 171–72 (surveying evolving views of scholars in the field).

²⁹ *Hibbs*, 538 U.S. at 736 (2003) (quoting STANDARDS OF THE H. COMM. ON EDUC. & LAB., 99th Cong., 2d Sess., 100 (1986)).

³⁰ See, *e.g.*, Siegel, *Pregnant Citizen*, *supra* note 23, at 184, 191–92; *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

³¹ Feminist lawyers argued under the Equal Protection Clause and under the Equal Rights Amendment that laws regulating pregnancy are sex-based state action, deserving heightened (strict) scrutiny, and unconstitutional whenever they enforce traditional sex roles or otherwise subordinate based on sex. Siegel, *Pregnant Citizen*, *supra* note 23, at 183–84, 191–92, 195, 197–98.

Justices fashioned a carve-out. *Geduldig* held that laws regulating pregnancy were not sex classifications that automatically triggered heightened equal protection scrutiny as other sex-based classifications do.³² The Court reasoned from the premise that sex-based stereotyping stopped where so-called real physical difference began—a practice of reasoning from the body or “physiological naturalism.”³³ When the Court extended *Geduldig*’s claims about pregnancy into federal employment discrimination law, the women’s movement organized and helped enact the Pregnancy Discrimination Act of 1978 (“PDA”), an amendment to Title VII³⁴ which recognized that employment practices that discriminate against pregnant persons discriminate on the basis of sex.³⁵

As courts acquired decades of experience interpreting the PDA, both liberal and conservative justices came to recognize that pregnant employees *are* subject to sex stereotyping. Twenty-five years after the passage of the PDA, the Court held in *Nevada Department of Human Resources v. Hibbs*³⁶ that Congress could enforce the Equal Protection Clause by enacting the family leave provisions of the Family and Medical Leave Act in order to redress stereotyping of and discrimination against pregnant workers.³⁷ Chief Justice Rehnquist found that many states’ sex-based maternity leave policies were “not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.”³⁸ Accordingly, the *Hibbs* Court concluded that Congress’s gender-neutral provision of family leave redressed sex stereotyping in the provision of

³² *Geduldig*, 417 U.S. at 496 n.20 (“While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero* . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics.”).

³³ For a discussion of physiological naturalism, see Siegel, *Pregnant Citizen*, *supra* note 23, at 189, 189 n.127; Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, at 267–68 (1992).

³⁴ Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2018)) [hereinafter PDA].

³⁵ *Id.*

³⁶ 538 U.S. 721 (2003).

³⁷ *Id.* at 736 (quoting STANDARDS OF THE H. COMM. ON EDUC. & LAB., 99th Cong., 2d Sess., 100 (1986)) (reporting that Congress determined that restrictions on women’s employment were tied “to the pervasive presumption that women are mothers first, and workers second” and that this “ideology about women’s roles has in turn justified discrimination against women when they are mothers or mothers-to be”).

³⁸ *Id.* at 731.

maternity leave, and as such, was a permissible expression of Congress's section 5 power.³⁹

In *Hibbs*, Chief Justice Rehnquist held that the Equal Protection Clause prohibits sex stereotyping of pregnant workers as “discrimination against women when they are mothers or mothers-to-be”⁴⁰—and never mentioned *Geduldig*. Before the Court's dicta in *Dobbs*, there had been no majority opinion invoking *Geduldig* to interpret the Equal Protection Clause since the era of its repudiation by Congress in the PDA.⁴¹ A growing number of commentators recognized that *Hibbs* has superseded *Geduldig*⁴² and holds that unconstitutional sex stereotyping can be directed at women when they are mothers or mothers-to-be.

We based our brief on Chief Justice Rehnquist's opinion in *Hibbs*, but even more fundamentally on Justice Ginsburg's landmark opinion in *United States v. Virginia*—the leading case setting forth the standards for equal protection-sex discrimination claims. It is less widely recognized that *Virginia*, decided just a few years before *Hibbs*, also discussed state regulation of pregnancy. When Justice Ginsburg reviewed forms of sex-based state action, she included a case featuring a dispute over laws accommodating pregnancy.⁴³ This was not

³⁹ *Hibbs*, 538 U.S. at 735–40.

⁴⁰ *Id.* at 736 (quoting STANDARDS OF THE H. COMM. ON EDUC. & LAB., 99th Cong., 2d Sess., 100 (1986)).

⁴¹ See Siegel, *Pregnant Citizen*, *supra* note 23, at 208 n.229. A quarter-century ago, Justice Scalia invoked *Geduldig* in a statutory case concerned with proving state of mind of private actors in abortion-clinic protests. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993) (holding that under the civil rights statute 42 U.S.C. § 1985(3), plaintiffs had to prove “invidiously discriminatory animus” such as ill will, and that the goal of preventing abortion “is not the stuff out of which a § 1985(3) ‘invidiously discriminatory animus’ is created”). Plaintiffs do not bear the burden of proving discriminatory purpose in cases like *Virginia* or *Hibbs*, cases arising when the state has engaged in sex-based state action.

Justice Scalia's opinion for the Court in *Bray* claims that the Court applied *Geduldig* to its abortion funding decision in *Harris v. McRae*, 448 U.S. 297 (1980). See *Bray*, 506 U.S. at 271–73. That is false. Justice Stewart's opinion in *McRae*—which he wrote just two years after Congress rejected *Geduldig-Gilbert* reasoning by passing the PDA—never even mentioned the equal protection/sex discrimination line of cases or *Geduldig*, even though the government invoked *Geduldig* as a reason for applying rational basis review. See Brief for the Sec'y of Health, Educ., & Welfare at 27, *Harris v. McRae*, 448 U.S. 297 (1980) (No. 79-1268), 1980 WL 339637 (“Similarly, the Court has reviewed legislative classifications involving pregnancy in accordance with the rational basis test.”) (citing *Geduldig v. Aiello*, 417 U.S. 484, 495–96 (1974)).

⁴² See Siegel, *Pregnant Citizen*, *supra* note 23, at 171 n.14.

⁴³ See *Virginia*, 518 U.S. at 533 (citing *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987)); *Brief of Equal Protection Scholars*, *supra* note 3, at 9.

accidental. Justice Ginsburg’s equality analysis focused not on the grounds of sameness, but of social status. Differences, the Court explained, “remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”⁴⁴

The *Virginia* majority pointed to a state law about pregnancy—a maternity leave benefit, upheld under the PDA in *California Federal Savings & Loan Association v. Guerra*⁴⁵—as an illustration of a sex-based law that is constitutional because the law advanced rather than restricted equal opportunity. Sex classifications that “promot[e] equal employment opportunity” or “advance [the] full development of the talent and capacities of our Nation’s people”—like the state law establishing unpaid pregnancy disability leave at issue in *Cal. Fed.*—are permissible.⁴⁶ But the Court in *Virginia* held that the Constitution’s guarantee of equal protection means that sex “classifications may not be used, as they once were, to create or perpetuate the . . . inferiority of women.”⁴⁷

In this passage, *Virginia* offers an historically informed anti-subordination standard to determine whether laws that classify on the basis of sex—including laws regulating pregnancy—violate equal protection. *Virginia*’s test breaks with the physiological naturalism of cases like *Geduldig*. Rather than “reason[ing] from the body” (and asserting that “only women can become pregnant” or that “pregnancy is an objectively identifiable physical condition with unique characteristics”) as *Geduldig* did,⁴⁸ *Virginia* reasons from social relations. *Virginia* examines how a law regulating pregnancy structures social relationships in order to determine whether state action classifying on the basis of pregnancy contravenes equal protection.

In short, our brief reads *Virginia* as *repudiating* reasoning from the body seen in earlier cases such as *Geduldig*, and thus advances a reading of *Virginia* that is significant in cases involving the regulation of pregnancy inside and outside the abortion context. This reading can also aid litigation challenging trans-exclusionary laws, where *Virginia* is sometimes invoked as if the case sanctioned claims of physical difference as a limit on equal protection claims,

⁴⁴ *Virginia*, 518 U.S. at 533.

⁴⁵ *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987).

⁴⁶ *Virginia*, 518 U.S. at 533 (quoting *Cal. Fed.*, 479 U.S. at 289 (first alteration in original)).

⁴⁷ *Id.* at 534 (internal citation omitted).

⁴⁸ *Geduldig*, 417 U.S. at 496 n.20.

when it does exactly the reverse.⁴⁹ In *Virginia*, Justice Ginsburg observes that government can regulate in matters concerning physical differences *so long as* classifications are not employed “for the denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”⁵⁰ These cautionary passages of the opinion call for the application of anti-stereotyping and anti-subordination principles to laws justified by claims about physical difference, rather than simply deferring to claims about “biology” or “nature.”⁵¹

We can now extend *Virginia*’s principles to questions of sex-role stereotyping involving pregnancy. And we can reason about the stereotyping of pregnancy intersectionally. Where matters of pregnancy are concerned, *Virginia* tells us that the law cannot enforce sex-role stereotypes that denigrate or impose constraints on individual opportunity. Those sex-role stereotypes include the belief that motherhood is a woman’s “paramount destiny,”⁵² that women who are poor or of color should have fewer children,⁵³ or that a man or a nonbinary person cannot be pregnant.⁵⁴ Sex-role stereotypes have always applied differently based on race, class, sexuality, and other characteristics, but all have

⁴⁹ State laws banning transgender minors from participation on sports teams that align with their gender identity cite *Virginia* before seeking to codify highly restrictive and contested definitions of “biological” sex. See IDAHO CODE ANN. §§ 33-6202, 6203 (West 2021); W. VA. CODE ANN. § 18-2-25d. In litigation over transgender students’ access to sex-specific bathrooms, some judges have cited *Virginia* as though any sex-based policy reflecting a real physical difference cannot be discriminatory. See *Adams v. Sch. Bd. of St. Johns Cty.*, 3 F.4th 1299, 1334 (11th Cir.) (Pryor, J., dissenting), *reh’g en banc granted*, 9 F.4th 1369 (11th Cir. 2021); *Grimm v. Gloucester Cty. Sch. Bd.*, 976 F.3d 399, 400 (4th Cir. 2020) (Niemeyer, J., concurring in denial of rehearing en banc).

⁵⁰ *Virginia*, 518 U.S. at 533.

⁵¹ In the past, it was commonplace to point to biology or nature to justify law enforcing traditional and unequal roles. See *Muller v. Oregon*, 208 U.S. 412, 422–23 (1908) (reasoning that woman’s “physical structure and a proper discharge of her maternal functions” justify law restricting the hours a woman can work); *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896) (“Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”).

⁵² *Bradwell v. The State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

⁵³ See Jamelle Bouie, *The Most Discriminatory Law in the Land*, SLATE (June 17, 2014, 11: 47 P.M.), <https://slate.com/news-and-politics/2014/06/the-maximum-family-grant-and-family-caps-a-racist-law-that-punishes-the-poor.html> [<https://perma.cc/3LRN-9TS9>] (observing that the family cap provisions of the Temporary Aid to Needy Families “was based on a racist stereotype of unfit black mothers. Today, family cap laws do nothing but punish the poor for being poor.”).

⁵⁴ See Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 228-35 (2016).

a common constitutional infirmity: they demean and subordinate based on sex in violation of *Virginia*.

II. *United States v. Virginia* Provides a New Framework for Analyzing the Constitutionality of Abortion Restrictions

Virginia provides an equal protection framework for evaluating the fifteen-week ban at issue in *Dobbs*, and other abortion bans and restrictions. Under the intermediate scrutiny standard set forth in *Virginia*, a state must show that its decision to regulate health and life by sex-discriminatory means is substantially related to the achievement of an important governmental end.⁵⁵ *Virginia* requires the state to offer an “exceedingly persuasive justification” for its use of any sex-based classification; that is, *Virginia* requires the government to justify its use of sex-based (and coercive) means *without* relying on “overbroad generalizations about the different talents, capacities, or preferences of males and females.”⁵⁶ Sex classifications may be used to promote equal opportunity, the Court explained, but sex “classifications may not be used, as they once were ... to create or perpetuate the legal, social, and economic inferiority of women.”⁵⁷

Mississippi’s abortion ban failed that test.

Rather than relate every step of the brief’s argument, which is available online,⁵⁸ we have identified certain features of our equality analysis that might apply to abortion restrictions across legislative and judicial contexts.

A. Mississippi’s Abortion Ban Classifies on the Basis of Sex, Triggering Equal Protection Scrutiny.

From the nineteenth century through the present day, lawmakers have enacted abortion bans to control the conduct of women who resist motherhood.⁵⁹ Abortion bans, past and present, punish those who would assist women in ending a pregnancy. Mississippi’s abortion ban explicitly classifies by sex in the text of the statute itself, which prohibits physicians from performing an abortion on “a maternal patient” after fifteen weeks.⁶⁰ Other

⁵⁵ *Virginia*, 518 U.S. at 533.

⁵⁶ *Id.*

⁵⁷ *Id.* at 534 (internal citation omitted).

⁵⁸ See *supra* note 3 for brief citation and hyperlink.

⁵⁹ See *infra* note 62.

⁶⁰ H.B. 1510 § 1(4), 2018 Leg., Reg. Sess. (Miss. 2018).

recently enacted abortion bans expressly name the “woman” or “pregnant woman” they target and regulate.⁶¹ Even if the text of a statute coercing pregnancy does not explicitly mention the sex of the pregnant persons the state has targeted, there is likely to be ample evidence in the deliberations leading to an abortion ban’s adoption.

B. The Statute Coerces the Performance of the Maternal Role.

Abortion restrictions are sex-based, not simply because they single out women, but because they single out women in order to impose traditional sex roles on them. Abortion bans historically and practically compel resistant women to continue pregnancy and to become mothers against their will, without recompense or support. In the nineteenth century, doctors who led the campaign to criminalize abortion openly emphasized the need to prohibit abortion in order to enforce women’s roles as wives and mothers, as our brief documents.⁶² Compelling a woman to give birth is forced motherhood, even if she places her child for adoption, and in nearly all cases she does not.⁶³

⁶¹ Kentucky’s fifteen-week ban refers to the “maternal patient” and “pregnant woman” throughout. H.B. 3, 2022 Leg., Reg. Sess. (Ky. 2022). Florida’s fifteen-week ban refers to the “woman” and “pregnant woman.” H.B. 5, 2022 Leg., Reg. Sess. (Fla. 2022). Oklahoma’s ban repeatedly refers to the “pregnant woman.” 2022 Okla. Sess. Law Serv. Ch. 11 (S.B. 612) (West).

⁶² *Brief of Equal Protection Scholars*, *supra* note 3, at 13–16. In the nineteenth century, the physician who led the campaign to ban abortion, Dr. Horatio Storer, claimed that childbearing was “the end for which [married women] are physiologically constituted and for which they are destined by nature.” See HORATIO ROBINSON STORER, *WHY NOT? A BOOK FOR EVERY WOMAN* 75–76 (1866); JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900*, at 78, 89, 148 (1978) (recounting Storer’s role in persuading Americans to ban abortion). According to Storer, avoiding this preordained biological and social role would lead to a woman’s physical and social ruin. See STORER, *supra*, at 37 (“[A]ny infringement of [natural laws] must necessarily cause derangement, disaster, or ruin.”). The American Medical Association’s 1871 *Report on Criminal Abortion* denounced a woman who ended a pregnancy: “She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract.” D.A. O’Donnell & W.L. Atlee, *Report on Criminal Abortion*, 22 *TRANSACTIONS AM. MED. ASS’N* 239, 241 (1871).

⁶³ A woman surely remains a mother if the state compelling motherhood tells her she is free to give the child away, but the woman herself does not experience that freedom. Gretchen Sisson, Lauren Ralph, Heather Gould & Diana Greene Foster, *Adoption Decision Making among Women Seeking Abortion*, 27 *WOMEN’S HEALTH ISSUES* 136 (2017) (finding, in a study of women denied abortions, that over 90% of those who gave birth chose parenting rather than adoption).

C. The State's Claims that Coerced Pregnancy Protects the Life of the Unborn and the Health of Women Rest on Sex-Role Stereotyping.

Under the Equal Protection Clause, government may classify by sex, if the sex-based means are substantially related to important government ends, and those reasons do not rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females.”⁶⁴

To demonstrate that the Mississippi statute rests on constitutionally impermissible sex-role stereotyping, our brief first reads the statute itself in historical perspective and then examines the statute in wider policy context—following the method *Virginia* itself employs to probe state action for sex-role stereotyping.⁶⁵

Mississippi advanced two paternalist justifications for the fifteen-week ban: Mississippi claimed the fifteen-week ban was enacted to (1) “protect the life of the unborn” and (2) “protect the health of women.”⁶⁶ Do sex stereotypes shape the state’s pursuit of these ends?

1. Protecting Unborn Life

In what is perhaps one of the strongest indicators of the gendered role assumptions informing the state’s choice of means to protect unborn life, the state believed that it could compel pregnancy and motherhood without support or recompense. When the state “restrict[s] the right to terminate pregnancies, [it] conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care” without compensation “for [these] services.”⁶⁷ As Justice Blackmun emphasized in *Casey*, the assumption “that women can simply be forced to accept the “natural” status and incidents of motherhood . . . rest[s] upon a conception of women’s role that has triggered the protection of the Equal

⁶⁴ *Virginia*, 518 U.S. at 533.

⁶⁵ *Brief of Equal Protection Scholars*, *supra* note 3, at 11 n.8; *Virginia*, 518 U.S. at 535–40 (determining from historical context that stereotyped beliefs about sex roles originating in nineteenth-century ideas about women’s physical and reproductive fragility underpinned the exclusion of women from Virginia Military Institute (“VMI”)); *id.* at 539 (determining from policy context that VMI’s rejection of coeducation in 1986 did not reflect “any Commonwealth policy evenhandedly to advance diverse educational options”).

⁶⁶ *Brief of Equal Protection Scholars*, *supra* note 3, at § 1(2)(b)(i)-(v) (citations omitted).

⁶⁷ *See Casey*, 505 U.S. 928 (Blackmun, J., concurring in part, dissenting in part).

Protection Clause.⁶⁸ Even if the community has decided to compel motherhood to protect unborn life, why does the community also expect the woman to bear the costs?

2. Protecting Women's "Health"

Instead of acknowledging and endeavoring to offset any health or life burdens on women who are coerced into childbearing by the statute, Mississippi instead claims that in coercing motherhood over a women's objection, the state is protecting *the woman* in addition to any fetal life she may carry. It only promotes the health of *women*, as well as the unborn, to coerce motherhood if one imagines that motherhood is woman's "paramount destiny."⁶⁹

In Part II of the brief, we show that the statute's gender-paternalistic justification rests on distinctive stereotypes about women as "destined" for motherhood that date back to the nineteenth century anti-abortion campaigns and continue to play an important role in the modern prolife movement; the stereotypes' continuing power distracts attention from the ways that an abortion ban overrides individuals' judgments about the health risk abortion poses in comparison to pregnancy and childbirth, which of course vary wildly with the pregnant person's individual circumstances.⁷⁰ Relying on these stereotypes, Mississippi assumed it could fulfill both of its important objectives, protecting fetal life and protecting women's health, without conflict, by prohibiting abortion after fifteen weeks.

This showing of state action enforcing pregnancy for gender-stereotypic reasons might be enough to make out an equal protection violation, but we go on to demonstrate how these traditional sex-role assumptions in turn distorted Mississippi's approach to protecting women's health and unborn life by examining the abortion ban in wider policy perspective. These sex-role assumptions come even more clearly into view as we consider Mississippi's choices about abortion in light of its choices about other policies that protect health and life.

⁶⁸ *Id.* See also *supra* text accompanying notes 51–52 (discussing sex role stereotyping in the context of equal protection).

⁶⁹ *Bradwell*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

⁷⁰ *Brief of Equal Protection Scholars*, *supra* note 3, at 13–19. For examples see *supra* note 63. For more on these nineteenth-century arguments, see Siegel, *Reasoning from the Body*, *supra* note 33, at 280–323. For examples of contemporary analogues, see Siegel, *Why Restrict Abortion?*, *supra* note 25 at 298–309.

D. Less Discriminatory Alternatives: The State Could Have Achieved Its Health- and Life-Protective Ends by More Inclusive and Less Coercive Means.

Mississippi employed a sex-based coercive classification to achieve indisputably important governmental ends. The equal protection cases require government to give reasons for employing sex-based means to protect life and health and require courts to subject those reasons to skeptical scrutiny. Has the state explained why it could not achieve its important ends by less restrictive means? As we show, Mississippi had many policy tools for achieving its asserted ends—*such as providing appropriate and effective sex education and contraception to those who wish to avoid becoming parents and assisting those who wish to bear and raise healthy families.*⁷¹ The state’s preference for sex-based and coercive means appears less benign when examined in light of these other policy choices. To protect life and health, Mississippi could have relied on more inclusive and non-coercive means. Why then did the state instead pursue its ends by sex-based coercive means?

III. “Skeptical Scrutiny”: Expanding the Frame and Asking New Questions About the Ways the State Protects Health and Life

Some conversations about abortion unfold as if the criminal law were the only instrument available to the state to protect health and life. Plainly, this is not so. In the half century since *Roe*, we have learned that abortion rates are responsive to resources. Access to effective contraception lowers abortion rates.⁷² Increasingly, women living in poverty resort to abortion because they are unable to provide for their families.⁷³ Yet, lawmakers and others who seek to ban abortion do not support policies that would lower abortion rates by less restrictive and noncoercive means—by helping individuals to prevent unwanted

⁷¹ For an illustration of these choices in Texas, see Cary Franklin, *Whole Woman’s Health v. Hellerstedt and What It Means to Protect Women*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 223 (Melissa Murray, Kate Shaw, & Reva Siegel eds., 2019). For an illustration of these choices in Louisiana, see Siegel, *Why Restrict Abortion?*, *supra* note 25, at 321–327.

⁷² Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008–11*, 374 *NEW ENG. J. MED.* 843 (2016); Joerg Dreweke, *New Clarity for the U.S. Abortion Debate: A Steep Drop in Unintended Pregnancy is Driving Recent Abortion Declines*, 19 *GUTTMACHER POL’Y REV.* 16 (2016).

⁷³ See, e.g., Sabrina Tavernise, *Why Women Getting Abortions Now Are More Likely to Be Poor*, *N.Y. TIMES*, (July 9, 2019), <https://www.nytimes.com/2019/07/09/us/abortion-accessinequality.html> [<https://perma.cc/ZSE7-ZNS2>] (“Half of all women who got an abortion in 2014 lived in poverty, double the share from 1994 ...”).

pregnancies, or by alleviating the conditions of poverty that lead many people to end pregnancies.

Mississippi is a case in point. States that wish to reduce abortion and to protect the life and health of women *and* of future generations can adopt many proven policy options, such as improving access to contraception, sex education, health care, financial assistance, childcare, and workplace protections. As Part III of our brief shows, Mississippi not only forewent these opportunities, it repeatedly turned down federal dollars that otherwise would have flowed to the state for these purposes. Instead of providing the care and support that could alter the background conditions that shape the decision to terminate a pregnancy, again and again the state chose to target and control women.

Equal protection requires that before a state targets women with coercive, discriminatory regulation, it must first explore non-coercive, non-discriminatory alternative means to achieve its ends. Mississippi's failure to do so makes constitutionally suspect both of its purported justifications for the abortion ban.

Expanding the frame to the broader policy context in which abortion restrictions are enacted also illuminates the ways in which the focus on abortion hinders progress on broadly shared goals of protecting health and lives. Looking beyond abortion law to take a more holistic view of policies that shape residents' lives and health allows us to ask: If states were not blinded by sex-based assumptions about women's "natural" roles as mothers, what might they do more effectively to protect the health and lives of women, children, and families?

A. Alternative 1: Use Available Federal Funds to Increase Access to Contraception and Provide Comprehensive Sex Education

A state taking practical steps to minimize abortion would first help people of all genders avoid unwanted pregnancy. Access to contraception and comprehensive sex education are two inclusive and non-coercive methods to achieve this aim. Individuals seeking abortions in Mississippi might have avoided pregnancy had the state provided accurate sex education and information about birth control. For example, a young woman who terminated her pregnancy at the state's last remaining clinic related how "because Mississippi teaches only abstinence in public schools, no one explained to her how to prevent pregnancy if she had sex."⁷⁴ The state turned away federal funds

⁷⁴ See Emily Wax-Thibodeaux & Ariana Eunjung Cha, *The Mississippi Clinic at the Center of the Fight to End Abortion in America*, WASH. POST (Aug. 24, 2021) <https://www.washingtonpost.com/nation/interactive/2021/mississippi-abortion-law/> [https://perma.cc/YTD2-LJTC].

to implement comprehensive sex education in favor of initiatives such as a “Teen Pregnancy Prevention Summit” featuring pamphlets discouraging the use of contraceptives.⁷⁵ In this regard, the state made a considered policy choice: to take the coercive step of restricting abortion while foregoing measures that would reduce unplanned pregnancy in the first place.

B. Alternative 2: Use Available Federal Funds to Expand Medicaid and Increase Low-Income Residents’ Access to Health Care

Mississippi asserts that restricting abortion will protect maternal health. But compelling pregnancy, especially for poor women of color who lack access to adequate medical care, jeopardizes mothers’ health and lives. Black women are especially at risk; under current policy conditions they are subject to pregnancy-related mortality at nearly three times the rate of white women.⁷⁶

Increasing access to health care is an inclusive, non-coercive means of improving health outcomes for pregnant persons, infants, and children.⁷⁷ Regular medical care and check-ups, for example, can reduce maternal deaths

⁷⁵ The pamphlet warned girls that contraception would harm their “physical[,] emotional and spiritual well-being.” Andy Kopsa, *Sex Ed Without Condoms? Welcome to Mississippi*, THE ATLANTIC (Mar. 7, 2013), <https://www.theatlantic.com/national/archive/2013/03/sex-ed-without-condoms-welcome-to-mississippi/273802> [<https://perma.cc/33SG-BCMR>]. A public-school sex education curriculum instructed students to unwrap a piece of chocolate, pass it around, and note how dirty it became in order to “show that a girl is no longer clean or valuable after she’s had sex.” Alana Semuels, *Sex Education Stumbles in Mississippi*, L.A. TIMES (Apr. 2, 2014), <https://www.latimes.com/nation/la-xpm-2014-apr-02-la-na-ms-teen-pregnancy-20140403-story.html> [<https://perma.cc/C2Y2-XSCP>]. State-subsidized crisis pregnancy centers, too, often “avoid discussion of contraception” or even discourage its use. *See, e.g.*, Amy G. Bryant & Jonas J. Swartz, *Why Crisis Pregnancy Centers are Legal But Not Ethical*, 20 AMA J. OF ETHICS, 269, 270 (2018); Amy G. Bryant, et al, *Why Crisis Pregnancy Centers are Legal But Not Ethical*, AMA J. of Ethics: Policy Forum, Mar. 2018, <https://journalofethics.ama-assn.org/article/why-crisis-pregnancy-centers-are-legal-unethical/2018-03> [<https://perma.cc/2XS6-33R7>].

⁷⁶ MISS. STATE DEP’T OF HEALTH, MISSISSIPPI MATERNAL MORTALITY REPORT, 2013-2016, at 12 (2021) (ranging from 51.9 to 61.4 deaths per 100,000 live births compared to 18.9 to 36.7 deaths per 100,000 live births). Between 2013 and 2016, Black women accounted for “nearly 80 percent of pregnancy-related cardiac deaths.” *Id.* at 16. A 2019 United Health Foundation report ranked Mississippi last in the nation in women’s and children’s health. United Health Foundation, *Health of Women and Children Report*, 96 (2019); UNITED HEALTH FOUNDATION, *HEALTH OF WOMEN AND CHILDREN REPORT 8* (2019), <https://assets.americashealthrankings.org/app/uploads/executive-highlights-ahr-health-of-women-and-children.pdf>. [<https://perma.cc/RJX2-5FDW>].

⁷⁷ Indeed, Medicaid expansion under the Affordable Care Act (ACA) reliably increases insurance access for low-income women. Jamie R. Daw et al., *Medicaid Expansion Improved Perinatal Insurance Continuity for Low-Income Women*, 39 HEALTH AFFS. 1538 (2020).

by as much as 60 percent.⁷⁸ But Mississippi—like many other states that resort to coercive means of reproductive control—has repeatedly rejected Medicaid expansion that could allow approximately 200,000 additional low-income residents to obtain coverage, even though the federal government would cover 90 percent of its cost.⁷⁹

Compelling women to continue pregnancies without providing adequate health care also endangers infants. Mississippi has the highest rate of infant mortality in the nation, and Black infants are especially at-risk.⁸⁰ Early pre-natal care can save infants' lives: the U.S. Department of Health and Human Services found in 2019 that newborns were almost five times more likely to die if their mothers lacked such care.⁸¹ Again, Mississippi *rejected free federal dollars* to insure hundreds of thousands of residents, while forcing people to carry potentially dangerous pregnancies to term.⁸²

⁷⁸ Emily E. Petersen et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011–2015, and Strategies for Prevention, 13 States, 2013–2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 423 (2019).

⁷⁹ Sarah Varney, *How Obamacare Went South in Mississippi*, THE ATLANTIC (Nov. 4, 2014), <https://www.theatlantic.com/health/archive/2014/11/how-obamacare-went-south-in-mississippi/382313/> [<https://perma.cc/WZB9-878L>]; Jimmie E. Gates, *Mississippi Could Gain 21,700 Jobs Under Medicaid Expansion*, MISS. TODAY (May 21, 2021), <https://mississippitoday.org/2021/05/21/medicaid-expansion-mississippi-gain-jobs/> [<https://perma.cc/94UJ-6ZFE>]; Robin Rudowitz, Bradley Corallo, & Rachel Garfield, *New Incentive for States to Adopt the ACA Medicaid Expansion: Implications for State Spending*, KAISER FAMILY FOUNDATION (Mar. 17, 2021), <https://www.kff.org/medicaid/issue-brief/new-incentive-for-states-to-adopt-the-aca-medicaid-expansion-implications-for-state-spending/> [<https://perma.cc/2MUX-6RSG>].

⁸⁰ MISS. STATE DEP'T OF HEALTH, INFANT MORTALITY REPORT 1 (2019), https://msdh.ms.gov/msdhsite/_static/resources/8431.pdf [<https://perma.cc/8B6W-EK4U>]. Black infants comprise most infant deaths in Mississippi and are almost twice as likely to die as white infants. *Id.* at 8. See also Isabelle Taft, *Mississippi Remains Deadliest State for Babies*, CDC DATA SHOWS, MISS. TODAY, Sept. 29, 2022 (reporting that in 2020, the mortality rate for Black babies was more than double that of white babies, and that nearly 60 percent of infants who died before age one in Mississippi were Black.).

⁸¹ See U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. ON WOMEN'S HEALTH, PRENATAL CARE, (Feb. 22, 2021), <https://www.womenshealth.gov/a-z-topics/prenatal-care> [<https://perma.cc/3KTE-SRTE>].

⁸² The refusal to provide coverage can contribute to high-risk pregnancies that drive up long-term insurance costs. For a powerful example, see Taft, *supra* note 80.

C. Alternative 3: Use Available Federal Funds to Maximize TANF Eligibility and Benefit Levels

Many Americans who end pregnancies cite a lack of economic resources among the primary reasons for their decision.⁸³ Temporary Assistance to Needy Families (“TANF”) gives states a means to support people in making a choice to continue their pregnancies by providing direct benefits for existing dependent family members. Yet, at the time of the *Dobbs* litigation, Mississippi set its TANF benefits at the lowest levels in the nation. (In contrast, six states set the maximum benefit at forty to sixty percent of the federal poverty line for a family of three, with the most generous state’s benefit levels exceeding Mississippi’s by tenfold.⁸⁴)

States have wide discretion to allocate TANF block grants.⁸⁵ Only a small percentage of federal money goes to families, with anti-abortion states providing the lowest benefit and eligibility levels.⁸⁶ In 2019, Mississippi spent only five percent of its federal TANF funds on direct cash assistance, and less than ten percent of families living below the poverty line received TANF.⁸⁷ Less than 3,000 families received Mississippi’s maximum benefit of \$170 per month by 2021, down from 23,700 families in 1999.⁸⁸ Indeed, Mississippi appears to

⁸³ See M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC WOMEN’S HEALTH 29 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3729671> [<https://perma.cc/WWF8-EV3Q>].

⁸⁴ *Policy Basics: Temporary Assistance for Needy Families*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/family-income-support/temporary-assistance-for-needy-families> [<https://perma.cc/CUH5-REAP>].

⁸⁵ A 2016 study found that, nationwide, less than a quarter of TANF funds went to direct cash assistance to families. Deborah Weinstein, *TANF at Twenty*, COALITION ON HUMAN NEEDS, Aug. 22, 2016, <https://www.chn.org/voices/tanf-at-twenty/> [<https://perma.cc/45GE-QXJE>].

⁸⁶ Aditi Shrivastava & Gina Azito Thompson, *TANF Cash Assistance Should Reach Millions More Families to Lessen Hardship*, CTR. ON BUDGET & POL’Y PRIORITIES, at 12, 19 (Feb. 18, 2022), <https://www.cbpp.org/research/family-income-support/tanf-cash-assistance-should-reach-millions-more-families-to-lessen> [<https://perma.cc/JS8P-MJWE>].

⁸⁷ *State Temporary Assistance for Needy Families Programs Do Not Provide Adequate Safety Net for Poor Families*, at Map: TANF-to-poverty ratios, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/state-temporary-assistance-for-needy-families-programs-do-not-provide-adequate-safety-net-for-poor> [<https://perma.cc/7LK2-BBMB>].

⁸⁸ Anna Wolfe, *Mississippi Found ‘Absurd’ Ways to Spend Welfare on Anything but the Poor. These Bills Would Put More Money into Families’ Pockets*, MISS. TODAY (Jan. 29, 2021), <https://mississippitoday.org/2021/01/29/mississippi-found-absurd-ways-to-spend-welfare-on-anything-but-the-poor-these-bills-would-put-more-money-into-families-pockets> [<https://perma.cc/G4XY-9BMV>].

have fraudulently misspent millions of dollars of its TANF funds to line the pockets of officials and wealthy residents.⁸⁹ But many states lawfully divert large portions of their TANF funds to programs that have nothing to do with direct assistance to needy families, including abstinence-only education and marriage promotion initiatives. As many as ten states pour TANF money into “crisis pregnancy centers” that mislead pregnant individuals about their reproductive health care options and dissuade people from seeking abortions and even contraception, all without providing medical care or other support to meet their needs during pregnancy and after childbirth.⁹⁰

D. Alternative 4: Repeal “Family Caps” that Deepen Child Poverty and Punish Poor Parents for Bearing Children

Abortion restrictions often go hand in hand with other coercive policies that discourage people from carrying pregnancies to term and make their lives—and those of their children—more difficult when they do. For instance, “family caps” (or “child exclusion” policies) bar TANF benefits for additional children born into families receiving public assistance. These policies echo the sordid history of reproductive controls targeting poor women and women of color; lawmakers often explicitly justify family caps as disincentives to childbearing.⁹¹

⁸⁹ Beginning in 2016, the director of the state’s Department of Human Services (“DHS”) spearheaded the “largest public embezzlement scheme in state history.” China Lee, *State Auditor: Former Director of DHS, Five Others Arrested in Largest Public Embezzlement Scheme in State History*, WLBT NEWS (Feb. 6, 2020, 1:01 PM), <https://www.wlbt.com/2020/02/05/state-auditor-former-director-dhs-five-others-arrested-largest-embezzlement-scheme-state-history/> [<https://perma.cc/L594-T4WF>]; see also Wolfe, *supra* note 88 (describing how dollars meant for TANF went to “a new volleyball stadium, a horse ranch for a famous athlete, multi-million dollar celebrity speaking engagements, high-tech virtual reality equipment, luxury vehicles, steakhouse dinners, and even a speeding ticket, to name a few.”); Rick Maese, *Brett Favre is the Face of a Scandal, But Mississippi’s Issues Go Deeper*, WASH. POST, Sept. 27, 2022, <https://www.washingtonpost.com/sports/2022/09/27/brett-favre-mississippi-welfare/> [<https://perma.cc/D9QK-36ML>].

⁹⁰ See, e.g., Jessica Glenza, *At Least 10 States Divert Federal Welfare Funding to Anti-Abortion Clinics*, GUARDIAN (June 4, 2021, 6:00 AM), <https://www.theguardian.com/world/2021/jun/04/states-divert-federal-welfare-funding-anti-abortion-clinics> [<https://perma.cc/2SKL-8NEF>]. See also Amal Bass, *Crisis Pregnancy Centers, State-Funded Harm, and State-Based Solutions*, REG. REV., Feb. 14, 2022, <https://www.theregview.org/2022/02/14/bass-crisis-pregnancy-centers-state-funded-harm-state-based-solutions> [<https://perma.cc/K437-6SQ4>]; Melissa N. Montoya et al., *The Problems with Crisis Pregnancy Centers: Reviewing the Literature and Identifying New Directions for Future Research*, 14 INT’L J. WOMEN’S HEALTH 757, 760 (2022); Carrie N. Baker, *New Research Shows States Diverting Federal Anti-Poverty Funds to Deceptive Anti-Abortion Centers*, Ms., June 15, 2021, <https://msmagazine.com/2021/06/15/states-diverting-federal-anti-poverty-funds-anti-abortion-centers-crisis-pregnancy-centers> [<https://perma.cc/D5GG-SPNB>].

⁹¹ See Ife Floyd, *States Should Follow New Jersey: Repeal Racist “Family Cap”*, CTR. ON BUDGET & POL’Y PRIORITIES: OFF THE CHARTS (Oct. 14, 2020, 11:15 AM),

In recent years, many states have repealed family caps because of their detrimental impact on the health and well-being of children and families. Mississippi is among just a dozen states that maintain a family cap.⁹² Again, rather than reducing abortion by helping low-income residents decide to bear and raise children *and* support their families, Mississippi continues to choose discriminatory, coercive measures that exacerbate the concerns of poor and low-income parents who fear that having another child will undermine their ability to care for their existing children.

E. Alternative 5: Use Available Federal Funds for Childcare Assistance to Enable Parents to Coordinate Family Support and Care

Childcare funding—or lack thereof—provides another telling measure of whether a state has pursued inclusive, noncoercive means of aiding residents who wish to continue pregnancies while providing for existing dependents. In Mississippi, less than two months before the legislature passed the abortion ban challenged in *Dobbs*, the *Jackson Clarion-Ledger* reported that the state welfare department had returned \$13 million in federal childcare funding for low-income working parents because the state failed to meet its match obligation—despite a waiting list of 21,500 children whose parents lacked childcare.⁹³

F. Alternative 6: Protect Pregnant Workers from Discrimination and Require Accommodations for Pregnancy in the Workplace

An individual's ability or inability to obtain and keep gainful employment also influences decisions about whether and when to become a parent. A state committed to encouraging women to carry their pregnancies to term under conditions that enable them to support themselves and their families should seize every opportunity to enhance the rights of pregnant workers. Indeed, many states and localities have enacted Pregnant Workers Fairness laws in recent

<https://www.cbpp.org/blog/states-should-follow-new-jersey-repeal-racist-family-cap> [https://perma.cc/MR9T-EZ3C].

⁹² *Id.*; Teresa Wiltz, *Family Welfare Caps Lose Favor in More States*, PEW TRUSTS: STATELINE (May 3, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/05/03/family-welfare-caps-lose-favor-in-more-states> [https://perma.cc/3LPE-QPFH].

⁹³ Anna Wolfe & Sarah Fowler, *Human Services Leaves \$13M in Child Care Funds on the Table*, MISS. CLARION-LEDGER (Jan. 29, 2018, 2:11 PM), <https://www.clarionledger.com/story/news/local/2018/01/29/human-services-leaves-13-m-child-care-funds-table/1065001001> [https://perma.cc/7H2P-L7EP].

years.⁹⁴ Others, including Mississippi, have rejected such inclusive and nondiscriminatory measures that protect pregnant people, parents, and children. Instead, they have targeted women with coercive restrictions that compel pregnancy.⁹⁵

Mississippi could have provided care and support for individuals who seek to avoid pregnancy or who wish to bear children while preserving their health, dignity, and ability to provide for existing family members. Instead of pursuing these nondiscriminatory, noncoercive alternatives, the state chose to prevent women and other pregnant people from making the most intimate, consequential life decisions for themselves, forcing them to give birth under dangerous and demeaning conditions. Its decisions to provide some of the lowest levels of TANF support,⁹⁶ despite having the highest levels of infant mortality in the nation,⁹⁷ and to preserve family caps even as other states are repealing them,⁹⁸ point to persistent stereotyping and devaluation of imagined beneficiaries as undeserving and irresponsible⁹⁹—imagined beneficiaries who most likely are, from inference and context, low-income Black women.¹⁰⁰ These policy choices reveal that abortion restrictions like Mississippi’s function “more as a tool of control than as an expression of care for . . . women and children.”¹⁰¹

⁹⁴ As of 2018, at least twenty-three states and several localities had passed Pregnant Workers Fairness laws to provide legal protections for pregnant employees. See *Map: State and Local Pregnant Worker Fairness Laws*, A BETTER BALANCE, <https://www.abetterbalance.org/resources/map-state-pregnant-worker-fairness-laws> [<https://perma.cc/VJ3B-N9VZ>] (last updated July 19, 2018).

⁹⁵ A BETTER BALANCE, *supra* note 94. See also H.B. 1046, 2022 Leg., Reg. Sess. (Miss. 2022) (dead in committee).

⁹⁶ See *supra* note 89 and accompanying text.

⁹⁷ Taft, *supra* note 80.

⁹⁸ Ife, *supra* note 91.

⁹⁹ See *supra* note 53 and accompanying text.

¹⁰⁰ For a debate among white and Black Mississippi lawmakers about the women regulated by the state’s abortion restrictions, including remarks by Republican Sen. Joey Fillingane, cosponsor of HB 1510, see Emily Wagster Pettus, *Mississippi Considers Abortion Ban After Fetal Heartbeat*, AP NEWS (Feb. 5, 2019), <https://apnews.com/article/phil-bryant-us-news-ap-top-news-courts-supreme-courts-7818576c81df41e2863bdd54cd8e1c0a> [<https://perma.cc/GN9Q-SQ7Z>].

¹⁰¹ *Brief of Equal Protection Scholars*, *supra* note 3, at 28–29.

IV. Abortion Restrictions Are Part of a Regime of Reproductive Coercion and Control that Targets Individuals and Communities Based on Race, Sex, and Class

Supporters of abortion restrictions have recently taken the extraordinary position that states curtailing abortion access actually promote equality under the law by preventing women's exercise of abortion rights from having eugenic effects.¹⁰² Our brief provides a response to those arguments: we show that abortion bans are rooted in a history of state-sponsored reproductive control that has targeted individuals and communities based on characteristics now considered constitutionally suspect.¹⁰³

First, efforts to link abortion rights to eugenics ignore the fundamental differences between a state-sponsored program of eugenic regulation designed to control the demographic character of a community and laws that protect individuals' ability to make the most intimate and personal decisions about their reproductive lives.¹⁰⁴ Eugenic measures empower the government to force individual conformity with state dictates about racial, religious, and sexual purity. By contrast, laws protecting reproductive freedom empower individuals to determine what is best for themselves, their families, and their communities.

Second, if there is any historical association between abortion law and projects of demographic control, it lies in the nineteenth-century campaign to criminalize abortion.¹⁰⁵ Physicians, led by Horatio Storer, supported laws criminalizing abortion because, as Storer argued, women—in particular, white, married, middle- and upper-class women—defied their natural maternal destinies when they avoided or ended pregnancies.¹⁰⁶ Storer and his allies blamed white, native-born Protestant women's reproductive self-determination for allowing higher birth rates among immigrants and Catholics to degrade the nation's racial and religious character. Later, the eugenics movement took up the call to maintain the demographic health of the American populace, employing different legal tools to control the reproductive conduct of a different

¹⁰² See, e.g., *Dobbs*, 142 S. Ct. at 2256 n.41; *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1790–91 (2019) (Thomas, J., concurring).

¹⁰³ *Brief of Equal Protection Scholars*, *supra* note 3, at 29–33.

¹⁰⁴ *Brief of Equal Protection Scholars*, *supra* note 3, at 29; Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599, 1634 (2022).

¹⁰⁵ *Brief of Equal Protection Scholars*, *supra* note 3, at 30; Murray, *Race-ing Roe*, *supra* note 9, at 2036–37.

¹⁰⁶ Siegel, *Reasoning from the Body*, *supra* note 33 at 286.

social class. Specifically, in their efforts to engineer a “fitter” population, early twentieth-century eugenicists turned not to abortion but to laws permitting the sterilization of “habitual criminals” and the “feebleminded,” focusing disproportionately on women who were poor, immigrants, disabled,¹⁰⁷ or considered sexually “promiscuous.”¹⁰⁸

Third, abortion restrictions are best understood as part of an evolving regime of reproductive control that perpetuates racial, economic, and sex inequality.¹⁰⁹ Reproductive control has taken many forms across time and space. Slaveholders exercised nearly absolute reproductive control over the persons they enslaved, backed by the force of law.¹¹⁰ Forced pregnancy and childbearing served enslavers’ economic interest in enslaved persons’ procreation. By the mid-twentieth century, lawmakers perceived impoverished communities of color as burdens on the public fisc and sought coercively to limit their reproduction.¹¹¹ In the 1950s and 1960s, post-partum sterilization of poor women of color without their consent, and often without their knowledge, became common enough to earn the colloquial moniker “Mississippi appendectomy.”¹¹² By contrast, doctors often refused to sterilize non-poor white women who wished to limit their family size.¹¹³

Finally, when abortion opponents cite the incidence of pregnancy termination among communities of color as evidence of abortion’s “eugenic potential,” they blame women of color—Black women in particular—for decisions that are shaped by starkly limited and selective state support for

¹⁰⁷ See Murray, *Race-ing Roe*, *supra* note 9, at 2062–70; Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, *supra* note 104, at 1613–1618.

¹⁰⁸ Murray, *Race-ing Roe*, *supra* note 9, at 2037.

¹⁰⁹ Decl. of Serena Mayeri, J.D., Ph.D., in Support of Pls.’ Mot. for Partial Summ. J., Jackson Women’s Health Org. v. Dobbs, Civil. No. 3:18-cv-00171-CWR-FKB (S.D. Miss. 2021).

¹¹⁰ Decl. of Serena Mayeri, J.D., Ph.D., in Support of Pls.’ Mot. for Partial Summ. J., *supra* note 109, at 4 (citing DEBORAH GRAY WHITE, *AR’N’T I A WOMAN: FEMALE SLAVES IN THE PLANTATION SOUTH* (rev. ed. 1999)); DOROTHY ROBERTS, *KILLING THE BLACK BODY* 22–55 (1997).

¹¹¹ Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, *supra* note 104, at 1617–21, 1634–35.

¹¹² *Brief of Equal Protection Scholars*, *supra* note 3, at 32; CHANA KAI LEE, *FOR FREEDOM’S SAKE: THE LIFE OF FANNIE LOU HAMER* 21–22, 80 (1999); REBECCA M. KLUCHIN, *FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950-1980*, at 93 (2009).

¹¹³ KLUCHIN, *supra* note 112, at 22.

families.¹¹⁴ Historically, safety net programs such as Social Security have supported white marital families with breadwinning husbands and homemaking wives and excluded or stigmatized people of color, especially single mothers.¹¹⁵ As detailed in Part III above, states that ban abortion have especially scant social supports for struggling pregnant people, parents, and children—who disproportionately are single mothers and people of color. Rather than making policy choices that might enable Americans safely to carry pregnancies, give birth, and raise flourishing families, abortion opponents accuse Black women of participating in genocide.¹¹⁶

V. Beyond *Dobbs*: Extensions and Applications

As the fight over equal protection in *Dobbs* suggests, equality arguments are of growing significance in vindicating claims of reproductive justice. Justice Alito’s attempt to block an equal protection claim that was not even before the Court in *Dobbs* is evidence of equality’s power, not its weakness. That power is on display in the three-Justice *Dobbs* dissent, which more systematically connects abortion rights to equality and liberty than any of the Court’s recent opinions.¹¹⁷ In doing so, it vividly illuminates the stakes of abortion rights for women’s ability to live lives of equal dignity, autonomy, and freedom.

As our brief expands the frame and examines a state’s choices about abortion law in light of its choices about other policies that protect life and health, the brief advances an antidiscrimination inquiry: it enables us to probe the strength of the state’s reasons for employing sex-based coercive means to further its indisputably important interest in protecting life. Not only does this inquiry expose sex stereotyping, it also spotlights the narrow bundle of policies we have come to term “prolife” and the attitude toward regulated communities they express. Why is it that so many states that claim “prolife” reasons for

¹¹⁴ *Brief of Equal Protection Scholars*, *supra* note 3, at 32; Murray, *Race-ing Roe*, *supra* note 9, at 2090–91.

¹¹⁵ See Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 100 (2002) (“Given the traditional belief that sustained wage-earners were men, it was understood that the social insurance programs of the Social Security Act were aimed at men, and not women. If women were to benefit from these programs, it would be derivatively, through their attachments to male beneficiaries.”).

¹¹⁶ Murray, *Race-ing Roe*, *supra* note 9, at 2090–91.

¹¹⁷ *Dobbs*, 142 S. Ct. at 2317–54 (Breyer, Sotomayor, & Kagan JJ., dissenting) (invoking equality—for example, “liberty and equality,” “equal citizenship” or “equal protection” approximately 25 times in criticizing and denouncing the majority’s decision to overrule *Roe* and *Casey*).

criminalizing abortion offer among the lowest levels of social supports for families—policies that threaten the life and health of those who bear children and the children they bear?¹¹⁸

Arguments that expand our understanding of the policies that count as “prolife” can play many roles. Such arguments can be asserted in politics to criticize states that primarily rely on carceral means to protect life. Or they can be invoked to forge coalitions in favor of inclusive, noncoercive means of protecting life, whether it is by supporting those who are sexually active and wish to avoid becoming parents, or by supporting those who become parents and need the community’s assistance in raising families.¹¹⁹

The brief’s doctrinal arguments, showing that in the decades after *Geduldig*, the Court extended equal protection stereotyping analysis into contexts that involve pregnancy, present the possibility of equality challenges of many kinds, even in federal court. While some Justices are likely not persuadable, other members of the *Dobbs* majority might differently respond to equal protection claims involving pregnancy in a future case—for example, in a case where medical personnel are chilled by an abortion ban and so do not provide urgently needed health care to pregnant persons facing cancer or giving birth.¹²⁰

¹¹⁸ For sources examining the safety-net policies of so-called pro-life jurisdictions, see Emily Badger, Margot Sanger-Katz & Claire Cain Miller, *States With Abortion Bans Are Among Least Supportive for Mothers and Children*, N.Y. TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/28/upshot/abortion-bans-states-social-services.html> [<https://perma.cc/5G2C-2Z6Q>]; Dylan Scott, *The End of Roe Will Mean More Children Living in Poverty; How ‘Pro-Life’ States Are Failing New Parents and Babies*, VOX, <https://www.vox.com/policy-and-politics/23057032/supreme-court-abortion-rights-roe-v-wade-state-aid> [<https://perma.cc/NHN2-SQV6>]; Chris J. Stein, *After Roe, Are Republicans Willing to Expand the Social Safety Net?*, THE GUARDIAN (July 5, 2022), <https://www.theguardian.com/us-news/2022/jul/05/roe-v-wade-abortion-republicans-social-safety-net> [<https://perma.cc/F9QV-7XQT>]. See also *Dobbs*, 142 S. Ct. at 2340 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (“[A] state-by-state analysis by public health professionals shows that States with the most restrictive abortion policies also continue to invest the least in women’s and children’s health.”).

¹¹⁹ See Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why It Matters in Law and Politics*, 93 IND. L.J. 207 (2018); Siegel, *supra* note 25 (employing frame expansion to analyze Louisiana’s choices in *June Medical*).

¹²⁰ Increasingly, the threat of prosecution under state abortion laws is chilling the provision of medical care to pregnant patients. Statutes often provide vaguely worded exceptions and inadequate guidance to medical personnel. See, e.g., Dov Fox, *Medical Disobedience*, 136 HARV. L. REV. [47-50] (forthcoming 2023); Kate Zernike, *What Does ‘Abortion’ Mean? Even the Word Itself Is Up for Debate*, N.Y. TIMES, (Oct. 18, 2022), <https://www.nytimes.com/2022/10/18/us/abortion-roe-debate.html> [<https://perma.cc/QZR6-293F>]; Kate Zernike, *Medical Impact of Roe Reversal Goes Well Beyond Abortion Clinics, Doctors Say*, N.Y. TIMES (Sept. 10, 2022), <https://www.nytimes.com/2022/09/10/us/abortion-bans-medical-care-women.html?smid=em-share> [<https://perma.cc/HB5N-9X5N>]; Christina Pazzanese, *‘Life of the Mother’ is Suddenly Vulnerable*, HARV. GAZETTE (July 19, 2022),

And the brief can contribute to equality arguments in other practical and institutional contexts. Such arguments might draw on the brief’s interpretation of equal protection doctrine, its analysis of stereotyping in the regulation of pregnancy and abortion, and its historical account of gender- and race-based reasoning in reproductive regulation. In state courts, equality claims can be used to oppose the resuscitation of “zombie laws”—archaic statutory abortion bans that some lawmakers may seek to enforce in the wake of *Dobbs*.¹²¹ At least one state court has appealed to *Virginia* as persuasive authority in interpreting its own state constitution’s equality clause.¹²² Other state courts have looked to

<https://news.harvard.edu/gazette/story/2022/07/life-of-the-mother-is-suddenly-vulnerable/> [<https://perma.cc/BC7X-S475>]. Justice Rehnquist, dissenting in *Roe*, thought that even if due process did not protect a woman’s decisions about abortion, federal courts should remain open to due process challenges to abortion restrictions that put “a mother’s life in jeopardy.” See *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (“The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother’s life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective . . .”).

A half-century later, equal protection may provide additional resources for claimants seeking relief in federal court, even if rational basis review is the standard, when the state enforces criminal bans on abortion in such an uncertain way as to chill the practice of medicine and imperil the life and health of pregnant persons. The executive branch, too, has tools at its disposal: for example, the U.S. Department of Health and Human Services issued guidance in July clarifying that the Emergency Medical Treatment and Labor Act (“EMTALA”) requires the provision of emergency medical treatment to pregnant patients if their health would otherwise be placed in “serious jeopardy,” or they would suffer “serious impairment to bodily function,” or “serious . . . dysfunction” to an organ. DEP’T OF HEALTH & HUMAN SERV’S, CENTER FOR CLINICAL STANDARDS AND QUALITY, QSO-22-22-Hospitals, REINFORCEMENT OF EMTALA OBLIGATIONS SPECIFIC TO PATIENTS WHO ARE PREGNANT OR ARE EXPERIENCING PREGNANCY LOSS (July 11, 2022), <https://www.cms.gov/files/document/qso-22-22-hospitals.pdf> [<https://perma.cc/NV5M-7RXN>]. And Congress can enact legislation protecting abortion access under its powers to enforce the equal protection and commerce clauses. See Women’s Health Protection Act, H.R. 3755, 117th Cong. § 2(a)(25)(B) (2021) (“Congress has the authority to enact this Act to protect abortion services pursuant to . . . its powers under section 5 of the Fourteenth Amendment to the Constitution of the United States to enforce the provisions of section 1 of the Fourteenth Amendment.”).

¹²¹ See, e.g., Brief for Professors of History and Law as Amici Curiae Supporting Planned Parenthood of Michigan and Sarah Wallett, *Planned Parenthood of Mich. v. Att’y Gen.*, No. 22-000044-MM (Mich. Ct. Cl. Aug. 23, 2022).

¹²² In 2018, the Iowa Supreme Court struck down an abortion restriction, emphasizing that “[d]isparate treatment and relegation of women to a subject sex may no longer be accomplished through the proxy of role differentiation.” *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 245 (Iowa 2018) (holding that seventy-two-hour mandatory delay for abortion violated the state constitution). Indeed, the court quoted *Virginia* in expounding the equal protection basis for its decision: “Equal protection of the law now prevents governments from ‘den[ying] to women, simply because they are women, full citizenship stature—equal opportunity

their states' equal rights amendments or other expansive state constitutional equality provisions.¹²³ State legislators are now enacting equality-based rights to abortion and contraception.¹²⁴

In the 2022 midterm elections, voters—especially young voters and women—turned out in great numbers to repudiate the Court's decision in

to aspire, achieve, participate in and contribute to society based on their individual talents and capabilities.” *Id.* (quoting *Virginia*, 518 U.S. at 532).

¹²³ In one early case, for example, a Connecticut court held that a restriction on public funding for abortion violated the state's Equal Rights Amendment precisely because of the sex stereotypes at the root of the restriction. *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986). The court reasoned that “[s]ince time immemorial, women’s biology and ability to bear children have been used as a basis for discrimination against them,” emphasizing the “devastating effect” that such discrimination has had. *Id.* at 159. The court held that Connecticut’s restriction on funding for abortion constituted “sex oriented discrimination” and therefore ran afoul of the state constitution. *Id.* at 159–60. Similar equality-based reasoning has been applied across the states. *See, e.g., N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 854, 856 (N.M. 1998) (holding that ban on Medicaid funding for abortion violated the state ERA, noting that “[h]istory teaches that lawmakers have often attempted to justify gender-based discrimination on the grounds that it is ‘benign’ or ‘protective’ of women” and that the abortion restriction “undoubtedly single[d] out for less favorable treatment a gender-linked condition that is unique to women”); *see also* Brief of Amicus Curiae Equal Rights Amendment Project at the Center for Gender and Sexuality Law at Columbia Law School in Support of Petitioners, *Allegheny Reprod. Health Ctr. v. Pa. Dep’t Hum. Servs.*, 249 A.3d 598 (Pa. 2021) (No. 26 MAP 2021) (arguing that Pennsylvania’s ban on state funding of abortion care violates the state constitution’s ERA).

Recently, a Michigan trial court invoked the state constitution’s equal protection provision alongside its protection of bodily integrity to strike down a 1931 statute that criminalized abortion. *Planned Parenthood of Mich. v. Att’y Gen.*, No. 22-000044-MM (Mich. Ct. Cl., Sept. 7, 2022) (Gleicher, J.); *see also* Jon King, *Judge Blocks Prosecutors from Enforcing Michigan’s ‘Chilling and Dangerous’ Abortion Ban*, MICHIGAN ADVANCE (Aug. 19, 2022), <https://michiganadvance.com/2022/08/19/judge-blocks-prosecutors-from-enforcing-michigans-chilling-and-dangerous-abortion-ban/> [<https://perma.cc/FD8P-EWLE>] (“Weaponizing the criminal law against providers to force pregnancy on our state’s women is simply contrary to the notion of due process, equal protection, and bodily autonomy in this court’s eyes”) (quoting Circuit Court Judge Jacob Cunningham’s oral ruling). Michigan voters subsequently approved a ballot initiative amending the state constitution to protect reproductive freedom. *See infra* note 127.

¹²⁴ The Preamble to New Jersey’s Reproductive Freedom Act, which was enacted in 2022 and codifies the right to abortion in state law, states that “[s]elf-determination in reproductive choice is key to helping establish equality among the genders and to allowing all people of childbearing age to participate equally” in “economic and social life.” N.J. STAT. ANN. § 10:7-1(c) (West 2022). Similarly, the “policy and purpose” section of New York’s Reproductive Health Act (enacted in 2019) states: “The legislature finds that comprehensive reproductive health care is a fundamental component of every individual’s health, privacy and equality.” N.Y. PUB. HEALTH LAW § 2599-aa (Consol. 2022). For other recently adopted guarantees of equality in reproductive decision making, *see infra* note 127 and accompanying text.

Dobbs.¹²⁵ Among several post-*Dobbs* ballot initiatives,¹²⁶ voters in Vermont and Michigan approved constitutional amendments subjecting infringements on reproductive freedom to strict scrutiny, requiring use of “least restrictive means” in order to “ensur[e] equal protection and treatment under the law,” as well as liberty and autonomy.¹²⁷ Along with our brief, these amendments ask government to employ inclusive and supportive means to protect life and health before infringing a pregnant person’s liberty and equality. After *Dobbs*, equality arguments continue to multiply in form and significance, expanding to new venues and vernaculars, and translating into legal and political discourse the constitutional values that animate struggles for reproductive justice.

¹²⁵ HOW THE SUPREME COURT’S DOBBS DECISION PLAYED IN 2022 MIDTERM ELECTION: KFF/AP VOTECAST ANALYSIS, KFF (Nov. 11, 2022), <https://www.kff.org/other/poll-finding/2022-midterm-election-kff-ap-votecast-analysis/> [<https://perma.cc/S47U-S5B7>].

¹²⁶ In an August 2022 primary election, voters in Kansas rejected a ballot initiative that would have revoked the state constitutional right to abortion in the name of protecting both women and children. The text of the ballot measure read: “Because Kansans value both women and children, the constitution of the state of Kansas does not require government funding of abortion and does not create or secure a right to abortion. To the extent permitted by the constitution of the United States, the people, through their elected state representatives, may pass laws regarding abortion, including, but not limited to, laws that account for circumstances of pregnancy resulting from rape or incest, or circumstances of necessity to save the life of the mother.” STATE OF KANSAS OFFICIAL PRIMARY ELECTION BALLOT, (Aug. 2, 2022), <https://sos.ks.gov/elections/22elec/2022-Primary-Election-Constitutional-Amendment-HCR-5003.pdf> [<https://perma.cc/3DHK-LH84>].

¹²⁷ The Vermont constitutional amendment provides, in relevant part: “The right to reproductive liberty is central to the exercise of personal autonomy and involves decisions people should be able to make free from compulsion of the State. Enshrining this right in the Constitution is critical to ensuring equal protection and treatment under the law and upholding the right of all people to health, dignity, independence, and freedom . . . The right to personal reproductive autonomy is central to the liberty protected by this Constitution and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.” VT. CONST. chap. 1, art. 22.

Michigan’s voters amended the state’s constitution to establish a specific right to reproductive freedom, which “entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.” The amendment provides that “[a]n individual’s right to reproductive freedom shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means.” MICH. CONST. art. I, § 28.

California voters passed a ballot initiative that amended the state constitution to provide: “The state shall not deny or interfere with an individual’s reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection.” 10. S.C.A. 10, 2021 S., Reg. Sess. (Cal. 2021).