

## LEAD ARTICLE

# DOBBS, RIGHT-WING REVISIONISM, AND PUBLIC OUTRAGE: RODRIGO'S LATE-NIGHT CHRONICLE

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*When we next see Rodrigo, he has been brought into town by Giannina's women's rights group. The Supreme Court had just decided Dobbs and revoked a constitutional right that had existed for fifty years prior. Giannina's organization is meeting to discuss possible responses to the Dobbs decision. While he is in town, Rodrigo decides to seek out the professor, hoping to reconnect and pick his brain on this seismic shift in the legal landscape.*

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#### INTRODUCTION: RODRIGO'S RETURN

I was arranging books on the shelf of my new law school office late one evening when I heard footsteps outside followed by a knock on the door.

“Rodrigo!”<sup>1</sup> I exclaimed. “Good to see you. Come in.”

The tall, smiling figure entered and looked for an empty spot in my office, which was littered with unopened boxes.<sup>2</sup>

“Have a seat,” I said, indicating a free spot on the couch. As he put his belongings down, I noticed a slim book with a bright cover sticking out of his backpack.<sup>3</sup> “What brings you around?”

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1. See generally Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) [hereinafter “*Chronicle*”], introducing our character and alter ego, Rodrigo Crenshaw. Rodrigo was born in the United States, but grew up in Italy where his father, an African-American serviceman, was stationed at a U.S. outpost. Rodrigo attended the base high school, then an Italian university (“the oldest in the world, Professor”), graduating second in his class. When the reader meets him, he has returned to the States, at the suggestion of his half-sister, Geneva Crenshaw, to seek the Professor's advice about obtaining an LL.M. degree from an American law school in preparation for a career in law teaching. The two discuss the young man's prospects, Continental social theories, American legal education, and the decline of the West. See *Chronicle*, *supra*. Despite their age difference, the two become good friends, discussing such topics as legal formalism, Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. 1105, 1109–10 (1997); love, Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition and the Redemptive Tragedy of Race*, 81 CALIF. L. REV. 387, 392, 395, 397–98, 400–02 (1993); Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo's Bittersweet Epiphany*, 101 MICH. L. REV. 1201, 1212 (2003); Black and white crime, Richard Delgado, *Rodrigo's Eighth Chronicle, Black Crime, White Fears: On the Social Construction of Threat*, 80 VA. L. REV. 503, 505, 521 (1994); empathy and false empathy, Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61, 65, 71 (1996); and law's recursive character, Richard Delgado, *Groundhog Law*, 21 J. L. SOC'Y 8–9 (2021), over the course of the following years. Readers follow his adventures in graduate school, his first teaching job, and his marriage to Giannina, a novelist, playwright, and later a public interest lawyer. The underlying purpose in creating the Rodrigo series is to give readers an opportunity to see what intellectuals of color think and talk about.

2. The Professor is in the middle of a job move, the latest of several over a long career.

“Giannina is in town for a meeting.<sup>4</sup> A women’s rights organization she belongs to is considering responses to the *Dobbs*<sup>5</sup> case. I came along hoping to pick your brain. I tried to call, but I didn’t have your new number.”

“I’m glad you did,” I said. “Teresa<sup>6</sup> and I were just talking about that case. But before we start, can I offer you coffee or a snack?”

“Gladly,” he said, glancing at my office espresso machine, which I had just unpacked. “Giannina and I heard about your new class on lawyers and social change and looked up your materials online.<sup>7</sup> But they didn’t seem to address cases like *Dobbs*.”

“It’s the first of its kind,” I said, filling the machine with distilled water from a pitcher and doling out some beans I had picked up recently at a corner store. “At least in the modern age. It goes against the role of courts as protectors of minority interests.” After a pause, I added, “Your favorite, French roast—okay?”

“You know me well,” he said. “The two of us couldn’t think of many others like it, either—at least not since *Carolene Products*<sup>8</sup> in 1938 with that famous footnote four.”<sup>9</sup>

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3. It turned out that the book was *LYSISTRATA AND OTHER PLAYS* by Aristophanes (Alan H. Sommerstein trans., Penguin Books 2002). *LYSISTRATA* is an ancient Greek play in which women take concerted action to coerce the men into ending the wars. See *infra* Part VII at nn. 117–20.

4. See Richard Delgado & Noah Markewich, *Rodrigo’s Remonstrance: Love and Despair in an Age of Indifference*, 88 *GEO. L.J.* 263, 264, 268 (2000), introducing Giannina and her mother, Teresa, with whom the Professor was immediately smitten.

5. *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2243 (2022) (overturning *Roe v. Wade*, 410 U.S. 113, 128 (1973), on the ground that “*Roe* was egregiously wrong from the start” and employed weak reasoning) [hereinafter cited as *Dobbs*]. For the view that *Dobbs* itself was wrong, see Alice Rothschild, *The Criminalization of Pregnancy*, *SEATTLE TIMES* (Aug. 1, 2022), <https://www.seattletimes.com/opinion/the-criminalization-of-pregnancy> [https://perma.cc/HW8E-LH4A] (positing that the decision is “likely a response to the growing power of women taking their rightful place in contemporary life [and] challenging their traditional subservient positions in the home and workplace, provoking fear among some men”).

6. See *Rodrigo’s Remonstrance*, *supra* note 4 (introducing Giannina’s mother, Teresa).

7. See Upper Level Course Descriptions, *SEATTLE U. SCH. OF L.*, <https://law.seattleu.edu/academics/degree-programs/jd/curriculum/upper-level-course-descriptions> [https://perma.cc/GP3Q-ZYYU] [hereinafter *Lawyering for Social Change*].

8. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

“And a little later, John Hart Ely’s book explaining the Court’s counter-majoritarian role as a bulwark against majoritarian oppression.”<sup>10</sup> I fished out coffee mugs from a cabinet and set them in front of us. “The Court almost never jettisons a constitutional right after first recognizing it, especially fifty years later after half the adult population has come to rely on it in planning their lives.<sup>11</sup> By the way, how much time do we have?”

“Giannina’s meeting is scheduled to end about an hour from now. She said she might drop in on us if it ends early. She mentioned there’s something she wanted to run past you. For some reason, she was reluctant to discuss it with me.”<sup>12</sup>

“Maybe we’ll find out later,” I said, filling our cups with steaming coffee. “We do have something in common. *Dobbs* came down at the very time when my own field, critical race theory, has been coming under attack.”<sup>13</sup>

“She and I noticed that, too. And when we reviewed your syllabus those parallels jumped out. Both fields are products of social movements.<sup>14</sup> So defending them can draw from the experience of feminists in the campaign leading up to *Roe v. Wade*,<sup>15</sup> NAACP Legal Defense Fund lawyers in the march toward *Brown v. Board of*

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9. *Id.* at 152 n.4. As he spoke, the Japanese internment cases, *Korematsu v. United States*, 323 U.S. 214 (1944), and *Hirabayashi v. United States*, 320 U.S. 81 (1943) came to mind, but the Court treated them as war-powers cases, ignoring their impact on minority interests. *See, e.g.*, PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* 325–29 (1993).

10. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1982).

11. *See infra* text and notes 35–37, discussing how people have come to rely on the right.

12. *See infra* Part VII.

13. *See, e.g.*, Janel George, *A Lesson on Critical Race Theory*, AM. BAR ASS’N J. (Jan. 11, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory) [https://perma.cc/7XJ6-Y4AX].

14. In the case of feminism, going back at least as far as the suffragists, and with critical race theory to the early work of Derrick Bell.

15. 410 U.S. 113 (1973).

*Education*,<sup>16</sup> or gay rights groups like Lambda in the campaign leading up to *Obergefell*.<sup>17</sup> Gee, that coffee's great."

"It's fair trade, from a little store down the block. But those movements are not all. My materials cover the push to gain compensation for soldiers exposed to Agent Orange in Vietnam,<sup>18</sup> environmental justice, and animal rights, a field some of my students are developing right now.<sup>19</sup> Even fair-trade coffee, like what we're drinking—all products of social action. And I'm sure you noticed that lawyers played only small roles in all of them, at least in the beginning. In fact, many authorities say that lawyers should stay away, at least at first, and let the pressure build for a while."<sup>20</sup>

### I. THE *DOBBS* RULING AND ITS CONSEQUENCES

"We noticed that, too," he said, squirming a little. "And most of the responses Giannina's group is talking about don't require lawyers. Much as people like us want to feel needed, taking *Dobbs* on frontally in hopes of persuading the Supreme Court to reverse itself is unrealistic, at least for now. Republicans have been seeding the judiciary with Federalist Society members who are young and will be on the bench for many years."<sup>21</sup>

I nodded. "Not only that. The opinion exudes the kind of self-righteous certainty that reminded some commentators of a steel

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16. 347 U.S. 483 (1954); *see, e.g.*, MARK TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987) (describing the long campaign).

17. *Obergefell v. Hodges*, 576 U.S. 644 (2015); *see also* Richard Delgado & Jean Stefancic, *Radical Method*, 24 U.C. DAVIS SOC. JUST. L. REV. 3, 7 (2020) (noting that radical and conventional legal strategies can combine to create change).

18. *See Lawyering for Social Change*, *supra* note 7 (listing topics).

19. *E.g.*, PETER SINGER, *ANIMAL LIBERATION* (1975) (discussing animal rights from a philosophical perspective); Ryne P. Smith, *The Lawyer's Role in Improving "Humane" Meat Labeling*, 48 MITCHELL HAMLINE L. REV. 688, 699–701 (2022) (challenging the industry's monopoly on the term "meat" in product labeling rules).

20. *E.g.*, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 3 (2d ed. 2008) (noting that social change begets legal change).

21. Richard Delgado & Jean Stefancic, *Farm-Raised Trout*, 25 U.C. DAVIS SOC. JUST. L. REV. 1 (2020); *see also* David Von Drehle, *The GOP Courted Antiabortion Zealots. Now They're Stuck with Them.*, WASH. POST (July 15, 2022, 4:17 PM), <https://www.washingtonpost.com/opinions/2022/07/15/republicans-stuck-with-antiabortion-zealots> [<https://perma.cc/N4M9-9KJY>].

trap.<sup>22</sup> The majority opinion asserts, with great certitude, that the Court has no business inventing new rights merely because a social group gets its ear.<sup>23</sup> Alito even pointed out, perhaps jokingly, that at least one foreign leader who criticized his majority opinion in *Dobbs* lost his job after doing so and that others might ‘pay the price.’<sup>24</sup>

“I caught that remark, too,” Rodrigo said. “For him, rights have to be either mentioned in the Constitution or steeped in a history of social practice, going back to the time of framing.”<sup>25</sup> Even Supreme

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22. See Garrett Epps, *Alito’s Arrogance and the End of Roe*, WASH. MONTHLY (May 5, 2022), <https://washingtonmonthly.com/2022/05/05/alitos-arrogance-and-the-end-of-roe> [<https://perma.cc/N65A-2Q8H>]; Robert Barnes, *Alito Dismisses Foreign Criticism of Supreme Court’s Abortion Ruling*, WASH. POST (July 28, 2022, 7:32 PM), <https://www.washingtonpost.com/politics/2022/07/28/alito-defends-roe-wade-abortion-ruling> [<https://perma.cc/L859-FLWX>] (noting Alito’s exasperated tone in response to doubts about the ruling); see also Liane Jackson, *Reigning Supreme: A Tipped Scale Has Unbalanced our ‘Coequal’ Branches of Government*, AM. BAR ASS’N J., Apr.–May 2022, at 24–25 (noting that “[some] observers worry about an increasing rule by fiat, evidenced by the [C]ourt’s willingness to overturn cases with decades of precedent and its overuse of the so-called shadow docket—traditionally intended for emergency actions but now used for substantive decisions . . . without oral argument or transparency”); Sarah Hougen Poggi & Cynthia A. Kierner, *A 1792 Case Reveals that Key Founders Saw Abortion as a Private Matter*, WASH. POST (July 19, 2022, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2022/07/19/1792-case-reveals-that-key-founders-saw-abortion-private-matter> [<https://perma.cc/N6HS-GG>] (discussing the self-certain quality of the opinion); Linda Greenhouse, *Religious Doctrine, Not the Constitution, Drove the Dobbs Decision*, N.Y. TIMES (July 22, 2022), <https://www.nytimes.com/2022/07/22/opinion/abortion-religion-supreme-court.html> [<https://perma.cc/2EMN-5DT4>] (same).

23. *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2278–79 (2022).

24. Sara Boboltz, *Justice Alito Mocks World Leaders Who Criticized Court’s Abortion Ruling*, HUFFPOST (July 28, 2022, 6:54 PM), [https://www.huffpost.com/entry/alito-rome-dobbs-abortion\\_n\\_62e2fdcae4b0c60a5666937a?utm\\_source=Sailthru&utm\\_medium=email&utm\\_campaign=Morning%20Email%207-29-22&utm\\_term=us-morning-email](https://www.huffpost.com/entry/alito-rome-dobbs-abortion_n_62e2fdcae4b0c60a5666937a?utm_source=Sailthru&utm_medium=email&utm_campaign=Morning%20Email%207-29-22&utm_term=us-morning-email) [<https://perma.cc/CLY6-GE4V>] (joking that Boris Johnson “paid the price” for doing so).

25. *Dobbs*, 142 S. Ct. at 2235 (Synopsis, listing all passages that discuss possible express mention in the Constitution or long grounding in history and tradition—and finding neither in *Roe v. Wade’s* declaration that abortion is a protected right or interest); see also Kenji Yoshino, *Is the Right to Same-Sex Marriage Next?*, N.Y. TIMES (June 30, 2022), <https://www.nytimes.com/2022/06/30/opinion/same-sex-marriage-supreme-court.html> [<https://perma.cc/4RN3-P4Z6>] (noting that the Court now rejects “[u]nenumerated rights . . . not explicitly set forth in the Constitution [or] inferred from its text, structure, ethos, and history” and urging women’s advocates to explore Equal Protection challenges for this reason).

Court precedent is not entitled to decisive consideration unless it is well reasoned and grounded in those factors.<sup>26</sup>

“For their part,” he continued, fishing out a crumpled piece of paper from his backpack, “the dissenters wrote that the decision amounted to ‘curtailment of women’s rights, and of their status as free and equal citizens,’<sup>27</sup> that it ‘undermines the Court’s legitimacy,’<sup>28</sup> breaks with core tenets of court procedure, including respect for its own precedents,<sup>29</sup> and was likely to wreak real damage to society and the Court’s reputation.<sup>30</sup> Supreme Court commentator Linda Greenhouse noted that analytical or historical integrity played little part in the decision, which bristled with religious dogma and ‘moral outrage.’<sup>31</sup> As she put it, the Court doesn’t seem worried about losing legitimacy in the eyes of the public.<sup>32</sup>

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26. *Dobbs*, 142 S. Ct. at 2278-79; see also Jeffrey L. Fisher, *The Other Way the Supreme Court is Nullifying Precedent*, POLITICO (Sept. 14, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/09/16/supreme-court-cases-precedent-00056689> [<https://perma.cc/M4H8-FR6C>] (noting that the conservative majority have been reinterpreting inconvenient precedent so as to minimize its significance).

27. *Dobbs*, 142 S. Ct. at 2318 (Breyer, J., dissenting).

28. *Id.* at 2350.

29. *Id.* at 2319–20; see also Joan E. Greve, *What the Liberal Justices’ Scorching Dissent Reveals About the Supreme Court*, GUARDIAN (July 11, 2022), <https://www.theguardian.com/law/2022/jul/11/us-supreme-court-liberal-justices-dissenting-opinions> [<https://perma.cc/Q8P6-72FK>] (summarizing liberal discontent with the ruling).

30. Greve, *supra* note 29.

31. Greenhouse, *supra* note 22. Other commentators have noted that precedent and doctrinal consistency are beginning to play little role in some recent Supreme Court decisions. See Elie Mystal, *Make No Mistake, The Supreme Court Will Kill Affirmative Action*, NATION (Nov. 1, 2022), <https://www.thenation.com/article/society/affirmative-action-oral-argument-supreme-court> [<https://perma.cc/3W9S-9C8L>].

32. *Id.*; see also Yvonne Wingett Sanchez, Patrick Marley & Matthew Brown, *Trust in Supreme Court Falters After Roe Decision*, WASH. POST (July 3, 2022, 9:52 AM), <https://www.washingtonpost.com/politics/2022/07/03/supreme-court-trust> [<https://perma.cc/9USH-VDV8>]; Noah Feldman, *Ending Roe is Institutional Suicide for Supreme Court*, WASH. POST (June 24, 2022, 3:31 PM), [https://www.washingtonpost.com/business/ending-roe-is-institutional-suicide-for-supreme-court/2022/06/24/b76e7650-f3db-11ec-ac16-8fbf7194cd78\\_story.html](https://www.washingtonpost.com/business/ending-roe-is-institutional-suicide-for-supreme-court/2022/06/24/b76e7650-f3db-11ec-ac16-8fbf7194cd78_story.html) [<https://perma.cc/8LNW-BECU>].

Most of the public seems to favor the right to abortion. See Aaron Blake, *As Roe v. Wade Faces Demise, Support for Abortion Rights Hits New Highs*, WASH. POST (June 6, 2022, 12:01 PM), <https://www.washingtonpost.com/politics/2022/06/06/abortion-rights->

“They should,” I said. “And not only because some of the consequences the dissenters warned about are starting to come true—Teresa and I created a clipping file just the other day—including the inability of pregnant women to obtain lifesaving medical treatment,<sup>33</sup> confusion among doctors about what they can and cannot do,<sup>34</sup> uncertainty over whether ectopic pregnancies fall under post-*Dobbs* prohibitions,<sup>35</sup> inability of many women to plan their lives,<sup>36</sup> uncertainty over whether a ten-year old rape victim may terminate an otherwise normal-seeming pregnancy,<sup>37</sup> and inability to carry out family planning and size.<sup>38</sup> We even read that some economists believe the market may suffer because unwanted

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polling-support [<https://perma.cc/6WAG-W2S8>]; Ann Telnaes, *The Supreme Court's Crisis of Legitimacy*, WASH. POST (June 30, 2022), <https://www.washingtonpost.com/opinions/interactive/2022/ann-telnaes-supreme-court-crisis-legitimacy> [<https://perma.cc/2T28-DAYV>] (diagram). Yet the Court seems unconcerned over public opinion. See Dahlia Lithwick, *Justices Are Not Kings*, SLATE (June 24, 2022, 5:57 PM), <https://slate.com/news-and-politics/2022/06/dobbs-decision-supreme-court-legitimacy.html> [<https://perma.cc/C8D3-BDKX>]; Nick Ehli & Robert Barnes, *Kagan Says Questions of Legitimacy Risky for Supreme Court*, WASH. POST (July 21, 2022, 6:07 PM), <https://www.washingtonpost.com/politics/2022/07/21/elena-kagan-supreme-court-legitimacy> [<https://perma.cc/5SYC-J2Z3>] (same).

33. On doctors' uncertainty, see, e.g., Michelle Goldberg, *The Anti-Abortion Movement's Contempt for Women Is Worse Than I Imagined*, N.Y. TIMES (July 18, 2022), <https://www.nytimes.com/2022/07/18/opinion/miscarriages-abortion-ban.html> [<https://perma.cc/56MK-WAKG>]; Katie Kindelan, *'Seismic Impact on Women's Lives': 5 Things to Know After the Supreme Court Overturned Roe v. Wade*, ABC NEWS, (June 24, 2022, 8:07 PM), <https://tinyurl.com/4kft2mac> [<https://perma.cc/JVJ2-HGRG>].

34. See Amanda Seitz & Josh Kelety, *Abortion Foes Downplay Complex Post-Roe v. Wade Realities*, AP NEWS (July 29, 2022), <https://apnews.com/article/abortion-health-ohio-government-and-politics-4eb0712711637e51c3676c852a6b2d7c> [<https://perma.cc/F5K9-EX4X>].

35. *Id.*; see also Rothschild, *supra* note 4.

36. Seitz & Kelety, *supra* note 34; see also Rothschild, *supra* note 4.

37. Conservatives are widely denouncing the incident as a hoax. See Monica Hesse, *The Ten-Year Old Pregnant Girl Exists. Why Did People Think She Didn't?*, WASH. POST (July 14, 2022, 5:32 PM), <https://www.washingtonpost.com/lifestyle/2022/07/14/10-year-old-abortion> [<https://perma.cc/64VF-JBT5>].

38. *Id.*; see also Faith Karimi, *Some People in the U.S. Are Rushing to Get Sterilized After the Roe v. Wade Ruling*, CNN NEWS (July 25, 2022, 9:01 AM), <https://www.cnn.com/2022/07/25/us/people-getting-sterilized-roe-v-wade-cec/index.html> [<https://perma.cc/B7VR-FV7V>] (discussing a healthy twenty-six-year-old woman who scheduled a tubal ligation because she feared being raped and unable to obtain an abortion).



pregnancies will cause many women to leave the workplace and purchase little other than baby products and other small items.”<sup>39</sup>

“The conservative wing may not stop with abortion,” Rodrigo added. “Commentators warn that affirmative action, gay rights and same-sex marriage may be next.<sup>40</sup> Contraception and prayer in schools, too.”<sup>41</sup>

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39. Christina Lindblad, *Abortion Bans Will Unravel Decades of Economic Progress*, BLOOMBERG BUS. NEWS (Aug. 3, 2022, 4:00 AM), <https://www.bloomberg.com/news/features/2022-08-03/roe-v-wade-being-overturned-will-hurt-the-us-economy> [<https://perma.cc/M7NZ-43WY>]; see also Editorial Board, *What the Biden Administration Could Do Now to Protect Abortion Rights*, N.Y. TIMES (July 8, 2022), <https://www.nytimes.com/2022/07/08/opinion/abortion-pills-policy.html> [<https://perma.cc/5DZ6-TQWL>] (warning that the decision will lead to “an increase in deaths of pregnant women by more than 20 percent,” with even higher rates for Black women); Jennifer Rubin, *It’s No Wonder Right-Wing Justices Did Not Weigh Dobbs’s Awful Impact on Women*, WASH. POST (July 25, 2022, 10:00 AM), <https://www.washingtonpost.com/opinions/2022/07/25/turnaway-study-abortion-bans-impact-women> [<https://perma.cc/27A6-PVRB>]; Rick Newman, *With Roe v. Wade Defunct, a ‘Poverty Shock’ Is Coming*, YAHOO! FIN. (June 24, 2022), <https://finance.yahoo.com/news/overturning-roe-v-wade-could-cause-a-poverty-shock-172630631.html> [[https://perma.cc/85R\]-2AKA](https://perma.cc/85R]-2AKA)] (warning of an economic downturn); Abby J. Leibman, *Forty Percent of Single Moms Face Food Insecurity, The Fall of Roe v. Wade Will Exacerbate That*, MS. MAG. (July 26, 2022) <https://msmagazine.com/2022/07/26/abortion-single-moms-hunger-poverty> [<https://perma.cc/6F5H-Q2SJ>] (same). Maureen Dowd accuses the Court of trying to send women back to the Dark Ages. Maureen Dowd, *The Radical Reign of Clarence Thomas*, N.Y. TIMES (June 25, 2022), <https://www.nytimes.com/2022/06/25/opinion/clarence-thomas-abortion-supreme-court.html> [<https://perma.cc/2WXT-YVFK>].

40. Kenji Yoshino, *supra* note 5; Arianna Coghill, *At Least 25 States May Be One Supreme Court Decision Away from Banning Same-Sex Marriage*, MOTHER JONES (July 23, 2022), <https://www.motherjones.com/politics/2022/07/obergefell-hodges-clarence-thomas-dobbs-roe-lgbtq> [<https://perma.cc/E8EA-65XG>]; see also Jamelle Bouie, *The Movement That Put Alito on the Court Isn’t Finished*, N.Y. TIMES (May 10, 2022), <https://www.nytimes.com/2022/05/10/opinion/if-you-think-republicans-will-stop-at-overturning-roe-you-arent-paying-attention.html> [<https://perma.cc/EU2X-3A26>] (opinion) (warning that conservative interest groups may have broader designs).

41. For a warning that *Dobbs* may be just a start, see Caroline Kitchener, *Roe’s Gone, Now Anti-Abortion Lawmakers Want More*, WASH. POST (June 25, 2022, 7:52 PM), <https://www.washingtonpost.com/politics/2022/06/25/roe-antiabortion-lawmakers-restrictions-state-legislatures> [<https://perma.cc/RC69-CFVD>]; Hannah Natanson, *After Court Ruling Conservatives Push Prayer into Schools: They Say Church and State Are Already Too Separate*, WASH. POST (July 26, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/07/26/school-prayer-kennedy-church-state> [<https://perma.cc/C4VK-TYUZ>].

## II. INSTITUTIONAL FACTORS—MEMORY AND JUDICIAL LEGITIMACY

After a pause, he added. “But I think you mentioned that those medical consequences were not all.”

“They’re not,” I said. “Several commentators point out that the Court is in danger of losing legitimacy in the eyes of the public.<sup>42</sup> Few say why, exactly. But I can think of two reasons, one having to do with the role of memory, and the other with the Court as a counter-majoritarian institution.”

“We didn’t see these points in your materials.”

### A. *The Role of Memory*

“They’ll be there in the 2023 version,” I said. “This is a new problem in movement theory. With memory, it’s simply that it’s much easier to change things back than to move them forward in a new direction.”

“That stands to reason, but why?”

“With conservative change, everyone has a memory of how things were before—in what some paint as the good old days. It’s like shooting fish in a barrel. But with progressive change, one usually is asking society to move to somewhere it has never been. People want assurance that it will really work and not just make things worse. So it’s harder moving things in that direction.”

“I agree,” he said, “although a colleague once told me that the conservative assault on abortion wasn’t easy at all but took years of planning and organizing. Some of his friends were in that movement, but he wasn’t, since he believes that the woman’s choice should take precedence. He mentioned that the attack on gun policy wasn’t that easy either.”

“What about the current situation? Conservatives on the Court took advantage of the opportunity *Dobbs* gave them to roll things back. I gather you think that’s where legitimacy comes in?”

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42. See *supra* notes 29–32 and accompanying text; see also Jamelle Bouie, *The Supreme Court Seems Awfully Nervous About Its Own Legitimacy*, N.Y. TIMES (Oct. 5, 2022), <https://www.nytimes.com/2022/10/04/opinion/roberts-alito-kagan-barrett-thomas.html> [<https://perma.cc/4BRC-68GF>].

### B. *Legitimacy*

“I do,” he said. “Even if doctrinal correction is unlikely any time soon because of the Court’s new composition, the public sides strongly with women.<sup>43</sup> With outrage running high, popular countermeasures should be quite feasible.”<sup>44</sup>

“They should. The reading public know that the Court is supposed to be the protector of minority interests. For legal scholars—especially old-timers like me—it brings to mind the *Carolene Products* footnote<sup>45</sup> and John Hart Ely’s famous axiom.<sup>46</sup> The public—the women in it, at least—are outraged because they know the Court has almost never reversed an important right affording minorities protection from majoritarian discrimination, as *Dobbs* does.”

“And that’s where memory comes in, too, Professor. Many women, even relatively young ones like Giannina, remember the early years when abortion rights first arrived to great celebration. They also learned from the older sisters how much work it took to get them recognized and don’t want them to slip away without a fight.”

“OK,” I said. “Now that we agree on what we are up against, why don’t we put our heads together about responses to *Dobbs*. I could start by listing one or two I thought of. Then you could add ones that you and Giannina have come up with and we can see what, if anything, they have in common.”<sup>47</sup>

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43. See Blake, *supra* note 32; see also *infra* notes 44–47 and accompanying text.

44. See *infra* notes 111–115 and accompanying text. Concern is running high even with some members of Trump’s own party. See Phillip Bump, *The GOP Has a Trump Problem on Abortion*, WASH. POST (July 15, 2022, 11:41 AM), <https://www.washingtonpost.com/politics/2022/07/15/gop-has-trump-problem-abortion/> [<https://perma.cc/TCK5-GYQ3>]; see also *Right-Wing Justices Put Supreme Court at Odds with America*, SEATTLE TIMES (July 1, 2022, 1:28 PM), <https://www.seattletimes.com/opinion/editorials/right-wing-justices-put-supreme-court-at-odds-with-america/> [<https://perma.cc/8GH5-G6A2>] (noting that the *Dobbs* opinion “has done real damage to America” and is unpopular with the public); Jonathan Weisman & Katie Glueck, *Republicans Begin Bracing for a Fierce Abortion Backlash*, N.Y. TIMES (Aug. 5, 2022), <https://www.nytimes.com/2022/08/05/us/politics/republicans-abortion-kansas.html> [<https://perma.cc/YEK2-CPDN>].

45. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

46. See generally ELY, *supra* note 10 and accompanying text.

47. See *infra* notes 109–122 and accompanying text.

### III. THE FIRST RESPONSE: ABORTION MAY NOT BE IN THE CONSTITUTION, BUT CONSENT IS

When he nodded affirmatively, I began as follows. “My first reaction is that abortion may not be in the Constitution, but consent is.<sup>48</sup> By the way, would you like some condiments in your coffee? They’re right over there. And the microwave is right there, too, if it’s getting cold.”

He retrieved sugar and creamer from my office shelf, stirred them in, and took a sip. Then, looking up with an animated expression that warmed my old professor’s heart, he exclaimed. “You know, nobody seems to have pointed that out. But, as you say, it’s right there in Article II.<sup>49</sup> The Constitution provides that the President nominates new justices with the advice and consent of the Senate.<sup>50</sup> He can’t do it all by himself, and neither can they.”

A second later, he exclaimed, “Wow! Professor, you’re really onto something. You see, fraud and deception everywhere vitiate consent—in contracts,<sup>51</sup> employment law,<sup>52</sup> sales,<sup>53</sup> marriage,<sup>54</sup> immigration,<sup>55</sup> and even military enlistments.<sup>56</sup> If Bill, a lanky teenager who is only fifteen but has facial hair and looks much older, deceives an Army recruiter into thinking he is 18, the military can

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48. U.S. CONST. art. II, § 2 (providing that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . .”).

49. *Id.*

50. *Id.*

51. See Search for Terms “Fraud” and “Vitiates,” CASEMINE, <https://www.casemine.com/search/us/%27fraud%2Bvitiates%22> [<https://perma.cc/R3PV-T3HF>] (legal research tool showing the many areas in which fraud vitiates consent).

52. *Id.*

53. *Id.*

54. *Annulments and Divorce Explained*, KURTZ & BLUM (Nov. 3, 2017), <https://www.kurtzandblum.com/blog/annulments-and-divorce-explained> [<https://perma.cc/6KTK-LADX>] (discussing remedies for a fraudulent marriage).

55. *Scams, Fraud, and Misconduct*, U.S. CITIZENSHIP & IMMIGR.SERVS. <https://www.uscis.gov/scams-fraud-and-misconduct/scams-fraud-and-misconduct> [<https://perma.cc/VDL4-453V>].

56. See TRIAL DEF. SERV., U.S. ARMY, WHAT YOU SHOULD KNOW ABOUT CHAPTER 7, AR 635-200 DEFECTIVE ENLISTMENTS/RE-ENLISTMENTS AND EXTENSIONS AND FRAUDULENT ENLISTMENT 1–2, [https://home.army.mil/knox/application/files/1315/6624/4721/Chapter\\_7.pdf](https://home.army.mil/knox/application/files/1315/6624/4721/Chapter_7.pdf) [<https://perma.cc/35M6-R4JX>] (discussing remedies for fraudulent enlistment).

kick him out as soon as they learn his real age.<sup>57</sup> Even if he has been sworn in and started basic training. Professor, this is dynamite stuff!”

“Well, we old-timers do come up with a new idea or two every now and then, even if we take a little longer coming up with them than people your age. And I might also point out that consent also satisfies Alito’s second criterion. It’s thoroughly grounded in social practice everywhere you look.

“But with our gangly recruit,” I quibbled, “what if the authorities don’t find out about his lie until forty years later after he has compiled a brilliant military record, earned a dozen medals, and been promoted to general? Mightn’t they overlook the original deception and let him finish out his career?”

“They might,” he said, “but if the truth came out soon, he’d find himself out the door and back working at the neighborhood car wash.<sup>58</sup> By the same token, if a man tells a woman he wants to marry her and have a large family, but it comes out a few weeks after they come back from the honeymoon that he had an irreversible vasectomy many years ago, she is entitled to an annulment.<sup>59</sup> I read that in a family law hornbook once when I was studying for the bar. And the same is true for a car agency that resets the odometer on a used car and sells it to an unwitting buyer who only finds out about it later. This happened to a friend of mine. The dealer had to pay a big fine.”<sup>60</sup>

“What about a Supreme Court nominee who lies about his credentials<sup>61</sup> or approach to precedent? You can’t turn back his

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57. *See id.* (listing repercussions such a youth might face).

58. *Id.*

59. *See* KURTZ & BLUM, *supra* note 54.

60. *See supra* notes 55–60 (discussing fraud in consumer transactions and sales); *see also* *Federal Remedies for Automobile Fraud Just Got Even More Powerful*, NAT’L CONSUMER L. CTR. (Nov. 20, 2019), <https://library.nclc.org/federal-remedies-used-car-fraud-just-got-even-more-powerful#content-0> [<https://perma.cc/P2HP-WR5K>].

61. Consider a hypothetical nominee who says he was on the law review even though he was not, graduated barely in the middle of his class, dropped out, and completed his legal education at an evening law school and later was disciplined by the bar several times, all of which he left off his c.v. and sidestepped under direct questioning. He was, however, a staunch member of the Federalist Society. *See* Billy Witz & Coey Kilgannon, *The (Real) Team at the Center of a Santos Tale*, N.Y. TIMES (Jan. 26, 2023), at A1 (describing a candidate who succeeded in winning a seat in Congress on the strength of fabricated achievements).

odometer,” I caviled, resolving to play my straight-man role to the hilt.<sup>62</sup>

After a moment’s reflection, he said, “I like the way you push me, Professor. I don’t think it has ever come up. So Congress would not be bound by precedent and could do whatever it thought the situation called for.”

“Such as maybe reopening the hearings,” I said. “Or taking a new vote, much as Trump wanted to do in the last election.”<sup>63</sup>

“Republicans would complain mightily,” he said. “They seem to care a great deal about fraud and deception, but only when they threaten one of their own.”<sup>64</sup> Take a Supreme Court nominee who outright lied about an important issue, such as believing that *Roe v. Wade* was a settled precedent, when he really didn’t.<sup>65</sup> Instead, he

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62. Imagine a judicial candidate who says, “I fully agree, Madame Congresswoman, with *Roe v. Wade*, women’s equality, and the right of all sexes to marry anyone they want, including members of their own”—and two months later rules against each one. In the *Dobbs* case, three recently appointed justices engaged in deception, to one degree or another, to Congress or individual members of it, about their intention to uphold precedent, including *Roe v. Wade*. See Robert Barnes, *Supreme Court, Dogged by Questions of Legitimacy, Is Ready to Resume*, WASH. POST (Sept. 29, 2022, 8:06 PM), <https://www.washingtonpost.com/politics/2022/09/29/supreme-court-roberts-kagan-legitimacy> [<https://perma.cc/XR5J-DJHK>] (quoting law professor Melissa Murray).

63. Steve Benen, *Short on Options, Trump Calls for a New Idea: A Do-Over Election*, NBC NEWS (Oct. 18, 2021), <https://www.msnbc.com/rachel-maddow-show/maddowblog/short-options-trump-pushes-new-idea-do-over-election-n1281740> [<https://perma.cc/6PNK-5HT4>] (noting that Trump called for a new 2020 election to correct alleged improprieties in the first one).

64. Or even when it is merely a risk. See Phillip Bump, *The Right Sees Democracy at More Risk, Thanks Largely to ‘Fraud’ Claims*, WASH. POST (June 6, 2022, 11:15 AM), <https://www.washingtonpost.com/politics/2022/06/06/right-sees-democracy-more-risk-thanks-largely-fraud-claims> [<https://perma.cc/N3B5-PLVD>].

65. See, e.g., Jared Gans, *Manchin ‘Alarmed’ by Gorsuch, Kavanaugh’s Votes on Roe*, HILL (June 24, 2022, 12:03 PM), <https://thehill.com/regulation/court-battles/3535914-manchin-alarmed-by-kavanaugh-gorsuchs-votes-on-roe> [<https://perma.cc/ZR9V-FFG9>]. Kamala Harris believed the same two candidates deceived her, too. Adela Suliman & Mariana Alfaro, *Harris Never Believed Kavanaugh and Gorsuch Would Uphold Roe*, WASH. POST (June 28, 2022, 8:37 AM), <https://www.washingtonpost.com/politics/2022/06/28/kamala-harris-abortion-supreme-court-roe-wade> [<https://perma.cc/3TR4-GPAP>]; see also Dowd, *supra* note 39 (noting that “Neil Gorsuch and another Trump appointee, Brett Kavanaugh, are now facing accusations from senators that they dissembled to get on the court and

secretly believes it was a poorly reasoned opinion that got through only because the Court was in the thrall of unprincipled liberals who gave in to a noisy interest group.<sup>66</sup> So he keeps quiet about his belief and is confirmed.<sup>67</sup> Years later, his deception comes to light but, by then, the justice insists that he has had a revelation. Fetuses are now persons in their own right and entitled to all the rights of full-fledged infants. Maybe even more so because they are helpless and in need of protection. The shallow reasons that would have led Congress to reject his candidacy years earlier had they known about them have fallen by the wayside. The justice now has supposedly had an epiphany and is a different person with stronger reasons for ruling as he did in a case like *Dobbs*. People can change, you know.”

“That’s true,” I conceded. “You push me, too, which I like. It might depend, don’t you think, on how much time has elapsed? If the new justice has a very quick turn-around from the answers he gave at his confirmation hearings, the Senate might want to take another look.

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played down their intentions to throw out *Roe*.”); Carl Hulse, *For Collins, Decision Is a Betrayal by Kavanaugh*, N.Y. TIMES, May 25, 2022, at A1 (same).

66. On how this risk allegedly arose in recent confirmation proceedings, see Aaron Blake, *How Collins and Murkowski Got the Trump Justices’ Roe Positions Wrong*, WASH. POST (May 3, 2022, 11:24 AM), <https://www.washingtonpost.com/politics/2022/05/03/trump-justices-ro-collins> [<https://perma.cc/K5EV-8BXB>]. Sam Alito had long opposed abortion rights but kept relatively quiet about his views until he was confirmed. John A. Farrell, *Alito Assured Ted Kennedy in 2005 of Respect for Roe, Diary Says*, N.Y. TIMES (Oct. 25, 2022), <https://www.nytimes.com/2022/10/24/us/politics/alito-kennedy-abortion.html> [<https://perma.cc/EG9K-JLUY>]; Charlie Savage, *Decades Ago, Alito Laid out Methodical Strategy to Eventually Overrule Roe*, N.Y. TIMES (June 25, 2022), <https://www.nytimes.com/2022/06/25/us/politics/samuel-alito-abortion.html> [<https://perma.cc/5DC6-HTZ6>]; see also Carl Hulse, *Kavanaugh Gave Private Assurances. Collins Says He ‘Misled’ Her*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/roe-kavanaugh-collins-notes.html> [<https://perma.cc/Z6AL-QSC2>] (noting that “the future justice . . . cited his stated commitment to precedent on *Roe*, helping clinch his confirmation”).

67. See Seung Min Kim, *Draft Abortion Opinion Puts New Spotlight on Confirmation Hearings*, WASH. POST (May 4, 2022, 3:18 PM), <https://www.washingtonpost.com/politics/2022/05/04/abortion-supreme-court-confirmation-hearings> [<https://perma.cc/7LBZ-8FPA>] (noting that a number of nominees seemed to change their views on abortion very soon after they were confirmed); see also *infra* text and note 93 (discussing a national commission that considered possible improvements in the confirmation process).

Kavanaugh, for example, showed his true colors only a short time later.”<sup>68</sup>

“Wigmore says that mental states are presumed to continue until an intervening event puts them in question.<sup>69</sup> Presumably this applies to Supreme Court nominees, too. They can change over time, but presumably not in five seconds. Trump, for example, wanted to court-martial retired military officers who, years later, took positions adverse to his well after they had put their uniforms in mothballs and taken up fishing.<sup>70</sup> So Trump apparently believed that serious sins have long roots worth exhuming.”

“It seems we both agree,” I said, “that the length of the interval would be an important consideration. Why don’t we move on to the next reason.”

#### IV. THE SECOND RESPONSE: FEDERAL SUPREMACY

“Fine with me,” he said. “We both agree that even if abortion is not deeply rooted in the text of the Constitution, consent is, right up there in black and white like the interstate commerce clause, which conservatives tend to like,<sup>71</sup> even though some of them are up in arms over the idea that some women may travel to other states to get abortions that are forbidden in their own.”<sup>72</sup>

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68. See Molly Roberts, *Susan Collins Confronts a Moment of Truth*, WASH. POST (June 2, 2022, 1:12 PM), <https://www.washingtonpost.com/opinions/2022/06/02/susan-collins-supreme-court-kavanaugh-truth> [<https://perma.cc/5DRS-C7BM>] (noting that the young Justice changed his mind only four years later).

69. WIGMORE ON EVIDENCE (4th ed., 2021), (citing *Ederly v. Ederly*, 193 Md. App. 215, 230 (2010)) (for an example of a clear intervening event: death).

70. Dan Lemothe, *Trump Wanted to Court-Martial Retired Officers, Book Says*, WASH. POST (May 11, 2022, 5:00 AM), <https://www.washingtonpost.com/national-security/2022/05/11/esper-book-trump-mchrysal-mcraven> [<https://perma.cc/MS3L-FWJ6>].

71. Even more firmly grounded than interstate travel, which is in the document only by implication. See, e.g., Debra Cassens Weiss, *Does Right to Travel for Abortion Include Right to Avoid Penalty? Kavanaugh Concurrence Doesn't Go So Far*, AM. BAR ASS'N J. (July 13, 2021, 11:35 AM), <https://www.abajournal.com/news/article/does-right-to-travel-for-abortion-include-right-to-avoid-penalty-kavanaugh-concurrence-doesnt-go-so-far> [<https://perma.cc/M9HM-4KH6>] (interviewing Seth Kreimer).

72. On the possibility that states may try to prohibit travel to other states to secure an abortion, see Elie Mystal, *Could GOP States Really Stop Pregnant People from Traveling to Get Abortions*, NATION (July 22, 2022), <https://www.thenation.com/article/politics/right-to-travel-abortion>; see also Jennifer McDermott, Geoff Mulvihill & Hannah Schoenbaum, *States Move to Protect Abortion*



“But lack of consent—if I may say so, Professor—is just not as promising an avenue as one might think. Congress is unlikely to reopen the confirmation hearings merely because a few liberal Senators thought they had been hoodwinked.<sup>73</sup> What other avenues are open besides complaining about lack of consent?”

“I have some in mind,” I said. “But I do think that everyone should raise lack of consent, if only to cast a shadow on the Court’s legitimacy.<sup>74</sup> Too many people believe the Court is sacrosanct and the justices are all little angels. They aren’t. Once people see that judges are not above a bit of self-deception—and even the ordinary kind—people may be open to other measures, especially at the state level, where activists can pressure courts and legislatures effectively.<sup>75</sup> Even

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from *Prosecution Elsewhere*, AP NEWS (July 6, 2022), <https://apnews.com/article/abortion-us-supreme-court-health-maine-north-carolina-9406a561971aa57640123034155b50df> [<https://perma.cc/V5RT-WRFH>]. But see Rothschild, *supra* note 5 (noting that some organizations are responding by creating “underground railroads” to assist women desiring to leave their home states to obtain medical treatment elsewhere); Chris Megerian & Seun-Min Kim, *Biden Signs Executive Order to Protect Travel for Abortion*, SEATTLE TIMES (Aug. 3, 2022, 7:38 PM), <https://www.seattletimes.com/seattle-news/health/biden-to-sign-executive-order-to-protect-travel-for-abortion> [<https://perma.cc/38RZ-J7WC>].

73. See Ed Shanahan, *Ocasio-Cortez Wants Two Justices Impeached for ‘Lying Under Oath’*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/27/us/aoc-roe-abortion-scotus.html> [<https://perma.cc/GGQ2-RM6A>].

74. See text and notes *supra* 42–47 (discussing damage to the Court’s legitimacy from its radical shift in *Dobbs*).

75. See Kate Zernike, *The Long Path to Reclaim Abortion Rights*, N.Y. TIMES (July 2, 2022), <https://www.nytimes.com/2022/07/02/us/abortion-rights-roe-v-wade.html> [<https://perma.cc/6QQ2-QV8B>] (noting that activists are aiming to invoke state constitutional provisions to establish such a right, despite the Supreme Court’s refusal to do so based on the federal version); Rachel Rebouche & Mary Ziegler, *Why Direct Democracy Is Proving So Powerful for Protecting Abortion Rights*, ATLANTIC (Nov. 11, 2022), <https://www.theatlantic.com/ideas/archive/2022/11/abortion-rights-midterm-election-ballot-initiatives/672071> [<https://perma.cc/8JFJ-QHEF>] (noting that citizens in some states are attempting to enact abortion rights through popular voting initiatives). As we wrote, activists in nineteen states were exploring the possibility of using state constitutional measures that protect women’s privacy as means to strike down restrictive state laws curbing the right. At least one has been successful. See Kate Zernike, *South Carolina Constitution Includes Right to Abortion, State Supreme Court Rules*, N.Y. TIMES (Jan. 5, 2023), <https://www.nytimes.com/2023/01/05/us/south-carolina-abortion-supreme-court.html> [<https://perma.cc/SJ86-8RY5>].

if after *Dobbs* the federal Constitution can no longer protect the right to abortion, states may decide that their own versions do.”

“Agreed,” he said. Although that might lead to a patchwork of states with radically different laws.”<sup>76</sup> Wouldn’t a broad federal statute be better?<sup>77</sup> Maybe we should be working toward something along those lines. Federal supremacy doctrine may supply a sounder basis than generalized considerations of legitimacy and the proper role of the Court.”<sup>78</sup>

“Maybe so,” I replied. “Although federal supremacy is under attack these days, and a conservative Congress could just as easily go in the opposite direction and deem abortion a federal crime, like murder.<sup>79</sup> This would naturally have to survive a Democratic filibuster and earn 60 votes in the Senate, not to mention avoid a presidential veto if the President were of the opposing party.”

“Which brings us to that other side of the equation,” he said. “What possibilities do you see for Executive action protecting women’s right to choose?”

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76. See *Abortion Ruling Prompts Variety of Reactions from States*, AP NEWS (July 21, 2022), <https://apnews.com/article/supreme-court-abortion-ruling-states-a767801145ad01617100e57410a0a21d> [<https://perma.cc/Y8XZ-4X4F>]; see also Kate Brumbach, *State Constitutional Challenge to Georgia Abortion Law Filed*, AP NEWS (July 26, 2022), <https://apnews.com/article/abortion-health-lawsuits-georgia-constitutions-e2223e6f105714276a96a9dfcaa94126> [<https://perma.cc/3V4U-TYYY>]. Some of the patterns the patchwork might take could easily surprise. See Alanna Vagianos, *Kansans Overwhelmingly Vote to Keep Abortion Protections in State Constitution*, HUFFPOST (Aug. 2, 2022), [https://www.huffpost.com/entry/kansans-vote-to-keep-abortion-protections-in-state-constitution\\_n\\_62e7f6e8e4b006483a9ff23c](https://www.huffpost.com/entry/kansans-vote-to-keep-abortion-protections-in-state-constitution_n_62e7f6e8e4b006483a9ff23c) [<https://perma.cc/42GH-ABZR>] (noting that at least one red-leaning state’s population supports that right).

77. E.g., Katie Rogers, *Harris Is Expected to Call for National Legislation to Protect Reproductive Rights*, N.Y. TIMES, Jan. 19, 2023, at A16 (noting that the vice president plans to take issue with Republicans who have tried to curtail reproductive rights); see also Farnoush Amiri and Mary Clare Jalonick, *House Votes to Restore Abortion Rights, Senate Odds Dim*, AP NEWS (July 15, 2022), <https://apnews.com/article/abortion-bills-house-vote-fc24d99f184d7aeec4926a6520311da5> [<https://perma.cc/RQ3A-KEVJ>].

78. On one such effort, see Amy B. Wong & Eugene Scott, *House Passes Bill to Codify Abortion Rights and Ensure Access*, WASH. POST (July 15, 2022, 1:42 PM), <https://www.washingtonpost.com/politics/2022/07/15/house-abortion-roe-v-wade> [<https://perma.cc/YPN7-YF2M>].

79. See Lydia D. O’Connor, *Senators Introduce Long-Shot Bipartisan Effort to Protect Some Abortion Access*, YAHOO (Aug. 1, 2022), <https://sports.yahoo.com/senators-introduce-long-shot-bipartisan-000329908.html> [<https://perma.cc/TWK5-T7W6>].

“Several. Biden has already been trying a few.<sup>80</sup> His are fairly cautious and narrow, but he could sign a broad Executive Order aimed at reducing *Dobbs*’ impact,<sup>81</sup> justifying it as a response to a national emergency.<sup>82</sup> He could declare a need for it in military hospitals in order to preserve an effective armed force.<sup>83</sup> He could

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80. See *Biden to Sign Order on Abortion Access*, AL (July 8, 2022), <https://www.al.com/news/2022/07/president-biden-to-sign-order-on-abortion-access.html> [https://perma.cc/TC7F-SX5Y]; see also Editorial, *What the Biden Administration Could Do Now to Protect Abortion Rights*, N.Y. TIMES (July 8, 2022), <https://www.nytimes.com/2022/07/08/opinion/abortion-pills-policy.html> [https://perma.cc/8W2X-S9PT] (urging a variety of avenues); Megerian & Kim, *supra* note 72 (noting that some defenders consider that his intervention does not go as far as it should). On the recent effort to reduce federal supremacy and restore states’ rights, see Samarth Desai, *Looking Back: Nullification in American History*, NAT’L CONST. CTR. (Feb. 4, 2022), <https://constitutioncenter.org/blog/looking-back-nullification-in-american-history> [https://perma.cc/FYK8-H2HW].

81. See Michael D. Shear & Sheryl Gay Stolberg, *Under Pressure, Biden Issues Executive Order on Abortion*, N.Y. TIMES (July 8, 2022), <https://www.nytimes.com/2022/07/08/us/politics/biden-abortion-executive-order.html> [https://perma.cc/2ZYM-N7SC] (noting that “the order stops far short of demands” and that the Administration hesitates to go further because the Hyde Amendment precludes the government from paying for abortions except in rare cases).

82. Yasmeeen Abutaleb, *Lawmakers Push Biden to Declare Health Emergency on Abortion*, WASH. POST (July 12, 2022, 7:12 PM), <https://www.washingtonpost.com/politics/2022/07/12/lawmakers-push-biden-declare-public-health-emergency-abortion> [https://perma.cc/SUM2-8NQQ]; Matt Viser & Caroline Kitchener, *Biden, in Fiery Speech, Announces Actions on Abortion Rights*, WASH. POST (July 8, 2022, 6:33 PM), <https://www.washingtonpost.com/politics/2022/07/08/biden-outline-new-steps-aimed-bolstering-abortion-rights> [https://perma.cc/8S9Q-EKR2].

83. See Allison Gill, *Overturing Roe Would be Disastrous for the U.S. Military*, WASH. POST (May 18, 2022, 9:00 AM), <https://www.washingtonpost.com/opinions/2022/05/18/overturing-roe-disastrous-america-military-readiness> [https://perma.cc/T4DU-92W6]; see also Lauren Coleman-Lochner, *Hospitals Must Provide Abortions When Needed Post-Roe, HHS Says*, SEATTLE TIMES (July 11, 2022, 1:55 PM), <https://www.seattletimes.com/nation-world/nation-politics/hospitals-must-provide-abortions-when-needed-post-roe-hhs-says> [https://perma.cc/HPN5-CZ5L]. At the time of writing, the military was beginning to examine this option. See Helene Cooper, *Pentagon Seeks to Reassure Service Members on Access to Abortion*, N.Y. TIMES (Oct. 21, 2022), <https://www.nytimes.com/2022/10/20/us/politics/military-abortion-access.html> [https://perma.cc/6MN4-V38U]; Amanda Seitz & Coleen Long, *Biden’s Efforts to Protect Abortion Access Hit Roadblocks*, AP NEWS (Dec. 6, 2022), <https://apnews.com/article/abortion-us-supreme-court-health-travel-government->

authorize doctors who treat Medicare and Medicaid patients on federal reservations to perform the procedure when they deem it medically necessary.<sup>84</sup> Even if some of them were located in states where abortion is a crime, federal supremacy should supersede state law even in a conservative Supreme Court.<sup>85</sup> The president could also direct the FDA to rule that abortion pills are legal when prescribed according to federal guidelines.<sup>86</sup> He could signal that he feels the same way about defending the right to contraception, which could be on the chopping block next, along with gay rights and affirmative action.”<sup>87</sup>

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c503469ac075698dee8fd951b067b967?utm\_source=homepage&utm\_medium=TopNews&utm\_campaign=position\_02 [https://perma.cc/MZE8-UJMV] (“[V]eterans and their beneficiaries are able to access abortion, even in states that have outlawed it, through the Department of Veteran Affairs in cases where the woman’s life or health is at risk or in cases of rape or incest.” Moreover, “the Defense Department will cover leave and travel costs for troops seeking abortions if they are not available in their state.”).

84. See Rogers, *supra* note 77 (urging that Biden instruct Medicaid administrators and heads of other federal agencies to “monitor and publicize the illnesses and deaths in states where abortion is no longer available” and that the CDC speak publicly about its intention to do likewise).

85. See Kindelan, *supra* note 33 (observing that medication abortions are currently approved by the U.S. Food and Drug Administration (FDA) for use up to seventy days, or ten weeks, after conception); see also Michelle Goldberg, *The Anti-Abortion Movement’s Contempt for Women is Worse than I Imagined*, N.Y. TIMES (July 18, 2022), <https://www.nytimes.com/2022/07/18/opinion/miscarriages-abortion-ban.html> [https://perma.cc/9EV5-C542] (noting that “under federal law, hospitals must provide abortions when they’re necessary to stabilize patients suffering medical emergencies, or transfer them to a hospital that will”).

86. See Alice Miranda Ollstein, *Biden Admin to Pharmacies: Refusing to Fill Prescriptions for Contraception or Abortion Pill Could Break Federal Law*, POLITICO (July 13, 2022, 1:06 PM), <https://www.politico.com/news/2022/07/13/biden-pharmacies-contraception-abortion-pill-00045582> [https://perma.cc/3MW8-XQ54]; see also Kitchener, *supra* note 41. But see Alanna Vagiano, *Looming Apocalyptic Decision Could Doom Abortion Pills Nationwide*, HUFFPOST (Dec. 9, 2022, 5:03 PM), [https://www.huffpost.com/entry/court-decision-ban-abortion-pills-fda\\_n\\_639396dde4b09e0de4930ccf](https://www.huffpost.com/entry/court-decision-ban-abortion-pills-fda_n_639396dde4b09e0de4930ccf) [https://perma.cc/K7TB-H2EZ]; Pam Belluck, *New Lawsuit Challenges State Bans on Abortion*, N.Y. TIMES (Jan. 25, 2023), <https://www.nytimes.com/2023/01/25/health/abortion-pills-ban-genbiopro.html> [https://perma.cc/AS26-CQ3Y].

87. Nathaniel Weixel, *Biden Officials Remind Insurers That They Must Cover Birth Control for Free*, HILL (July 28, 2022, 4:21 PM), <https://thehill.com/policy/healthcare/3578525-biden-officials-remind-insurers-they->

## V. THE THIRD RESPONSE: PACK THE COURT

“Professor, you really know your federal courts. But couldn’t the Supreme Court block almost any of the initiatives you mentioned just now? An anti-abortion group could secure an injunction in a conservative circuit, and when it reached the newly conservative Supreme Court, a majority could uphold it.<sup>88</sup> They could, for example, rule that the Executive Order operates in an area that requires clear-cut congressional authority<sup>89</sup> or hold that Congress did not give the FDA or the President broad enough powers to carry out sweeping measures like those you mentioned.<sup>90</sup> Protests could merely cause conservative justices to dig in their heels more firmly. The *Dobbs* opinion says that the Court has no business listening to the man or

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must-cover-birth-control-for-free [https://perma.cc/9MP6-Y8BR]; Edwin Rios, *Supreme Court Could Strike Blow Against Affirmative Action in Harvard Case Ruling*, GUARDIAN (Aug. 2, 2022, 11:37 AM), <https://www.theguardian.com/us-news/2022/aug/02/supreme-court-affirmative-action-harvard> [https://perma.cc/4U5S-7F6U].

88. To scandalize liberal court-watchers, conservative judges could easily cite the notorious case of *Lochner v. New York*, 198 U.S. 45 (1905), which set the stage for laissez-faire capitalism; see also James E. Stewart, *Did the Supreme Court Open the Door to Reviving One of Its Worst Opinions*, N.Y. TIMES (July 2, 2022) <https://www.nytimes.com/2022/07/02/business/scotus-lochner-v-new-york.html> [https://perma.cc/F5CL-LXBR] (citing Laurence Tribe for raising this possibility); see Kindelan, *supra* note 33 (observing that Justice Thomas warned of such a turn when he called for the reconsideration of several rulings, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), which established the right of married couples to use contraception. As he put it: “Because any substantive due process decision is ‘demonstrably erroneous,’ we have a duty to ‘correct the error’ established in those precedents,” he wrote, adding, “After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated.” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301–02 (2022) (Thomas, J., concurring)).

89. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (ruling that the agency lacks authority to regulate greenhouse gases).

90. See Paul Waldman & Greg Sargent, *Texas’s New Lawsuit Against Biden Shows our New Post-Roe Future*, WASH. POST (July 14, 2022, 5:51 PM), <https://www.washingtonpost.com/opinions/2022/07/14/texas-lawsuit-paxton-biden-post-roe-future> [https://perma.cc/38KV-8DR2] (noting that Texas authorities are planning exactly such an effort) ; Lois Beckett, *House Passes Bill to Protect Same-Sex and Interracial Marriage*, GUARDIAN (July 19, 2022, 8:52 PM), <https://www.theguardian.com/us-news/2022/jul/19/us-house-bill-protect-same-sex-interracial-marriage> [https://perma.cc/2Y6Q-4Y3Y].

woman in the street, maybe not even the President.<sup>91</sup> What would you do then?”

“You’ve got me in a corner,” I said. “The only thing I can think of is to pack the Court. Either that or enact term limits.<sup>92</sup> Either would be popular with the public.<sup>93</sup> Even the mere threat of packing might get the Court to listen more closely to public opinion.”<sup>94</sup>

“And that might be good for democracy,” he said. “You know, in one way of looking at it, the Republicans un-packed the Court to ward off Merrick Garland’s candidacy, keeping its size small until it

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91. See *supra* notes 23–24 and accompanying text.

92. E.g., Jennifer Rubin, *There Is a Path to Save the Supreme Court from Itself*, WASH. POST (Dec. 11, 2022, 9:50 AM), <https://www.washingtonpost.com/opinions/2022/12/11/supreme-court-reform-expansion-term-limits-ethics> [<https://perma.cc/7E25-NTZD>] (discussing proposals that are found to be considerably favorable with the public); see Emily Gresko & Emily Thompson, *Poll Shows Two-Thirds of Americans Favor Term Limits for Justices*, AP NEWS (July 25, 2022), <https://apnews.com/article/abortion-ketanji-brown-jackson-us-supreme-court-government-and-politics-only-on-ap-8adc9a08c9e8001c8ef0455906542a60> [<https://perma.cc/G6LJ-55E8>]; see also Bouie, *supra* note 42.

93. See *Presidential Commission on the Supreme Court of the United States*, THE WHITE HOUSE <https://www.whitehouse.gov/pscotus> [<https://perma.cc/VM8G-D4M4>] (describing its work and purpose); see also PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., FINAL REPORT (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf> [<https://perma.cc/AEX2-WTPT>].

94. Public opinion is running strongly in favor of abortion rights, so that *Dobbs* runs counter to broad support for the right of women to terminate a pregnancy. Gresko & Thompson, *supra* note 92; see also Stephen Groves, *GOP Governors Mulling 2024 Run Aren’t Rushing Abortion Laws*, AP NEWS (July 14, 2022), [https://apnews.com/article/abortion-2022-midterm-elections-us-supreme-court-presidential-kristi-noem-d3b6fa5ff263e79aab1ef86bdfaf0860\\_e79aab1ef86bdfaf0860](https://apnews.com/article/abortion-2022-midterm-elections-us-supreme-court-presidential-kristi-noem-d3b6fa5ff263e79aab1ef86bdfaf0860_e79aab1ef86bdfaf0860) [<https://perma.cc/XZ8P-VFAT>]; Pema Levy, *How the Left Lost Faith in Scotus and Learned to Love Packing the Court*, MOTHER JONES (Oct. 14, 2022), <https://www.motherjones.com/politics/2022/10/how-the-left-lost-faith-in-scotus-and-learned-to-love-packing-the-court> [<https://perma.cc/6DUM-FY9D>] (noting that the abovementioned reforms are popular with many of the public). For an essay by two law professors urging the public to take measures to end a conservative takeover of the Court and an illegitimate reign by the new, highly politicized members of that body, see Ryan D. Doerfler & Samuel Moyn, *A Plea to Liberals on the Supreme Court: Dissent with Democracy in Mind*, N.Y. TIMES (Dec. 20 2022), <https://www.nytimes.com/2022/12/20/opinion/supreme-court-liberal-dissent.html> [<https://perma.cc/M2UZ-HD86>].

suit their purpose to restore it to the regular number.<sup>95</sup> Several times in history, pressure groups have expanded or shrunk the number of justices on the Court.<sup>96</sup> And Roosevelt's threat to do so got the Court's attention. It quickly stopped invalidating New Deal legislation aimed at improving the fortunes of workers and the poor and lifting the country out of a depression.<sup>97</sup> Roosevelt used this threat successfully, and Biden could too.<sup>98</sup> I'm impressed by your knowledge of history, Professor!"

#### VI. THE FOURTH RESPONSE: DEFINE THE TERMS "PRECEDENT" AND "SUPER-PRECEDENT"

"Never mind the flattery," I grumbled. "Those were your ideas, too. But how about new rules governing how the justices are to treat precedent? They could define what is a super-precedent and require nominees to any federal judgeship to pledge not to rule in defiance of landmark cases like *Skinner v. Oklahoma*,<sup>99</sup> *Marbury v. Madison*,<sup>100</sup> *Brown v. Board of Education*,<sup>101</sup> and maybe even *Obergefell v. Hodges*,<sup>102</sup> without a very good reason.

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95. In recent times, nine. See Karoun Demirjian, *Republicans Refuse to Budget Following Garland Nomination to Supreme Court*, N.Y. TIMES (Mar. 16, 2016, 5:18 PM), <https://www.washingtonpost.com/news/powerpost/wp/2016/03/16/republicans-refuse-to-budget-following-garland-nomination-to-supreme-court> [<https://perma.cc/5LJY-SSDL>].

96. See Joshua Zeitz, *How the Founders Intended to Check the Supreme Court's Power*, POLITICO (July 3, 2022, 7:00), <https://www.politico.com/news/magazine/2022/07/03/dont-expand-the-supreme-court-shrink-it-00043863> [<https://perma.cc/9CNL-9W7N>].

97. See Lesley Kennedy, *This is How Roosevelt Threatened to Pack the Court and Its Consequences*, HISTORY (Sept. 19, 2020), <https://www.history.com/news/franklin-roosevelt-tried-packing-supreme-court> [<https://perma.cc/PT4H-F9Q9>] (discussing Roosevelt's threat and the reaction it sparked).

98. See Zeitz, *supra* note 96 (discussing this possibility today); Doerfler & Moyn, *supra* note 94 (urging much the same).

99. 316 U.S. 535, 542 (1942) (cabining *Buck v. Bell*, 274 U.S. 200 (1927) and holding that procreation is a fundamental right protected from infringement by state action).

100. 5 U.S. 137 (1803) (holding that courts may review statutes for constitutional violation).

101. 347 U.S. 483 (1954); *see id.* at 692 (holding that African American students have a right to equal access to public schools).

102. 576 U.S. 644 (2015) (upholding same-sex marriage); *see also* Rubin, *supra* note 92 (proposing a code of ethics for the justices).

“As things stand,” I continued, “Congress can enact rules shaping federal-court jurisdiction,<sup>103</sup> judges’ pay,<sup>104</sup> and possibly even their term of office.<sup>105</sup> It would seem a simple exercise of supervisory power to enact additional guidelines governing the Court’s decisional calculus. The federal rules of civil procedure and evidence already do this for the lower courts.<sup>106</sup> In fact, Congress need not have a system of federal courts at all<sup>107</sup> and could abolish them at the drop of a hat.<sup>108</sup> It would seem to follow that they could spell out how they want judges to decide cases.”

“Now that’s intriguing,” he conceded. “And it offers a role for lawyers, since both of us have been having trouble finding one. One possibility would be a simple rule making it difficult to reverse a previous decision,<sup>109</sup> perhaps by requiring federal judges to obtain Congress’ permission before reversing one.<sup>110</sup> This would make them careful, but not interfere with their creativity in genuinely novel cases. May I use your microwave to heat up my coffee? It seems to have gotten cold while we were talking about the higher reaches of federal law.”

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103. See 28 U.S.C. § 1332 (1996); see also Jamelle Bouie, *The Supreme Court is the Final Word on Nothing*, N.Y. TIMES, July 3, 2022 (observing that Congress can strip the Court of its ability to hear certain classes of case or lay down rules on how it is to decide ones where it does have jurisdiction) <https://www.nytimes.com/2022/07/01/opinion/dobbs-roe-supreme-court.html>; see also *Draft Report*, *supra* note 92 (discussing placing limits on the Court’s jurisdiction).

104. See U.S. CONST. Art. III, cl.3 (noting that their salary may not be diminished while in office).

105. See PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., *supra* note 93 (discussing term limits for Supreme Court justices); see also Bouie, *supra* note 42.

106. See 28 U.S.C. § 2072 (the current version of the Rules Enabling Act of 1934).

107. See U.S. CONST. art. III, § 2 (the so-called “Exceptions Clause”); see also Bouie, *supra* note 103.

108. See *supra* note 103–105. I recalled that when I had mentioned this possibility to Teresa at home recently, she had asked what would happen if the Supreme Court pushed back at any such effort to disband itself and asked what would happen if they went on strike, refused to cooperate with the order and continued hearing cases as though things were normal. I had muttered something about it’s never having happened, but that it would lead to a constitutional crisis if it did.

109. E.g. “No court under these rules may reverse a prior ruling without approval of the Judiciary Committee.”

110. *Id.*; see also PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., *supra* note 93, (discussing measures to improve judicial ethics).



“Allow me,” I said, punching in 30 seconds. Just as the humming stopped, we heard a sound in the hallway.

VII. ENTER GIANNINA: *LYSISTRATA*, FEMALE SOLIDARITY, AND SEX STRIKES—THE FIFTH RESPONSE

“Hi, guys. Still at it, I see.” We looked up to see the tall, dark-haired woman standing in the doorway and smiling at us. “Looks like moving day. May I come in?”

“By all means,” I said. “We were just finishing. How was your meeting?”

“Great. We went over several possible responses, some of them legal. Right up your alley, I bet, including challenging the confirmation process on the basis of dishonesty in the hearings, changing the composition of the Court, imposing term limits, and new laws requiring the justices to honor precedent. Then we discarded all of them in favor of direct action. Very direct,” she said, looking at us meaningfully.

Noticing that Rodrigo was looking just as astonished as I must have, I said, “Those are some of the very avenues we considered. Your group must have been reading our minds.” I muttered a few words about having known all along that women were the smarter sex, but instead asked about the group’s thoughts on direct action.

Glancing at my bookshelf, half-full with the books I had been unpacking, she said, “We’ve read your syllabus, Professor, as well as your assigned readings. And we’ve decided to take a leaf from some of the movements you cover.”

“And do what?” I coaxed.

“We’ve decided to begin by putting as much pressure on conservative forces as possible. We’ll march, demonstrate, write letters and op-ed columns, and break the law in carefully selected ways and dare the other side to file charges.<sup>111</sup> We’ll bring back graphic images such as coat hangers and post them everywhere.<sup>112</sup>

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111. See Michael Kazin, *Even If Republicans Outlaw Abortion, Americans Will Soon Rebel*, N.Y. TIMES (July 13, 2022) <https://www.nytimes.com/2022/07/11/opinion/republicans-abortion-prohibition.html> [<https://perma.cc/48A4-2NVB>] (comparing the current situation to Prohibition, a social experiment that drew public disfavor and was ultimately reversed).

112. These are shocking reminders of the dangerous and unsanitary self-help abortions that proliferated in the days before *Roe v. Wade*. They may, indeed, be returning already. See Steve Descano, *My Governor Can Pass Abortion Laws, But I Won’t*

We'll run opposition candidates in every election we can. We'll urge prosecutors and police to refuse to enforce the new laws.<sup>113</sup> We'll ask every city in which one of us lives to declare itself a sanctuary.<sup>114</sup> We'll ask everyone to vote.<sup>115</sup> We'll never rest until we turn things around."

"A good start," I said. "Almost every successful social-change movement began that way."

"But we'll go further," she continued. "We'll seek out every woman we know who sits on a panel or board of directors of a foundation on which any of the Supreme Court majority justices also sits and shame them into resigning.<sup>116</sup> We'll do the same with every woman serving

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*Enforce Them*, N.Y. TIMES (May 31, 2022) <https://www.nytimes.com/2022/05/31/opinion/prosecutor-abortion-virginia.html> [<https://perma.cc/KSK7-FJEH>] (using a photographic depiction of a clothes hanger gripped by a female hand to illustrate the predicament facing women and those who will be called on to prosecute them).

113. See Descano, *supra* note 112; Kimberlee Kruesi, *If Roe Falls, Some D.A.s Won't Enforce Anti-Abortion Laws*, AP NEWS (June 16, 2022), <https://apnews.com/article/abortion-2022-midterm-elections-politics-nashville-71f3b8de244a5158f46665ceaad2f2a7> [<https://perma.cc/MGG4-LATV>]; see also Scott Wilson, *Democratic Cities in Republican States Seek Ways Around the Abortion Ban*, WASH. POST (July 13, 2022, 9:00 AM), <https://www.washingtonpost.com/nation/2022/07/13/abortion-bans-blocked-cities> [<https://perma.cc/V59Y-H4XV>].

114. On one such city, see Sarah Grace Taylor, *City Council Votes to Make Seattle a Sanctuary City for Abortion*, SEATTLE TIMES (June 26, 2022, 2:04 PM), <https://www.seattletimes.com/seattle-news/politics/councilmember-seeks-to-make-seattle-an-abortion-sanctuary-city> [<https://perma.cc/ZL79-HTTR>].

115. This may be starting to happen. Ruth Graham, *'Will We Keep Marching?' On Roe's 50th Anniversary, Abortion Opponents Reach Crossroads*, N.Y. TIMES (Jan. 19, 2023), <https://www.nytimes.com/2023/01/19/us/abortion-roe-v-wade-50th-anniversary.html> [<https://perma.cc/W6Q4-X9D9>] (noting that "In November, voters affirmed abortion rights in every state where the issue was on the ballot, including in conservative states like Montana and Kentucky" and observing that much of the action is now taking place at the state level and includes marches and demonstrations); see also Hannah Knowles, Emily Guskin & Scott Clement, *Americans Dismayed and Less Likely to Vote*, WASH. POST (July 29, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/07/29/abortion-roe-midterms-poll> [<https://perma.cc/U5V3-6Y8K>].

116. See, e.g., Oma Sidiq & Nicole Gaudiano, *Sen. Ted Cruz Presses SCOTUS Nominee Ketanji Brown Jackson on Critical Race Theory and Asks If She Agrees that "Babies are Racist,"* BUS. INSIDER (Mar. 22, 2022, 6:01 PM) <https://www.businessinsider.com/cruz-presses-scotus-nominee-ketanji-brown-jackson-critical-race-theory-2022-3> [<https://perma.cc/97HT-VK2X>] (demonstrating an attempt at shaming by a prominent senator).

on the staff of a member of Congress who played a part in the movement against abortion. If they refuse to go along, we'll isolate and refuse them our company in sports, leisure activities, and civic clubs. They'll lead lonely lives and be able to interact only with those of like mind."

"That could work," I said. "Although maybe not as well as you might wish, since social circles already come somewhat divided by political orientation. Sisterhood is powerful, though. But, say—what about the men?"

"After an initial phase of sweet-talking them, we'll declare a sex strike. None of us will, shall we say, have anything to do with any man who cooperates with the anti-abortion movement."

"I can't believe it," Rodrigo said. "I have a book on that very subject right here. In a famous comedy by Aristophanes, the women of Athens were disgusted by the Peloponnesian War, which had been dragging on for years.<sup>117</sup> They announce a sex strike, which quickly got the men's attention.<sup>118</sup> The sex-deprived men become eager to change their ways—some women, too. After much negotiation, chants, choruses, and appearances by Old Women and Old Men, the two sides agree to come to terms and end the war.<sup>119</sup> The play is considered a masterpiece of early comedy for the way it skewers the foibles of men and some women who collaborate with them in hopes of gaining favor."<sup>120</sup>

"And do you think it would work in today's world?" I asked. "I know I personally would do almost anything not to forfeit Teresa's company."

"Me, too," Rodrigo said, looking over at Giannina, who quickly assured him that he would not be on the women's hit list. He muttered something about a big relief, then added, in a serious tone: "I realize that, unlike Aristophanes' play, the current situation is not a comedy."

Giannina shot him a quick look of appreciation and added: "The whole thing does have aspects that are darkly amusing. For one thing, liberal men would have an advantage during the strike. No one in our meeting mentioned this, but consider an average-looking man—

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117. *LYSISTRATA*, *supra* note 3.

118. *Id.*

119. *Id.*

120. *Id.*

not like you, Rodrigo, nor you, Professor. You're very well preserved for your age."

"Thanks a lot," I said. "I do exercise every day, you know."

"At any rate," she continued. "This average-looking specimen has, let's say, fourteen dates in a typical year. After the women's strike eliminates much of the competition—staunch Republican men who have taken public stances against abortion rights—this same man might enjoy a field day—maybe 50 dates a year. Republican men, after spending lonely weekends watching TV with their male buddies, might reconsider their position on abortion."

"It seems to have worked in Athens," Rodrigo said. "After Lysistrata and her friends declared war, the men quickly came to their senses and began acting in a way more amenable to the women's wishes."

"One other thing," she added. "Democratic women who aren't glamor girls might also benefit from new attention. To the extent that some men are shallow in their preferences for companionship and choose, in part, because of a woman's appearance, you could see this as an additional bonus for women who do the right thing.<sup>121</sup> They might, of course, detest their politics enough to turn them down. But it's always nice to be asked.

"And it would not even need to be an official, announced strike," she continued, "with union cards, armbands, and picket lines. Just a tacit agreement among women to have little to do with men who act disrespectfully toward them and support measures that diminish their reproductive autonomy. Men who value their company would quickly get the message. Maybe even old geezers on the Supreme Court. The whole thing might proceed informally, without any public declaration, just by the operation of natural friendship patterns, shaped by the recognition that anyone who rejects women's rights is a

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121. John Nash, an eccentric award-winning economist at Oxford University, is said to have applied game theory and auction economics to dating and the pursuit of a mate, see Tom McCarthy, *John Nash, Mathematician Portrayed in A Beautiful Mind, Dies in Taxi Crash at 86*, GUARDIAN (May 25, 2015, 9:40 AM), <https://www.theguardian.com/us-news/2015/may/24/john-nash-mathematician-beautiful-mind-dies-taxi-crash> [<https://perma.cc/ZVA4-3VD6>]; see also RICHARD POSNER, SEX AND REASON (1992) (discussing many of the same behaviors and preferences).

poor marital prospect or even weekend date. This may already be happening.”<sup>122</sup>

“More likely their young clerks are the ones who would quickly pick up on the new rules,” I said. “Ones who are just a few years out of law school, in the prime of their reproductive lives, and lonely after long hours in the law library.”

#### CONCLUSION

I jumped as Giannina’s cell phone rang loudly. “It’s Gus,”<sup>123</sup> she said. “He wants to know when we’re coming home. He says he finally heard back from Greta, whom, as you recall, he met in Europe last month.<sup>124</sup> She says she wants to accept his invitation for a date and wants to know if he can hop on a plane or sailboat tomorrow.”

As they quickly gathered their things and bade me farewell and good luck in my new job, I reflected on what we had covered. I thought Rodrigo had a point in predicting that the *Dobbs* opinion was certain to provoke widespread opposition from women’s groups as well as society at large.<sup>125</sup> I also agreed that the majority opinion exhibited many deficiencies, but that little change was likely to come through litigation, at least any time soon. And I thought that Giannina’s group and Rodrigo himself were right that the times called for resistance and direct action,<sup>126</sup> even, perhaps, including a strike by women and their supporters.<sup>127</sup> I recalled that portions of the opinion had practically dared them to do so.<sup>128</sup>

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122. See Janay Kingsberry, *The End of Roe Is Changing Friendships: For Better or for Worse*, WASH. POST (July 31, 2022, 8:00 AM), <https://www.washingtonpost.com/lifestyle/2022/07/31/friendships-abortion-roe> [<https://perma.cc/S2VN-3GG2>].

123. See Delgado, *supra* note 1 (introducing Gus, Rodrigo and Giannina’s son).

124. A precocious teenager and diehard environmental activist, Gus has many adventures. See, e.g., Richard Delgado, *Children’s Right to a Liveable Future*, 71 ALA. L. REV. 261, 264 (2019).

125. See *supra* notes 44–46 and accompanying text.

126. See *supra* notes 102–115 and accompanying text.

127. See *supra* notes 116–122 and accompanying text.

128. See *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring) (noting that “the people” could avail themselves of the democratic process if they disagreed with *Dobbs* and its ruling); see Bracey Harris, *Alito Says Overturning Roe Would Give Women a Voice on Abortion: In the South It’s Not That Simple*, NBC NEWS (May 16, 2022, 12:23 PM),

I resolved to mull over whether such a strike, like Lysistrata's, had a chance of succeeding, or whether, like Roosevelt's threat to pack the Court, the sisters were proposing it only for its novelty and *in terrorem* effect. I recalled that when she mentioned it, Rodrigo and I both had flinched involuntarily.

On reflection, it occurred to me that Giannina's idea may not have been quite as outlandish as it sounded. After all, no less an authority than Richard Posner wrote an entire book on sexuality and the law in which he likened male-female relationships to a kind of social marketplace in which men and woman brought different needs and interests to the table and engaged in tacit negotiations as part of an elaborate dance.<sup>129</sup> His book contained, as I recalled, discussions of sexual attraction, courtship, marriage, homosexuality, date rape, pornography, and even partners' differing preferences for number of children and when to start having them.

I made a note to mention all this to Rodrigo and Giannina in case they needed some authority for their audacious proposal. Anticipating that they might need to talk with a labor lawyer versed in the theory of strikes and concerted action, I jotted down the name of a former student working in this area. Would Giannina's strike be illegal under the NLRA? Under antitrust law? Perhaps Rodrigo could enlist his colleague Laz<sup>130</sup> to help him think through all of these implications.

I kicked myself for not having mentioned interest-convergence, Derrick Bell's well-known axiom.<sup>131</sup> I had recently read that a large corporation in one state (Indiana) with a new, tough abortion law was threatening to relocate outside the state because "the right to make decisions regarding reproductive health ensures that women have the same opportunity as others to participate fully in our work

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<https://www.nbcnews.com/news/us-news/alito-abortion-roe-voting-rights-south-rcna28440> [<https://perma.cc/UW46-GNU5>].

129. POSNER, *supra* note 121.

130. See Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1713-14 (1995) (introducing Rodrigo's faculty buddy Laz Kowalski, a conservative devotee of law-and-economics, but, like Rodrigo, a staunch anti-racist).

131. See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (positing a way of interpreting and understanding the history of civil rights advances for African Americans).

force and that our work force is diverse.”<sup>132</sup> I made a note to mention this, too, in the follow-up email I had promised them and scolded myself for not having thought of it earlier.

I was happy to learn that my syllabus was reaching at least a few readers.<sup>133</sup> As I gathered up my own things and turned off the light, I thought how fortunate I was, as an aging professor approaching his sunset years, to have opportunities to exchange ideas with youthful colleagues like Giannina and Rodrigo, as well as the new students I would be teaching in a few weeks.<sup>134</sup>

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132. Lora Kelley, *Major Indiana Employers Criticize State's New Abortion Law*, N.Y. TIMES (Aug. 7, 2022), <https://www.nytimes.com/2022/08/06/business/indiana-companies-abortion.html> [<https://perma.cc/SL2N-FDRW>].

133. See *supra* text accompanying notes 7–8.

134. I planned to teach Practicum, *supra* note 7, at my new school next semester. In the midst of my happy reverie described above, I noticed, however, that immediately after entertaining those sentimental thoughts and just before turning off my office light, I spied Rodrigo's half-empty coffee cup lying unwashed on my table.