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The Never-Ending Struggle for Reproductive Rights

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FOREWORD

THE NEVER-ENDING STRUGGLE FOR REPRODUCTIVE RIGHTS

*Stephanie Toti**

For me, the annual Book Review issue is a time for reflection. It provides an opportunity to take stock of scholarly trends, reassess conventional wisdom, and gather new insights to apply to the practice of law. The reviews contained in this year's issue address a wide range of subjects, including the history of public defenders, the use of bigotry rhetoric in conflicts over marriage and civil rights law, the role of cost-benefit analysis in federal policymaking, and racial inequities in tax policy. This impressive commentary on an astute and varied collection of books about the law will inspire many of us to pause and consider larger questions about our own work: Where do things stand? How did we get here? What comes next?

My career has largely focused on reproductive rights. It is an area of the law that is perpetually at a crossroads and therefore always ripe for reflection. These rights, long recognized and deeply valued by a majority of Americans, are continually under attack and always—it would seem—on the brink of elimination. Almost from the day *Roe v. Wade* was decided,¹ critics began calling for it to be overruled, and commentators began predicting its downfall.² Although it has weathered the storm for nearly fifty years, those critics and commentators remain undeterred, still forecasting *Roe*'s imminent demise.³ And who knows? Perhaps this charged moment in our nation's history, which seems increasingly like the dystopian future that prescient novelists warned of long ago, will see a disruption in constitutional protection for reproductive rights. Or perhaps the rights that have been central to the liberty and equality of women and gender-expansive people for half a century will continue to endure.

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1. 410 U.S. 113 (1973).

2. See Robert Post & Reva Siegel, Essay, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 407–10, 410 n.189 (2007).

3. E.g., Mary Ziegler, Opinion, *The End of Roe Is Coming, and It Is Coming Soon*, N.Y. TIMES (Dec. 1, 2021), <https://www.nytimes.com/2021/12/01/opinion/supreme-court-abortion-mississippi-law.html> [perma.cc/8CDM-Z6KR]; Rich Lowry, *End Roe*, NAT'L REV. (Nov. 11, 2021, 11:47 AM), <https://www.nationalreview.com/magazine/2021/11/29/end-ro-roe> [perma.cc/L4UV-CKMT]; Mark Joseph Stern, *The End of Roe*, SLATE (June 27, 2018, 6:03 PM), <https://slate.com/news-and-politics/2018/06/kennedys-retirement-ensures-roe-v-wade-will-be-overturned.html> [perma.cc/4AH9-HGQD].

In this Foreword, I would like to reflect on two aspects of reproductive rights law in particular. First, there is a seeming duality in the Supreme Court's abortion jurisprudence. On the surface, it embodies a longstanding commitment to safeguarding the right to abortion. But just below the surface, the caselaw reflects a deep tension between this commitment and the Court's recognition that certain members of our society—some motivated by “unprincipled emotional reactions” and others motivated by “principles worthy of profound respect”⁴—will never accept that the Constitution grants the authority to make decisions about the outcome of a pregnancy to the individual who is pregnant rather than to the government. Second, the abortion right has proven surprisingly durable despite powerful efforts to subvert it. It seems that the vital relationship of this right to core constitutional values like liberty, equality, and freedom of belief, and the critical role that it plays in the ability of women and all people with the capacity for pregnancy to participate fully and equally in society, make it extremely difficult to cast aside, rhetorical denunciations notwithstanding.

I. THE DUALITY OF THE SUPREME COURT'S ABORTION JURISPRUDENCE

Few areas of the law are more fraught than reproductive rights. The view from ten thousand feet may not suggest this: it shows an unbroken line of cases spanning nearly five decades in which the Supreme Court has held that the right to end a pre-viability pregnancy is a fundamental component of the liberty protected by the Due Process Clause.⁵ On the ground, however, there have been nonstop efforts to unsettle this seemingly settled area of law, with abortion opponents constantly mounting strategic campaigns to chip away at the scope of the abortion right and seat jurists who are hostile to abortion. Despite Justice Kennedy's famous declaration that “[l]iberty finds no refuge in a jurisprudence of doubt,”⁶ doubt abounds in the legal landscape surrounding reproductive rights, and the contours of the abortion right have often fluctuated with the membership of the Court.

The Court first recognized a constitutional right to abortion in 1973 in *Roe v. Wade*⁷ and its lesser-known companion, *Doe v. Bolton*.⁸ Both cases were decided 7–2, indicating broad support for the newly recognized right, with no clear ideological or partisan fault lines separating the majority and dissent.⁹

4. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992).

5. *See, e.g.*, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2112 (2020) (plurality opinion); *id.* at 2133–34 (Roberts, C.J., concurring in the judgment); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016); *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003); *Casey*, 505 U.S. at 851–53; *Roe*, 410 U.S. at 152–54.

6. *Casey*, 505 U.S. at 844. This part of *Casey* has been attributed to Justice Kennedy. *See* JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 56 (2007).

7. 410 U.S. at 152–54.

8. 410 U.S. 179, 181–82 (1973).

9. The seven justices in the majority were William Douglas, appointed by President Franklin D. Roosevelt; William Brennan and Potter Stewart, appointed by President Eisenhower;

But just a few years later, the Court seemed to lose some of the courage of its conviction, holding first in *Maher v. Roe* and then in *Harris v. McRae* that the Constitution permits governments to prohibit public health-insurance programs from covering abortions.¹⁰ As Justice Marshall noted in dissent, such coverage bans are “the product of an effort to deny to the poor the constitutional right recognized in *Roe v. Wade*.”¹¹

Over the next twelve years, the Supreme Court reaffirmed *Roe* on several occasions, striking down state and local laws that flouted its holding.¹² Nevertheless, the Supreme Court’s membership became steadily more conservative—and inimical to abortion rights—as Presidents Ronald Reagan and George H.W. Bush collectively filled five vacancies on the Court.¹³ This led to increasing calls by sitting justices to reconsider *Roe*.¹⁴ By 1989, when the Court decided *Webster v. Reproductive Health Services*, which concerned the constitutionality of a Missouri statute regulating abortion, it was so fractured that it could not produce a majority decision.¹⁵ Justice Kennedy joined *Roe*’s dissenters in urging the Court to reconsider *Roe*’s holding,¹⁶ Justice O’Connor said

Thurgood Marshall, appointed by President Johnson; and Harry Blackmun, Warren Burger, and Lewis Powell, appointed by President Nixon. *Id.* The two dissenting justices were Byron White, appointed by President Kennedy, and William Rehnquist, appointed by President Nixon. *Id.* For an account of the internal process that led to the Supreme Court’s decisions in these historic cases based on Justice Blackmun’s personal archives, see LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 72–101 (2005).

10. *Harris v. McRae*, 448 U.S. 297, 326–27 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977).

11. *Harris*, 448 U.S. at 338 (Marshall, J., dissenting). Justice Marshall noted further in a companion case:

Since efforts to overturn [*Roe* and *Doe*] have been unsuccessful, the opponents of abortion have attempted every imaginable means to circumvent the commands of the Constitution and impose their own moral choices upon the rest of society. . . . The impact of the regulations here falls tragically upon those among us least able to help or defend themselves. As the Court well knows, these regulations inevitably will have the practical effect of preventing nearly all poor women from obtaining safe and legal abortions.

Beal v. Doe, 432 U.S. 438, 455 (1977) (Marshall, J., dissenting) (citations omitted). For a discussion of the disparate impact of abortion coverage bans on people of color, see Michele Goodwin & Meigan Thompson, *In the Shadow of the Court: Strategic Federalism and Reproductive Rights*, 18 *GEO. J. GENDER & L.* 333, 352–56 (2017).

12. See, e.g., *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) (“[T]he constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman’s right to decide whether to end her pregnancy.”); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419–20 (1983) (expressly reaffirming *Roe*).

13. President Reagan appointed Sandra Day O’Connor to the Supreme Court in 1981, Antonin Scalia in 1986, and Anthony Kennedy in 1988. President Bush appointed David Souter to the Supreme Court in 1990 and Clarence Thomas in 1991.

14. See, e.g., *Thornburgh*, 476 U.S. at 785 (Burger, C.J., dissenting); *id.* at 814–15 (O’Connor, J., dissenting); *City of Akron*, 462 U.S. at 459 (O’Connor, J., dissenting).

15. 492 U.S. 490 (1989) (plurality opinion in part).

16. *Webster*, 492 U.S. at 518 (plurality opinion).

that she continued to find *Roe*'s analytical framework "problematic,"¹⁷ and Justice Scalia made an outright call for the Court to overrule *Roe*.¹⁸ Following the appointment of Clarence Thomas in 1991, it was widely believed that the Court was poised to do just that.¹⁹

One year later, in *Planned Parenthood of Southeast Pennsylvania v. Casey*, the Supreme Court did reconsider whether the Constitution protects the right to pre-viability abortion. To the consternation of *Roe*'s critics, however, it once again answered the question affirmatively.²⁰ At the same time, however, a plurality of the Court replaced *Roe*'s trimester framework—a variation of strict scrutiny—with the less rigorous undue burden standard.²¹ Applying this standard, the Court upheld mandatory waiting-period and disclosure requirements of a kind that it had previously deemed unconstitutional.²²

After concluding that *stare decisis* warranted continued adherence to *Roe*'s central holding,²³ *Casey* explained that *Roe* is not a typical precedent, and that persistent efforts to overturn it jeopardize not just the rights of those with the capacity to become pregnant but the legitimacy of the Court and the nation's commitment to the rule of law.²⁴ Declaring that "the Court's interpretation of the Constitution call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution,"²⁵ *Casey* concluded that it was not only appropriate but "imperative to adhere to the essence of *Roe*'s original decision."²⁶

The opinion's authors no doubt hoped that their work would settle the matter—doctrinally, at least—once and for all. But Justice Blackmun took a more skeptical view. In a wistful passage at the end of his opinion concurring in part and dissenting in part, he expressed concern that the confirmation process for his successor would reignite debate about the abortion right and potentially tip the scales in the other direction.²⁷ Justice Blackmun was succeeded on the Supreme Court by Justice Breyer, another abortion-rights supporter.

17. *Id.* at 529 (O'Connor, J., concurring in part and concurring in the judgment).

18. *Id.* at 532 (Scalia, J., concurring in part and concurring in the judgment).

19. Neil A. Lewis, *Thomas Declines Request by Panel for Abortion View*, N.Y. TIMES (Sept. 11, 1991), <https://www.nytimes.com/1991/09/11/us/the-thomas-hearings-thomas-declines-requests-by-panel-for-abortion-view.html> [perma.cc/CS9F-BG37].

20. 505 U.S. 833, 845–46 (1992).

21. *Id.* at 876–78 (plurality opinion).

22. *Id.* at 881–87 (plurality opinion).

23. *Id.* at 854–64 (majority opinion).

24. *Id.* at 865–69.

25. *Id.* at 867.

26. *Id.* at 869.

27. *Id.* at 943 (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part) ("I am 83 years old. I cannot remain on this Court forever . . ."). I must confess that the first time I read Justice Blackmun's opinion in *Casey*—some twenty years ago—I felt a sort of arm's-length empathy for the person wondering if his most significant contribution to public service would stand the test of time and feeling powerless to safeguard the progress he had worked so hard to secure. It hits a lot closer to home for me now.

But Blackmun was right to think that the abortion debate would continue to play a pivotal role in the confirmation process for Supreme Court justices—and that abortion access would hang in the balance.

Since *Casey*, the Supreme Court's abortion jurisprudence has fluctuated with changes in the Court's membership. In *Stenberg v. Carhart*, the Court struck down a Nebraska statute banning a method of second-trimester abortion.²⁸ But seven years later in *Gonzales v. Carhart*, after Justice O'Connor was succeeded by Justice Alito, the Court upheld a nearly identical federal statute.²⁹ In *Whole Woman's Health v. Hellerstedt*—which, in my humble opinion, is a high-water mark in the Supreme Court's abortion jurisprudence—the Court clarified that, when applying the undue burden standard, courts must weigh a law's burdens against its benefits to determine if the burdens are justified.³⁰ But just four years later in *June Medical Services v. Russo*, after Justice Kennedy was succeeded by Justice Kavanaugh, a fractured Court could not agree that the undue burden standard requires courts to weigh benefits against burdens—or even that *Whole Woman's Health* had said that it did.³¹

Despite the flip-flopping in these cases, a majority of justices remained committed to certain core principles—namely, that states “may not prohibit any woman from making the ultimate decision to terminate her pregnancy” prior to viability or impose an undue burden on this right.³² Their disagreements were principally about whether particular burdens were justified and who bore the burden of proof. I don't mean to minimize the importance of those disagreements—how courts apply the undue burden standard can determine whether or not, as a practical matter, large segments of the public are able to access abortion services. My point is simply that, throughout this period, the Court did not waver in its recognition of the right to abortion.

Nevertheless, its decisions were infused with profound discomfort about the controversial nature of the abortion right, which stems from committed opposition to abortion by a vocal minority of Americans.³³ In *Stenberg*, as in

28. 530 U.S. 914, 920–22 (2000).

29. 550 U.S. 124, 132–33 (2007).

30. 136 S. Ct. 2292, 2300 (2016).

31. Compare *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2120 (2020) (plurality opinion), with *id.* at 2135–39 (Roberts, C.J., concurring in the judgment).

32. *Gonzales*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 879); accord *June Med. Servs.*, 140 S. Ct. at 2120 (plurality opinion); *id.* at 2135 (Roberts, C.J., concurring in the judgment); *Whole Woman's Health*, 136 S. Ct. at 2300; *Stenberg*, 530 U.S. at 921.

33. Professors Post and Siegel suggest that this discomfort is a virtue. See Post & Siegel, *supra* note 2, at 427–30. In their view, by respectfully acknowledging the competing claims of abortion-rights proponents and opponents before taking sides, the Supreme Court safeguards its legitimacy with all factions of the public while at the same time maintaining independence from political pressure. *Id.* In contrast to scholars who urge judicial minimalism on deeply controversial issues like abortion to avoid public backlash, see, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 114–15 (1999), Post and Siegel argue that divisive court opinions—even those that produce backlash—play a healthy role in constitutional democracy by promoting political engagement and identification with the Constitution. Post & Siegel, *supra* note 2, at 390–91.

many earlier cases, the Court expressly professed its awareness of the controversy and then proceeded, once again, to reaffirm the right to abortion:

We again consider the right to abortion. We understand the controversial nature of the problem. Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child; they recoil at the thought of a law that would permit it. Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with the least resources to undergo illegal abortions with the attendant risks of death and suffering. Taking account of these virtually irreconcilable points of view, aware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the Constitution's guarantees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose. We shall not revisit those legal principles.³⁴

Despite this declaration, the Court seems destined to revisit those legal principles again and again.

II. THE DURABILITY OF THE ABORTION RIGHT

So why has the abortion right endured for so long despite committed efforts by powerful forces to undermine it? In my opinion, it's because of the vital way in which that right embodies core values embedded in the Constitution. This is not the conventional wisdom—or at least a thing that hip constitutional commentators like to admit. For a long time, it was trendy for even progressive academics—particularly those both white and male—to criticize *Roe* as being a product of judicial activism divorced from both the letter and spirit of the Constitution. This type of critique is epitomized in John Hart Ely's 1973 article "The Wages of Crying Wolf," in which the author argues that the abortion right recognized in *Roe* "lacks connection with any value the Constitution marks as special."³⁵ I recall feeling a ferocious sense of anger when I first read this article in law school, and it hasn't diminished much in the decades since. I find it infuriating that a person who lacks the ability to become pregnant could so casually dismiss as subjects of constitutional concern *my* bodily integrity, *my* religious beliefs, *my* ability to participate fully and equally in society, and *my* power to make decisions about intensely personal matters that will profoundly impact the course of my life. In my view, the argument is as sexist and egotistical as it is utterly incorrect.

34. *Stenberg*, 530 U.S. at 920–21 (citations omitted).

35. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 949 (1973); see also *id.* at 936–37, 943 (arguing that the abortion right is not inferable from the values embodied in the Constitution and that *Roe* is "dangerous" because it gives a false impression of "vindicating an interest the Constitution marks as special").

At the risk of stating the obvious, pregnancy is a life-altering condition with far-reaching physical, emotional, spiritual, and economic consequences. A pregnant person experiences palpable physical symptoms like nausea, fatigue, weight gain, increased urination, and swelling of the feet not for days or weeks, but for months. Pregnancy carries serious health risks, including death.³⁶ Maternal mortality is significant in the United States, with Black people dying from pregnancy-related causes at 2.9 times the rate of white people.³⁷ At least one in eight people who give birth experience serious postpartum depression.³⁸ Moreover, pregnant individuals who seek abortion care but are unable to obtain it experience greater poverty and unemployment, and are more likely to remain in contact with abusive partners, than those who are able to obtain a wanted abortion.³⁹

Once one accepts that the Constitution values and protects the rights of women and gender-expansive people to the same extent as cis-gendered men, there can be no real doubt that the abortion right is connected to myriad values that the Constitution marks as special. Compelling someone to remain pregnant for months and ultimately give birth to a child substantially burdens their constitutionally protected liberty, equality, and freedom of belief, especially if they reject the view that spiritually significant human life begins at conception.

In *Casey*, members of the Court who had previously expressed skepticism about the constitutional foundation of the abortion right could not deny this stubborn truth. A majority of the Court recognized that “[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education” because “[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”⁴⁰ It further acknowledged that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”⁴¹ Moreover, in declaring that “[o]ur obligation is to define the liberty of all, not to mandate our own moral code,” the

36. See Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *OBSTETRICS & GYNECOLOGY* 215, 217–18 (2012).

37. DONNA L. HOYERT, NAT’L CTR. FOR HEALTH STAT., *MATERNAL MORTALITY RATES IN THE UNITED STATES, 2020*, at 1 (2022), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/E-stat-Maternal-Mortality-Rates-2022.pdf> [perma.cc/VN3D-2G98]; K.S. Joseph et al., *Maternal Mortality in the United States: Recent Trends, Current Status, and Future Considerations*, 137 *OBSTETRICS & GYNECOLOGY* 763, 766–67 (2021).

38. *Depression Among Women*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 14, 2020), <https://www.cdc.gov/reproductivehealth/depression/index.htm> [perma.cc/NP3T-P7FT].

39. DIANA GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION* 185, 232–33 (2020).

40. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

41. *Id.* at 856.

Court invoked a long tradition of constitutionally prescribed government neutrality in matters of political, social, and religious controversy.⁴² Apparently, it is far easier to castigate a right of crucial importance to the lives of millions of people in an inert commentary or dissent than to abolish it in an opinion that carries the force of law.⁴³

III. LOOKING AHEAD

As I mentioned at the outset, this is a charged moment in our nation's history, one in which renewed attention to social, economic, and legal inequities—and efforts to remediate them—has sparked forceful resistance by those who fear a loss of their relative power and privilege. An awareness of the acrimonious divisions currently plaguing us, and the volatility they create, permeates many of the books reviewed in this issue. For example, Jamal Greene's *How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart* urges greater use of the proportionality standard in constitutional review as a means of reducing political polarization. Jesse Wegman's *Let the People Pick the President: The Case for Abolishing the Electoral College* advocates for reforming the Electoral College to restore to the democratic process the trust and functionality that the author currently finds lacking. And Justice Breyer's *The Authority of the Court and the Peril of Politics* acknowledges increasingly urgent calls to reform the Supreme Court's structure while voicing fear that they will delegitimize the institution in the eyes of the public. The reviews in this issue not only acknowledge these tensions but offer inspiring calls for collective progress toward justice and equity.

Against this polarized backdrop, it is not surprising that calls to overturn *Roe* have once again reached a fever pitch. While I am fairly confident in my assessment of where things stand and how we got here, I am far less sure about

42. *Id.* at 850–51 (“Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other.” (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) and *Texas v. Johnson*, 491 U.S. 397 (1989))); see also *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018) (“[I]t is not . . . the role of the State or its officials to prescribe what shall be offensive.”); *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985) (“[T]he individual’s freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority.”); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .”).

43. In *Whole Woman’s Health v. Hellerstedt*, the Supreme Court made clear that the Constitution does not permit states to hollow out the right protected in *Roe* and *Casey* through unnecessary health regulations that make abortion too costly or difficult to access, 136 S. Ct. 2292, 2309–10 (2016), particularly “for poor, rural, or disadvantaged” patients, *id.* at 2302 (quoting *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014)). See also *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 920–21 (7th Cir. 2015) (“[P]ersons who have a sophisticated understanding of the law and of the Supreme Court know that convincing the Court to overrule [*Roe* and *Casey*] is a steep uphill fight, and so some of them proceed indirectly, seeking to discourage abortions by making it more difficult . . . to obtain them.”).

what comes next. As this issue goes to press, another abortion case is pending at the Supreme Court. In *Dobbs v. Jackson Women's Health Organization*, the Court granted certiorari on the question of whether all pre-viability abortion bans are unconstitutional, which is another way of asking whether the Court should continue to adhere to *Roe's* central holding.⁴⁴ A decision in the case, which concerns a Mississippi statute banning abortion at fifteen weeks of pregnancy, is expected in June. This time, the Court may well overrule *Roe*. Or it may further diminish protection for the abortion right in a way that makes abortion practically inaccessible for many people. Or it may fracture in a way that fails to produce a controlling opinion. Or it may surprise us, yet again. The only thing that's certain is that the decision won't be the Court's last word on the subject.

44. 141 S. Ct. 2619, 2619–20 (2021) (mem.).