

Challenging the Inconceivability Fallacy:
Post-*Dobbs* Abortion Rhetoric, Transgender Visibility,
and What the United States Can Learn from Latin
America’s “Green Wave”

Jordan Thomas*

After fifty years of pro-choice advocacy groups abroad looking to the United States as a beacon of hope and a guidebook for how to achieve similarly expansive abortion liberties, the United States abdicated its position as a global leader on abortion rights with its decision to overturn Roe v. Wade in 2022. In contrast, three of Latin America’s four most populous nations—Argentina, Mexico, and Colombia—have expanded abortion protections in the past three years. The victories in all three countries were linked to a grassroots abortion-rights movement known as the “Marea Verde” or “Green Wave” that has been advocating for change across Latin America.

Several comparative law and policy studies have focused on the groundbreaking changes introduced in the “Green Wave” countries and sought insights that might be transferrable to the United States. These works have often focused on the grassroots tactics and constitutional reasoning adopted in those nations. This Note offers a novel contribution to this literature by taking an alternative analytical angle and focusing on an underappreciated source of lessons from the “Green Wave” nations—not the

* Yale Law School, J.D. 2026. Thanks to Professors James Whitman and Julie Suk, to my dear family and friends, to my Yale College PLSC 233 Constitutional Law students, and to the editors of the *Yale Law & Policy Review* for their invaluable feedback, comments, and support on this Note. All errors are my own. Much love as well to Princeton Professor Elizabeth Armstrong for initially fostering my passion for reproductive justice scholarship years ago, to Ray Chambers for reminding me that some of the most transformative law and policy insights can often be gleaned by looking abroad, to my beloved home city of Newark, New Jersey for teaching me to “never stop fighting the good fight,” and to Mom/Dad (for everything).

grassroots-organizing tactics and legal reasoning, but the legal language, as expressed through law and policy. Ultimately, the analysis here reveals a remarkable rhetorical progressivism in the “Green Wave,” with all three nations demonstrating a commitment to an essential premise of this piece: although abortion is indeed a “women’s issue,” it is not exclusively such—it could, and should, be recognized as a transgender issue as well.

This Note argues that the United States has much to learn from the abortion-rights rhetoric of Latin America’s “Green Wave” nations. Whether as a reflection of what this Note calls the “inconceivability fallacy”—the failure to recognize that persons other than cisgender women can get pregnant—or as a strategic decision that eschews gender-inclusive pregnancy language for other reasons, it is clear that transgender, nonbinary, and other gender-diverse persons with a capacity for pregnancy remain largely invisible across some of the United States’ most notable judicial, legislative, and executive statements on abortion rights. This Note demonstrates why this elision is troubling and points to the “Green Wave” nations as proof of an inspiring fact: change is not only necessary; it is possible.

INTRODUCTION	701
I. A PRIMER ON GENDER-INCLUSIVE TERMINOLOGY AND CONCEPTS	710
A. <i>Who Can Get Pregnant? Challenging the Inconceivability Fallacy</i>	710
1. Cisgender Pregnancy	710
2. Transgender, Nonbinary, and Other Gender-Diverse Pregnancies	711
B. <i>Gender-Inclusive Pregnancy and Abortion-Rights Language</i>	712
II. THE ABORTION-RIGHTS RHETORIC OF THE LATIN AMERICAN “GREEN WAVE”	
NATIONS AND THE UNITED STATES.....	715
A. <i>Argentina</i>	718
1. The Voluntary Interruption of Pregnancy Law	718
2. The Long March Toward a Gender-Inclusive Outcome	722
B. <i>Mexico</i>	726
1. Landmark Supreme Court Decisions in the States of Coahuila and Sinaloa.....	726
2. Abortion Decriminalization Nationwide.....	730
3. Historical Parallels with Argentina.....	731
C. <i>Colombia</i>	732
1. Sentencia C-055-22: A Momentous Ruling by the Constitutional Court.....	732

- 2. A Familiar Origin Story 734
- D. *The United States*..... 736
 - 1. Supreme Court Rulings 736
 - a. *Dobbs v. Jackson Women’s Health Organization*..... 736
 - b. Other Notable Cases 739
 - 2. Legislative Actions 741
 - a. Women’s Health Protection Act 742
 - b. Ensuring Women’s Right to Reproductive Freedom Act 745
 - c. Reproductive Freedom for All Act 746
 - 3. Executive Orders..... 748
- E. *Can This Rhetorical Divergence Be Explained? A Brief Sociopolitical Analysis*..... 749
 - 1. Historical Context and Modern Receptivity to “Debt-of-Democracy” Claims 750
 - 2. Judicial Philosophies Regarding the Institutional Roles of the Courts..... 753
- III. WHY THIS MATTERS 755
 - A. *Law’s Expressive and Educative Functions: Legal Recognition as a Means of Countering Stigma, Discrimination, and Harm* 755
 - B. *Legal Implications of Exclusion*..... 758
 - 1. Denial of Benefits..... 758
 - 2. Debilitation of Strategy 759
 - C. *Advancing Fundamental Principles of Good Legal Writing and Advocacy* 762
 - 1. Precision 763
 - 2. Clarity 764
 - 3. Respect, Dignity, Fairness, and Justice 765
 - a. The Philosophical, Inherent-Worth Account..... 767
 - b. The External, Socioexpressive Account..... 768
 - c. The Internal, Psychosocial Account..... 768
- CONCLUSION: CHANGE IS POSSIBLE 770

INTRODUCTION

Archived Recording (Josh Hawley)
You’ve referred to people with a capacity for pregnancy. Would that be women?
Archived Recording (Khiara Bridges)

Many women, cis women, have the capacity for pregnancy. Many cis women do not have the capacity for pregnancy. There are also trans men who are capable of pregnancy as well as non-binary people who are capable of pregnancy.

Archived Recording (Josh Hawley)

So this isn't really a women's rights issue, it's a—it's a what?

Archived Recording (Khiara Bridges)

*We can recognize that this impacts women while also recognizing that it impacts other groups. Those things are not mutually exclusive, Senator Hawley.*¹

America has long been fascinated with the image of the pregnant man. Whether as a source of revile, ridicule, humor, or horror, the trope abounds in various forms of media and pop-culture over the past century.² Indeed, it provided one of the most unexpected, and in many ways baffling, movie scenes of the early 1990s—a hulking Arnold Schwarzenegger rendered effeminate, nine months pregnant, donning maternity wear, and delivering a baby on screen, all alongside Danny DeVito in a RomCom perhaps more remarkable for its precocious subversion of the gender binary and its broadcast of a certain form of queerness than for the inherent quality of its comedy.³ Of course, the engine powering much of the humor in the film was the generally accepted presumption that men cannot get pregnant, and that to even suggest otherwise would be risible—an idea that this Note refers to as the “inconceivability fallacy.” Hence the snarky text imprinted on the film’s marketing poster: “Nothing is inconceivable.”⁴

Although it is often dismissed as one the worst movies of Arnold Schwarzenegger’s career, perhaps the greatest irony of *Junior* as it approaches its thirtieth anniversary is that it was unintentionally correct. It is, admittedly, going too far to say that *nothing* is inconceivable in the realm

-
1. *A Post-Roe America: The Legal Consequences of the Dobbs Decision, Hearing Before the U.S. S. Comm. on the Judiciary*, 117th Cong. (2022) (statement of Khiara M. Bridges, Professor of Law, U.C. Berkeley School of Law).
 2. Amanda Hess, *Pregnant Men Were a Movie Punchline. Now They're Horror Villains*, N.Y. TIMES (Aug. 2022), <https://www.nytimes.com/2022/08/05/movies/pregnant-men-resurrection.html> [<https://perma.cc/XS5Y-5ULG>].
 3. *Junior*, IMDB (1994), <https://www.imdb.com/title/tt0110216/> [<https://perma.cc/2MK9-GNBS>].
 4. *Id.*

of conception,⁵ but the idea of the pregnant man certainly is not inconceivable.⁶ With the benefit of more modern understandings of sex and gender, we now understand that transgender men, non-binary persons, intersex persons, and many others along the gender spectrum are capable of conceiving a child.⁷ As a result, we can now see the flaws that undergird the inconceivability fallacy. Put simply, we can now see that, far from being inconceivable, the possibility of a pregnant man is both a physiological and sociological fact.⁸

Consider the case of Thomas Beatie, the transgender man who made global headlines in 2008 when he appeared on the Oprah Show as “the world’s first pregnant man.”⁹ Beatie was assigned female at birth, had gender-affirming surgery involving a double mastectomy and phalloplasty—meaning his clitoris was surgically reconfigured to mimic a phallus—and legally changed his sex marker from “female” to “male” on his

-
5. For instance, there are many persons who by choice, congenital anomaly, infertility, or other reason cannot or do not want to carry a pregnancy. For further discussion, *see infra* Section I.A.
 6. *See* discussion *infra* Section I.B.
 7. *See id.*
 8. *See id.*
 9. To be sure, the concept of a transgender man giving birth was not altogether unknown at the time—particularly among those in the LGBTQIA+ (lesbian, gay, bisexual, transgender, queer, questioning, intersex, asexual, and other gender-diverse identities) community. *See* Rheana Murray, *He was Famous for Being ‘The Pregnant Man.’ Here’s Where Thomas Beatie is now*, TODAY (June 30, 2021, 4:25 PM EDT), <https://www.today.com/health/thomas-beatie-reflects-his-fame-pregnant-man-t223681#> [<https://perma.cc/M8LK-D354>] (“Reese, whose own pregnancy journey has been documented, was also perturbed by the media’s portrayal of Beatie as ‘the first pregnant man,’ adding that he had known dozens of transgender men who had given birth before he heard Beatie’s story.”). It does appear, however, that Beatie was the first *married* man to give birth—*see First Married Man to Give Birth*, GUINNESS WORLD RECORDS, <https://www.guinnessworldrecords.com/world-records/first-married-man-to-give-birth> [<https://perma.cc/B42W-S5HZ>]—and he is generally considered the first transgender man to go nationally public with his pregnancy. *See* Angela Andalaro, *Thomas Beatie, The First Publicly Pregnant Transgender Man, Reflects On 2008 Media Frenzy*, LITTLE THINGS (Jan. 26, 2023), <https://littlethings.com/family-and-parenting/thomas-beatie-13-years> [<https://perma.cc/J4HU-P3FM>].

official identity documents.¹⁰ In addition, he took bimonthly testosterone injections for years to suppress feminine sex characteristics and decided to grow a beard.¹¹ Throughout this process, however, Beatie retained his female reproductive organs, which later allowed him to become pregnant through artificial insemination.¹² This explanation for Beatie's pregnancy is far less whimsical than what transpired in *Junior*,¹³ but both instances of the "pregnant man" capturing the public imagination shared one central feature—both forced the American public to rethink not only the gender binary that we traditionally associate with pregnancy but also the language that we use to describe the concept of pregnancy in light of these challenged assumptions. As described by a *New York Times* opinion writer at the time, "[i]n the discussions that followed [Beatie's] announcement, what became poignantly clear is that there is no good language yet to discuss his situation, words like an all-purpose pronoun to describe an idea as complex as a pregnant man."¹⁴

In 2022, this tension regarding the language that we use to describe pregnancy and the gender-diverse array of individuals who need access to reproductive health care was once again thrust into the national spotlight, this time for far less benign reasons. On May 2022, the news outlet Politico leaked a draft of the U.S. Supreme Court's majority opinion in *Dobbs v.*

10. David Batty, *Q&A: The 'Pregnant Man'*, THE GUARDIAN (July 4, 2008, 1:29 EDT), <https://www.theguardian.com/world/2008/jul/04/usa.gender2> [<https://perma.cc/CY7D-SMKU>].

11. *Id.*

12. *Id.* See *infra* Section I.A. for further explanation of the physiology involved in such pregnancies.

13. *Junior's* plot involves a research scientist—played by Arnold Schwarzenegger—undergoing an embryo implant in order to test a fertility drug that he and a colleague had invented for the purposes of reducing the chances of miscarriage. Schwarzenegger's self-experimentation was compelled by the fact that the drug was unapproved by the FDA and thus barred from testing on others. The film hardly explains how this was possible without Schwarzenegger's character initially having had female reproductive organs, in contrast with Thomas Beatie and other transgender men.

14. Guy Trebay, *He's Pregnant. You're Speechless*, N.Y. TIMES (June 22, 2008), <https://www.nytimes.com/2008/06/22/fashion/22pregnant.html> [<https://perma.cc/7H3Q-5YTX>].

Jackson Women's Health Organization,¹⁵ the case that ultimately overturned two of the Court's landmark abortion-rights precedents—*Roe v. Wade*¹⁶ and *Planned Parenthood v. Casey*¹⁷—and disavowed federal constitutional protections for abortions.¹⁸ Predictably, protests against the ruling were immediate and impassioned, with many pro-choice demonstrators invoking slogans that have been associated with the abortion-rights and feminist movements for decades: “Stop the war on women,” “Men shouldn't be making laws about women's bodies,” “No uterus, no opinion.”¹⁹ Yet, many advocacy groups recognized that this kind of rhetoric excludes a wide swath of persons impacted by the decision—not only transgender men, nonbinary persons, and many other gender-diverse persons with a capacity for pregnancy, as noted above, but also women without a uterus because of birth circumstance or medical procedure. This realization forced several organizations to change their language,²⁰ opting for “gender-inclusive” phrases that more accurately capture the entire population of persons with

-
15. See Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM EDT), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/66SA-WZJH>].
 16. 410 U.S. 113 (1973).
 17. 505 U.S. 833 (1992).
 18. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).
 19. See Alan Taylor, *Photos: Protests Against the Overturning of Roe*, THE ATLANTIC (June 26, 2022), <https://www.theatlantic.com/photo/2022/06/photos-protests-against-overturning-roe/661399/> [<https://perma.cc/57M2-9EXZ>]; Andrea Marks, Brenna Ehrlich & Daniel Kreps, *The Fight Isn't Over*, ROLLING STONE (June 24, 2022), <https://www.rollingstone.com/culture/culture-pictures/roe-wade-dobbs-abortion-rights-protest-1373949/> [<https://perma.cc/NU2S-K8FE>]; Grace Widyatmadja, Catie Dull, Estefania Mitre & Wynne Davis, *Photos: See Reactions to the Roe v. Wade Decision Across the U.S.*, NPR (June 24, 2022, 9:11 PM ET), <https://www.npr.org/sections/pictureshow/2022/06/24/1107328844/protests-and-celebrations-after-supreme-court-overturns-roe-v-wade> [<https://perma.cc/VC5T-VNFS>].
 20. See, e.g., AC Facci, *Why We Use Inclusive Language to Talk About Abortion*, AM. CIV. LIBERTIES UNION (June 29, 2022), <https://www.aclu.org/news/reproductive-freedom/why-we-use-inclusive-language-to-talk-about-abortion> [<https://perma.cc/7UU4-6LNJ>].

a capacity for pregnancy who are threatened by restrictions on access to abortion care.²¹

This evolution has caused quite a furor in public discourse, with advocates of gender-inclusive language frequently being subject to ridicule, rage, or rejoinder. Perhaps no reaction better encapsulates the views of many opponents of gender-inclusive pregnancy and abortion-rights language than Bette Midler's viral Twitter post from July 4, 2022: "WOMEN OF THE WORLD! We are being stripped of our rights over our bodies, our lives and even of our name! They don't call us 'women' anymore; they call us 'birthing people' or 'menstruators', and even 'people with vaginas'! Don't let them erase you! Every human on earth owes you!"²²

Bette Midler was neither the first nor the last prominent figure to stir controversy in this manner. For many readers, the Midler incident called to mind the trans-exclusionary comments linked to J.K. Rowling in recent years, including when she mockingly responded to the article "Opinion: Creating a More Equal Post-COVID-19 World for People Who Menstruate" with the following Twitter caption: "'People who menstruate.' I'm sure there used to be a word for those people. Someone help me out. Wumben? Wimpund? Woomud?"²³ These comments recently resurfaced as part of a broader controversy surrounding a *New York Times* opinion piece by Pamela Paul,²⁴ who herself has been a vocal critic of gender-inclusive language when describing pregnancy.²⁵ And of course, there is the work of

-
21. See discussion *infra* Section I.B. for examples and further explanation of gender-inclusive pregnancy and abortion-rights language.
 22. Bette Midler (@BetteMidler), TWITTER (July 4, 2022, 11:28 AM), <https://twitter.com/BetteMidler/status/1543979948611981313?s=20> [<https://perma.cc/SPM6-DW2D>].
 23. J.K. Rowling (@jk_rowling), TWITTER (June 6, 2020), https://twitter.com/jk_rowling/status/1269382518362509313?s=20 [<https://perma.cc/C9PK-LZ39>].
 24. Pamela Paul, *In Defense of J.K. Rowling*, N.Y. TIMES (Feb. 16, 2023), <https://www.nytimes.com/2023/02/16/opinion/jk-rowling-transphobia.html> [<https://perma.cc/E659-M3D>].
 25. See Pamela Paul, *The Far Right and Far Left Agree on One Thing: Women Don't Count*, N.Y. TIMES (July 3, 2022), <https://www.nytimes.com/2022/07/03/opinion/the-far-right-and-far-left-agree-on-one-thing-women-dont-count.html> [<https://perma.cc/6KAG-GNLC>].

The Atlantic's Helen Lewis, who has accused the left of “declaring a war on saying ‘women.’”²⁶

The exchange between Senator Josh Hawley and U.C. Berkeley Law Professor Khiara Bridges in this Note’s epigraph demonstrates how the broader debate over gender-inclusive pregnancy rhetoric has extended from the public forum into the political sphere. The instantly viral quarrel occurred during a Senate Judiciary Committee hearing regarding the socio-legal ramifications of the Supreme Court’s decision in *Dobbs*,²⁷ which reached a boiling point when Professor Bridges accused Senator Hawley’s questioning of being transphobic and dangerous.²⁸ Though certainly more contentious than earlier incidents, the Hawley-Bridges dispute was redolent of a similar headline-grabbing moment during Justice Ketanji Brown Jackson’s Senate confirmation hearings, during which Senator Marsha Blackburn went on a tirade against transgender rights and asked then-Judge Jackson, “Can you provide a definition for the word ‘woman’?”²⁹ As many scholars and commenters have noted in the past, politicians are intelligent—or at least politically savvy—on hot-button issues; they ultimately adopt the rhetoric that they believe most appeals to their constituents.³⁰ Certainly, debates on this issue will continue to unfold in

-
26. Helen Lewis, *The Abortion Debate Is Suddenly About ‘People,’ Not ‘Women,’* THE ATLANTIC (May 14, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/abortion-rights-debate-women-gender-neutral-language/629863/> [<https://perma.cc/BJ79-9A6D>].
27. *A Post-Roe America: The Legal Consequences of the Dobbs Decision, Hearing Before the U.S. S. Comm. on the Judiciary*, 117th Cong. (2022) (statement of Khiara M. Bridges, Professor of Law, U.C. Berkeley School of Law).
28. *Id.* (“I want to recognize that your line of questioning is transphobic and it opens up trans people to violence by not recognizing them.”).
29. *Jackson Confirmation Hearing, Day 2*, C-SPAN (Mar. 22, 2022), <https://www.c-span.org/video/?518342-102/jackson-confirmation-hearing-day-2-part-6;> see also Jonathan Weisman, *A demand to Define ‘Woman’ Injects Gender Politics into Jackson’s Confirmation Hearings*, N.Y. TIMES (Mar. 23, 2022), <https://www.nytimes.com/2022/03/23/us/politics/ketanji-brown-jackson-woman-definition.html> [<https://perma.cc/3VEX-8LBA>] (describing the exchange between Justice Jackson and Senator Blackburn).
30. See Matthew Stanmyre, *Banning Transgender Athletes Has No Shot in Liberal N.J. So Why Is This Politician Pushing for It?*, NJ.COM (Sept. 20, 2021, 7:50 AM), <https://www.nj.com/politics/2021/09/banning-transgender-athletes-has-no-shot-in-liberal-nj-so-why-is-this-politician-pushing-for-it.html> [<https://perma.cc/9L2Q-V5HM>] (“Most politicians have a pretty good fix on

public and political forums as our shared lexicon calibrates toward a new equilibrium—ideally one that is appropriately equitable, inclusive, and rights-expansive.

This Note argues that the recent recalibration toward gender-inclusive pregnancy language in the United States' social, political, and clinical discourse has not been reflected in critical areas of its federal legal discourse. In the entire 213-page *Dobbs* opinion, for instance, there was not a single reference to transgender, nonbinary, and other gender-diverse persons.³¹ Even the liberal Justices' joint dissent in that case evinced the sort of women-centric, trans-exclusionary language that Bette Midler, J.K. Rowling, and Helen Lewis espouse.³² And this was despite the fact that, arguing from a place of dissent, the liberal Justices could have been as bold and expansive as possible in articulating their vision for abortion rights in the future.

The United States has much to learn from how Latin America's "Green Wave" nations have approached this issue. Neither Argentina, Mexico, nor Colombia have shied away from gender-inclusive rhetoric in their most recent wave of landmark abortion expansions.³³ Rather, these nations have unequivocally demonstrated their commitment to the essential premise of this piece: although abortion is indeed a "women's issue," it is not exclusively such—it could, and should, be recognized as a transgender issue as well.

This Note offers three essential—though not exhaustive—reasons why gender-inclusive abortion-rights rhetoric matters. First, drawing on the work of scholars like Cass Sunstein and Chris Eisgruber, this piece analyzes the "expressive" and "educative" functions that gender-inclusive legal recognition can play in countering stigma, discrimination, and harm.³⁴ Second, this piece demonstrates that gender-exclusive language has serious legal implications; not only does it encourage narrow interpretations of the law and the subsequent denial of legal benefits, but it also undermines

their constituents and what's likely to appeal to them."); Michael Powell, *A Vanishing Word in Abortion Debate: 'Women'*, N.Y. TIMES (June 8, 2022), <https://www.nytimes.com/2022/06/08/us/women-gender-aclu-abortion.html> [<https://perma.cc/S7RU-UNFC>] ("You don't become a candidate for the presidency or speaker of the House by being dumb about what works in politics . . .").

31. See discussion *infra* Section II.D.1.a.

32. *Id.*

33. See discussion *infra* Sections II.A.-C.

34. See discussion *infra* Sections III.A.

efforts at galvanizing the sort of unified, coalition-based advocacy that many activists believe to be the strongest strategy for generating institutional change.³⁵ Third, this piece highlights the role of gender-inclusive abortion-rights rhetoric in advancing fundamental principles of good legal writing and advocacy, including precision, clarity, respect, dignity, fairness, and justice.³⁶

This Note sits at the intersection of two major lines of scholarship. One line of scholarship has challenged our legal system's rigid binary of sex and gender and considered what various bodies of law might look like if gender were decoupled from sex, including in the realm of pregnancy.³⁷ Another line of scholarship—both legal and journalistic—has studied the groundbreaking abortion expansions of the “Green Wave” countries and sought insights that might be transferrable to the United States, with a focus on the grassroots-advocacy tactics and constitutional reasoning observed in those nations.³⁸

This is the first piece to the Author's knowledge that coalesces the foregoing literature bases as part of a distinct project that looks to the “Green Wave” nations specifically for guidance on the *rhetoric* that the United States should be using to discuss pregnancy and abortion rights, rather than focusing solely on the grassroots strategies and legal reasoning of those nations. In that respect, this piece is also adjacent to a longstanding base of comparative law literature on “legal transplants,”³⁹ though its objective is to illuminate the potential for transplanting essential words and expressions rather than substantive legal doctrines. The idea is that, by focusing solely on substance rather than rhetoric, current scholarship on the “Green Wave” countries has failed to recognize not only (1) an essential element of what makes those nations' abortion laws unique, but also (2) important ways in which those nations exemplify the potential for

35. See discussion *infra* Sections III.B.

36. See discussion *infra* Sections III.C.

37. See, e.g., David Fontana & Naomi Schoenbaum, *Unsexed Pregnancy*, 119 COLUM. L. REV. 309 (2019); Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221 (2020); Jessica Clarke, *Pregnant People?*, 119 COLUM. L. REV. F. 173 (2019); Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2019).

38. See *infra* notes 70-73 and accompanying text.

39. See, e.g., ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993); Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003).

“unsexing” pregnancy in the way that some U.S. legal scholars have long thought necessary in theory but lacked real-world case studies in practice.

Part I of this Note offers an essential primer on gender-inclusive terminology and concepts and sets the foundation for the descriptive and normative analyses that follow. Part II offers a novel contribution to the existing literature by contrasting the abortion-rights rhetoric of the “Green Wave” nations with that of the United States. Part III discusses why rhetorical differences between the “Green Wave” nations and the United States matter and why the latter would be wise to adopt the gender-inclusive abortion vernacular of the former. This Note concludes by offering parting remarks and a word of inspiration: change in the United States is not only necessary; it is possible.

I. A PRIMER ON GENDER-INCLUSIVE TERMINOLOGY AND CONCEPTS

A. *Who Can Get Pregnant? Challenging the Inconceivability Fallacy*

1. Cisgender Pregnancy

Presented with the question, “Who can get pregnant?”, most individuals would respond with a fairly intuitive answer: “women.” And they would be correct, in a certain limited sense. After all, many *cisgender* women are indeed capable of pregnancy, and they are accountable for a large proportion of the approximately 3.6 million births registered in the United States each year.⁴⁰ The science involved in such instances is complex, but most individuals will have encountered it by the end of high school. At the risk of oversimplifying, pregnancy in a cisgender woman occurs after a fertilized egg successfully travels down the fallopian tube and implants in the uterus, at which point an embryo starts growing.⁴¹

Yet, it is also important to note the ways in which a conceptualization of pregnancy that exclusively centers “women” simultaneously cuts too broadly and too narrowly. First, this view is overly broad in the way that it fails to acknowledge how pregnancy is still impossible for *transgender*

40. *Births and Natality*, NAT'L CTR. FOR HEALTH STATS., <https://www.cdc.gov/nchs/fastats/births.htm> [<https://perma.cc/2AWS-BY9Z>].

41. *How Pregnancy Happens*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/pregnancy/how-pregnancy-happens> [<https://perma.cc/23YG-WGQB>].

women—although that could change soon⁴²—and may also be outside the realm of possibility for some *cisgender* women who struggle with infertility. Second, this view is unduly narrow in the way that it excludes a wide array of gender-diverse individuals who retain a capacity for pregnancy despite not identifying as women. These individuals are too often excluded from the conversation—in no small part because of a lack of awareness in conjunction with entrenched societal beliefs that “men cannot get pregnant” (the inconceivability fallacy)—but they are equally capable of reproduction and in need of reproductive care.⁴³

2. Transgender, Nonbinary, and Other Gender-Diverse Pregnancies

After years of invisibility, marginalization, and stigmatization—much of which persists today—transgender and gender-diverse pregnancies have gradually begun to find broader acceptance and rigorous study in the medical literature.⁴⁴ The bottom-line from this research is clear: anyone who has a fully functioning uterus and ovaries can become pregnant and give birth. As such, transgender and gender-diverse persons who were assigned female at birth and retain their reproductive organs may have the capacity to become pregnant, either through sexual intercourse or assistive reproductive interventions.⁴⁵

42. Dina Fine Maron, *How a Transgender Woman Could Get Pregnant*, SCI. AM. (June 15, 2016), <https://www.scientificamerican.com/article/how-a-transgender-woman-could-get-pregnant/> [<https://perma.cc/PEG8-5Z39>].

43. See Alexis Hoffkling, Juno Obedin-Maliver & Jae Sevelius, *From Erasure to Opportunity: A Qualitative Study of the Experiences of Transgender Men Around Pregnancy and Recommendations for Providers*, 17 BMC PREGNANCY & CHILDBIRTH 8 (2017); Heidi Moseson et al., *The Imperative for Transgender and Gender Nonbinary Inclusion*, 135 OBSTETRICS & GYNECOLOGY 1059 (2020).

44. For some of the leading studies in the field, see Hoffkling et al., *supra* note 43; Moseson et al., *supra* note 43; Alexis Light, Juno Obedin-Maliver, Jae Sevelius & Jennifer Kerns, *Transgender Men Who Experienced Pregnancy After Female-to-Male Gender Transitioning*, 124 OBSTETRICS & GYNECOLOGY 1120 (2014); Juno Obedin-Maliver & Harvey J Makadon, *Transgender Men and Pregnancy*, 9 OBSTETRIC MED. 4 (2015); and Angela Leung, Denny Sakkas, Samuel Pang, Kim Thornton & Nina Resetkova, *Assisted Reproductive Technology Outcomes in Female-to-Male Transgender Patients Compared with Cisgender Patients: A New Frontier in Reproductive Medicine* 112 FERTILITY & STERILITY 858 (2019).

45. See Leung et al., *supra* note 44, at 859, 863.

Although many transgender pregnancies are planned, like Beatie's, data suggests that some are unintended.⁴⁶ These unintended transgender pregnancies sometimes arise from missing testosterone,⁴⁷ but experts emphasize that transgender men can also have unintended pregnancies "while taking or still amenorrheic" from testosterone, as these treatments are not equivalent to birth control.⁴⁸ Regardless, whether planned or unintended, the resounding point is the following: transgender, nonbinary, and other gender-diverse persons need and are entitled to reproductive care—including abortion—just as cisgender women need and are entitled to such services.

B. Gender-Inclusive Pregnancy and Abortion-Rights Language

Recognizing the multiplicity of gender identities that experience pregnancy and seek reproductive care like abortions, various medical providers, government organizations, and advocacy organizations have demonstrated a commitment to using more gender-inclusive—sometimes also referred to as "gender-neutral"—language in recent years. For instance, the NIH has issued the following guidance:

Both *pregnant women* and *pregnant people* are acceptable phrases. It is unnecessary to avoid the word *women* by substituting phrases like *birthing people*, or *people with uteruses*. Neutral terms like *pregnant patients*, *pregnant people*, or other wording as applicable (e.g., *pregnant teens*), present an inclusive alternative. Use

46. See Light et al., *supra* note 44, at 7.

47. See Hallie Lieberman, *Trans Men Talk About Why They Got Abortions*, BUZZFEED NEWS (Aug. 15, 2022, 12:47 PM), <https://www.buzzfeednews.com/article/hallielieberman/trans-men-abortion-rights-roe> [<https://perma.cc/2H2B-MBST>] ("The reason I got pregnant is because I had been going through a bout of depression for a while and not really having all the money to get my testosterone, so I kind of stopped taking it for a while."); Denise Grady, *A Family in Transition: Two Fathers and the Baby Girl They Never Expected*, N.Y. TIMES, <https://www.nytimes.com/2018/06/16/health/transgender-baby.html> [<https://perma.cc/V5AV-CT4A>] ("Trans men have conceived on purpose, but Tanner isn't one of them. In his case, it happened by accident after he missed a few doses of testosterone, and he didn't suspect he was pregnant until the morning sickness hit.").

48. See Obedin-Maliver & Makadon, *supra* note 43.

judgment and context to determine whether to use *pregnant women* or *pregnant people / pregnant patients*.

Using more limited and specific language is sometimes important. For instance, if discussing a study that only involves cisgender women, gender-specific language (pregnant women) would be most accurate to reference that study's findings. If the word *women* is preferable, but transgender and nonbinary people are also referenced, phrasing like *women and other pregnant patients* can provide an inclusive alternative.⁴⁹

In this same vein, the ACLU posted the following statement on Twitter after the Supreme Court overturned *Roe v. Wade*: "Today's decision is a gender, racial and economic justice catastrophe with deadly consequences. *Women and people who can become pregnant* have been forced into a second-class status. The impacts will fall hardest on Black women who already face a severe maternal mortality crisis."⁵⁰

This shift has not come without controversy.⁵¹ As proponents of gender-inclusive language retort, however, many claims levied in opposition generally miss the mark. First, regarding those opponents who fear that gender-inclusive language could have an "othering" effect and "reduce [the] visibility of women"⁵² in society, they wrongly frame the use of this language as a zero-sum game and neglect to acknowledge the much larger base of research demonstrating the host of harms associated with gender-exclusive language.⁵³ The same can be said in response to critics like Helen

49. *Inclusive and Gender-Neutral Language*, NAT'L INSTS. OF HEALTH (Oct. 20, 2022), <https://www.nih.gov/nih-style-guide/inclusive-gender-neutral-language#> [<https://perma.cc/TX62-3E6D>].

50. ACLU (@ACLU), TWITTER (June 24, 2022, 10:26 AM) (emphasis added), <https://twitter.com/ACLU/status/1540340550200688643?s=20> [<https://perma.cc/4P6F-ZBA3>].

51. *See supra* notes 25-32 and accompanying text.

52. Brooke Migdon, *Experts Warn Gender-Neutral Language Like 'Pregnant People' May Put Mothers at Risk*, THE HILL (Feb. 1, 2022), <https://thehill.com/changing-america/respect/diversity-inclusion/592335-experts-warn-gender-neutral-language-like/> [<https://perma.cc/PP9A-FFSP>].

53. *See, e.g.*, Hoffkling et al., *supra* note 43, at 8; Moseson et al., *supra* note 43, at 1060-62. It is quite clear that transgender persons are the ones currently being othered and rendered invisible in ways that cause harm, which is why there has been a push for gender-inclusive language in the first instance. For more in-depth analysis, see discussion *infra* Part III.

Lewis who equate the use of gender-inclusive language with “declaring a war on saying ‘women.’” This is an unfair mischaracterization that obscures the nuances of the movement. No one is saying that it is impermissible to say “women” or that one need use “othering,” “dehumanizing” language that refers only to body parts when discussing certain issues—to the contrary, the NIH guidance above explicitly noted that “[b]oth pregnant women and pregnant people are acceptable phrases. It is unnecessary to avoid the word women by substituting phrases like birthing people, or people with uteruses.”⁵⁴ Rather, the argument in favor of gender-inclusive pregnancy language is that one should be mindful of when “women”-centric language is incomplete, hurtful, and potentially even harmful,⁵⁵ and one should “[u]se judgment and context to determine whether to use pregnant women or pregnant people” in such instances. Transgender activists could not be clearer about their support of this contextualized, nuanced approach to gender-inclusive language:

To the extent that people say that anyone has a problem with [saying women] in the trans community, that’s an actual lie. . . . The times when it might be appropriate to use “pregnant people” is when you were talking about the universe of people who can get pregnant, some of whom are actually men, trans men like me, and some of whom are non-binary people who don’t identify as men or women.⁵⁶

For the reasons noted in the preceding Section, access to abortion services is one critical area of the law that implicates “the universe of people who can get pregnant”—certainly cisgender women, but also transgender, nonbinary, and other gender-diverse persons. The argument proffered in this Note is thus that America’s legal vernacular should reflect this reality and adopt the gender-inclusive pregnancy and abortion-rights terminology that is gradually penetrating its sociopolitical discourse. Part II of this Note discusses the lessons that we can glean from Latin America’s “Green Wave” nations in this respect, and Part III discusses why these lessons matter.

54. *Inclusive and Gender-Neutral Language*, *supra* note 49.

55. *See* discussion *infra* Part III.

56. Shannon Palus, *How to Think About the Debate Over the Phrase “Pregnant People”*, SLATE (July 9, 2022, 5:55 AM), <https://slate.com/technology/2022/07/pregnant-people-inclusive-language-gender-debate.html> [<https://perma.cc/VD8V-ZNT2>].

II. THE ABORTION-RIGHTS RHETORIC OF THE LATIN AMERICAN “GREEN WAVE” NATIONS AND THE UNITED STATES

The decades-long international order of abortion rights has undergone a radical shift in just the past three years. At the start of 2021, according to a comprehensive study by the Center for Reproductive Rights,⁵⁷ sixty-six countries either prohibited abortion altogether or allowed it only to save a woman’s life; sixty-four countries allowed abortion to preserve a woman’s health—broadly defined⁵⁸—or under a variety of socioeconomic circumstances; and seventy-three countries allowed abortion on request for a certain number of weeks. Among the countries in the latter category, the most common gestational limit for abortion remains twelve weeks. The United States, by contrast, has long been viewed as a global leader in allowing abortion without restrictions until viability—about twenty-three weeks—dating back to the Supreme Court’s 1973 ruling in *Roe v. Wade*.⁵⁹

The foregoing global abortion-rights landscape was dramatically altered when the U.S. Supreme Court issued its June 2022 decision in *Dobbs v. Jackson Women’s Health Organization*.⁶⁰ In disavowing *Roe v. Wade*’s federal constitutional protections and returning the authority to regulate abortions to “the people [of the states] and their elected representatives,”⁶¹ the United States joined just three other countries—El Salvador, Nicaragua, and Poland—that have scaled back abortion rights since 1994.⁶² Essentially,

57. *The World’s Abortion Laws*, CTR. FOR REPRODUCTIVE RTS. (Feb. 23, 2021), https://reproductiverights.org/wp-content/uploads/2019/05/WALM_2021_update_V1-1.pdf [<https://perma.cc/3PX6-3CN4>].

58. The World Health Organization advises that countries permitting abortion on health grounds should interpret “health” to mean “a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.” *Abortion*, WHO, https://www.who.int/health-topics/abortion#tab=tab_1 [<https://perma.cc/JQL7-3EMD>].

59. *See* 410 U.S. 113 (1973).

60. 597 U.S. 215 (2022).

61. *Id.* at 259.

62. *See* Laurin-Whitney Gottbrath, *U.S. Joins Only 3 Other Countries That Have Rolled back Abortion Rights Since 1994*, AXIOS (June 24, 2022), <https://www.axios.com/2022/05/05/only-3-countries-have-rolled-back-abortion-rights-since-1994> [<https://perma.cc/6CLV-W3FZ>]. In contrast with the United States, El Salvador, Nicaragua, and Poland, the overwhelming global trend over the past fifty years has been toward a liberalization of abortion laws. *See id.*

after fifty years of pro-choice advocacy groups abroad looking to the United States as a beacon of hope and a guidebook for how to achieve similarly expansive abortion liberties, the United States abdicated its position as “the most influential nation in the Americas” in inspiring a global trend toward abortion liberalization.⁶³ Rather, the nation known for decades as being a positive outlier in the push for abortion-inclusive reproductive justice has now become an outlier in the opposite direction, and this reversal has already begun to embolden anti-abortion forces abroad.⁶⁴

In contrast, three of Latin America’s four most populous nations—Argentina, Mexico, and Colombia—have expanded abortion protections in the past three years. Argentina passed a bill that legalized abortion in the first fourteen weeks of pregnancy in December 2020,⁶⁵ Mexico’s Supreme Court Justice of the Nation decriminalized abortion by way of four historic opinions between September 2021⁶⁶ and September 2023,⁶⁷ and Colombia’s Constitutional Court voted to decriminalize abortion in the first twenty-four weeks of pregnancy in February 2022.⁶⁸ The victories in all three countries were linked to a grassroots abortion-rights movement known as the “Marea Verde” or “Green Wave”—a reference to the color of

63. Luke Taylor, *How South America Became a Global Role Model for Abortion Rights*, BMJ (Aug. 16, 2022), <https://doi.org/10.1136/bmj.o1908> [<https://perma.cc/4Q9F-JRLB>].

64. Rebecca Root, *Abortion Rights: Global Repercussions Continue Six Months After US Supreme Court’s Dobbs Decision*, INT’L BAR ASS’N (Dec. 9, 2022), <https://www.ibanet.org/%20Abortion-rights-Global-repercussions-continue-six-months-after-US-Supreme-Court> [<https://perma.cc/XX3W-8YLZ>].

65. See Law No. 27610, *Acceso a la Interrupción Voluntaria Del Embarazo* [Access to the Voluntary Interruption of Pregnancy], Dec. 30, 2020, (Arg.).

66. See Press Release, *Mexican Supreme Court: Landmark Decisions at the Vanguard for Reproductive Rights Worldwide*, SUPREMA CORTE DE JUSTICIA DE LA NACIÓN (Oct. 1, 2021), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6606> [<https://perma.cc/6N7A-LNFP>].

67. See Amparo en Revisión 267/2023, Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN], 6 de septiembre de 2023 (Mex.); Press Release, *The Legal System That Regulates The Crime of Abortion in the Federal Criminal Code is Unconstitutional Because it Is Contrary to the Right to Decide of Women and People with the Capacity to Gestate*, SUPREMA CORTE DE JUSTICIA DE LA NACIÓN (Sept. 6, 2023), <https://www.internet2.scjn.gob.mx/red2/comunicados/comunicado.asp?id=7504> [<https://perma.cc/N3SR-2X3E>].

68. See Corte Constitucional [C.C.] [Constitutional Court], febrero 21, 2022, Sentencia C-055-22 (Colom.).

the bandanas, t-shirts, and handkerchiefs worn by its activists—that has been advocating for change across Latin America.⁶⁹ Suddenly, a largely Catholic, religiously conservative region known for having some of the most restrictive abortion laws in the world has traded places with the United States and become a source of inspiration for other nations.

Several comparative law and policy studies have focused on the groundbreaking changes introduced in the “Green Wave” countries and sought insights that might be transferrable to the United States. These works have often focused on the grassroots tactics and constitutional reasoning adopted in those nations.⁷⁰ For instance, in *A World Without Roe: The Constitutional Future of Unwanted Pregnancy*, Julie Suk “examines the constitutional law of abortion access in peer democracies,” including Argentina, Mexico, and Colombia, and argues that “the common thread in laws liberalizing abortion around the world [has been] the understanding of unwanted pregnancy as a public problem for which the State bears responsibility, rather than a purely private matter as in *Roe*.”⁷¹ Indeed, this recent interest among legal scholars is part of a broader trend also seen

69. See Joe Hernandez, *How Green Became the Color of the Abortion Rights Movement*, NPR (June 27, 2022, 7:01 AM ET), <https://www.npr.org/2022/06/27/1107717283/abortion-rights-green-symbol> [<https://perma.cc/M3UZ-XXMN>]; Ximena Casas, *How the ‘Green Wave’ Movement Did the Unthinkable in Latin America*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/11/01/opinion/abortion-latin-america.html> [<https://perma.cc/CS6P-TEW4>].

70. See, e.g., Kim D. Ricardo, *Was Justice Ginsburg Roe-Ght?: Reimagining U.S. Abortion Discourse in the Wake of Argentina’s Marea Verde*, 48 MITCHELL HAMLINE L. REV. 128 (2022); Kathleen Marie McGean, *The Roots of Rights: Where Do Courts Find Constitutional Support for a Woman’s Right to Choose or a Fetal Right to Life?*, 51 GA. J. INT’L & COMP. L. 197 (2022); Julie C. Suk, *A World Without Roe: The Constitutional Future of Unwanted Pregnancy*, 64 WM. & MARY L. REV. 443 (2022).

71. Suk, *supra* note 70, at 449; see also *id.* at 448 (“While global constitutional norms cannot easily be transplanted to U.S. law, the trajectories of jurisdictions that developed the right to abortion access from strong pro-life baselines could inform the alternatives to *Roe* by which abortion access could be reimagined and reestablished in America.”).

among activists⁷² and journalists⁷³, as U.S. pro-choice forces seek to regroup, recalibrate, and rebuild in the wake of *Dobbs*.

In the ensuing paragraphs, this Note takes an alternative analytical angle and focuses on an underappreciated source of lessons from the “Green Wave” nations—not the organizing tactics and legal reasoning, but the legal *language* as expressed through law and policy. Ultimately, this analysis reveals a remarkable rhetorical progressivism in the “Green Wave” nations that might be surprising given their religious-conservative roots. Neither Argentina, Mexico, nor Colombia have shied away from the gender-inclusive abortion-rights rhetoric espoused in this Note and eschewed by some within the United States.

A. Argentina

1. The Voluntary Interruption of Pregnancy Law

On December 30, 2020, Argentina’s National Congress officially passed the historic Voluntary Interruption of Pregnancy Law (VIPL).⁷⁴ At its core, the VIPL legalized abortion—which it refers to as the “voluntary termination of pregnancy”—up until the fourteenth week of pregnancy. In addition, it guaranteed that abortions in Argentina would be available for free and sought to make abortion access universal. Under the VIPL, an abortion procedure can be requested at any public or private health facility, and doctors are legally bound to either perform it or refer the patient to another physician or health facility. Lastly, the law established a series of principles to guide its application on behalf of all medical providers, legal entities, government officials, and related parties.⁷⁵

72. Oriana González & Marina E. Franco, *U.S. Abortion Rights Advocates Host Latin American “Green Wave” Leaders in Historic First*, AXIOS (Mar. 2, 2023), <https://www.axios.com/2023/03/02/abortion-rights-us-latin-america-green-wave> [https://perma.cc/Y6SB-YF8G].

73. Ailsa Chang, Jonaki Mehta & Justine Kenin, *What the U.S. Can Learn from Abortion Rights Wins in Latin America*, NPR (July 7, 2022, 5:00 AM ET), <https://www.npr.org/2022/07/07/1110123695/abortion-roe-latin-america-green-wave> [https://perma.cc/VA2Z-GALE].

74. *See* Law No. 27610, *Acceso a la Interrupción Voluntaria Del Embarazo* [Access to the Voluntary Interruption of Pregnancy], Dec. 30, 2020, (Arg.).

75. *See* Law No. 27610, *Acceso a la Interrupción Voluntaria Del Embarazo* [Access to the Voluntary Interruption of Pregnancy], Dec. 30, 2020, (Arg.); *see*

It is difficult to overstate the significance of the VIPL. First, the law is certainly significant for the people whom it seeks to protect and the injustices it seeks to combat. Second, the law is significant for the impact that it had on other nations in Latin America. Various sources have noted that, although Argentina was not the first Latin American country to legalize abortion,⁷⁶ it was the spark that ignited the Green Wave abortion-rights movement in others.⁷⁷ Third, the law was significant for how its enactment seemed to signal at least a partial break from the Roman-Catholic and evangelical-Protestant forces that have historically proven effective at impeding pro-choice abortion efforts in Argentina.⁷⁸ As an example, Argentina is the birth nation of Pope Francis, who, at the time that the National Congress was debating the VIPL, sent a handwritten letter to a congresswoman reiterating the importance of protecting life against attempts to legalize abortion.⁷⁹

also Protocol for the Comprehensive Care of Persons with the Right to the Voluntary Interruption of Pregnancy: 2022 Update, ARG. MINISTRY OF HEALTH (2022), <https://bancos.salud.gob.ar/recurso/protocolo-para-la-atencion-integral-de-las-personas-con-derecho-la-interrupcion-voluntaria> [https://perma.cc/28SE-APDY] (interpreting and establishing guidelines based on the principles outlined in the VIPL).

76. The Latin American abortion-rights victories began with Cuba in 1961, followed by Guyana in 1995, and then Uruguay in 2012—which legalized abortion for all in the first twelve weeks of pregnancy and for cases of rape in the first fourteen weeks of pregnancy. See Liz Mineo, *Lesson from Latin America for U.S. Abortion Rights Movement*, HARV. GAZETTE (Oct. 26, 2022), <https://news.harvard.edu/gazette/story/2022/10/lesson-from-latin-america-for-u-s-abortion-rights-movement/> [https://perma.cc/8FEX-5BTD].
77. See Hernandez, *supra* note 69. See also discussion *infra* Sections II.B. (discussing Argentina’s influence on Mexico), II.C. (discussing Argentina’s influence on Colombia).
78. Abortion has long been a contentious issue in Argentina, in large part because more than 60% of the population identifies as Catholic and 15% identifies as Protestant—including evangelical Christians—and the leadership of both groups opposes the practice. See *2019 Report on International Religious Freedom: Argentina*, U.S. DEP’T OF STATE (2019), <https://www.state.gov/reports/2019-report-on-international-religious-freedom/argentina/> [https://perma.cc/3XAJ-K2TQ].
79. See Vatican News Staff Writer, *Pope Thanks Argentinian Women’s Network for Pro-Life Commitment*, VATICAN NEWS (Nov. 26, 2020), <https://www.vaticannews.va/en/pope/news/2020-11/pope-francis-thanks-argentinian-women-s-network-for-their-commit.html> [https://perma.cc/5YBV-CLUW].

Most of all, for the purposes of this Note, the VIPL is significant for the gender-inclusive language that it used throughout its twenty-two Articles. For instance, Article 1 of the law, which asserted its objective, was unequivocal about who the VIPL was intended to protect: “The purpose of this law is to regulate access to voluntary termination of pregnancy and post-abortion care, in compliance with the commitments assumed by the Argentine State in matters of public health and the human rights **of women and people with other gender identities with the ability to gestate . . .**”⁸⁰ This language is repeated throughout some of the most important introductory sections of the law—Article 2’s summary of the rights that “women and people with other gender identities with the capacity to gestate” possess;⁸¹ Article 4’s more specific declaration of the right to terminate a pregnancy up to and including the fourteenth week of gestation;⁸² and Article 5’s enumeration of the minimum protections that health personnel must guarantee when providing abortion or post-abortion care.⁸³

Even when altering the exact terms used, the VIPL never veers from its commitment to gender-inclusive language. For instance, as an alternative to “women and people with other gender identities with the capacity to gestate,” the law in seventeen locations refers to the rights of “pregnant

80. Law No. 27610, *Acceso a la Interrupción Voluntaria Del Embarazo* [Access to the Voluntary Interruption of Pregnancy], Dec. 30, 2020, (Arg.) (emphasis added).

81. *Id.* (“**Women and people with other gender identities with the capacity to gestate** have the right to: a) Decide to terminate the pregnancy in accordance with the provisions of this law; b) Request and access care for the termination of pregnancy in the health system services, in accordance with the provisions of this law; c) Require and receive post-abortion care in the health system services, without prejudice to the fact that the decision to abort would have been contrary to the legally authorized cases in accordance with this law; d) Prevent unintended pregnancies through access to information, comprehensive sexual education, and effective contraceptive methods.”) (emphasis added).

82. *Id.* (“**Women and people with other gender identities capable of pregnancy** have the right to decide and access the termination of their pregnancy up to the fourteenth (14th) week, inclusive, of the gestational process.”) (emphasis added).

83. *Id.* (“Health personnel must observe dignified treatment, respecting the personal and moral convictions of the patient, to eradicate practices that perpetuate the exercise of violence against **women and people with other gender identities with the capacity to gestate.**”) (emphasis added).

person[s].”⁸⁴ One such instance is in the aforementioned Article 5, which seeks to ensure that access to an abortion is universal for all persons in need: “**Every pregnant person** has the right to access the termination of their pregnancy in the health system services or with their assistance, within a maximum period of ten (10) calendar days from their request and under the conditions established in this law.”⁸⁵ Another example occurs in Article 4’s description of the specific circumstances under which an abortion may be permitted beyond the fourteen-week gestational limit: “Outside of the term provided in the previous paragraph, **the pregnant person** has the right to decide and access the termination of their pregnancy only in the following situations”⁸⁶

Note the remarkable similarity between the language in the foregoing provisions of the VIPL and the gender-inclusive language urged by the U.S. National Institutes of Health, as discussed in Section I.B. of this Note: “If the word *women* is preferable, but transgender and nonbinary people are also referenced, phrasing like **women and other pregnant patients** can provide an inclusive alternative.”⁸⁷ In this way, Argentina’s VIPL demonstrates that the fears vocalized by those who opposed gender-inclusive language on the grounds that it would erase women were misguided. Argentina’s law does not utilize oft-ridiculed phrases like “people with uteruses” or “bodies with vaginas” to avoid mentioning women in the law. To the contrary, it either (1) opts for an approach that names the full range of persons impacted but *leads with women*, recognizing that they are the largest population involved—“women and people with other gender identities with the ability to gestate”—or (2) utilizes gender-neutral language that has gained general acceptance in the medical community and is duly respectful of women and gender-diverse persons alike—“[e]very pregnant person.”⁸⁸ With the VIPL, Argentina became an archetype worldwide for points that advocates of transgender visibility had been making for years: implementing gender-inclusive pregnancy language in the law does not necessitate an erasure of women nor does it require an absurd distortion of otherwise intuitive language; women and gender-diverse persons with similar capacities for pregnancy can coexist, and the law is made all the more effective when it explicitly recognizes this.

84. *Id.*

85. *Id.* (emphasis added).

86. *Id.* (emphasis added).

87. NAT’L INSTS. OF HEALTH, *supra* note 49 (emphasis added).

88. *Id.* (emphasis added).

2. The Long March Toward a Gender-Inclusive Outcome

The origins of the fight for gender-inclusive abortion-rights rhetoric in Argentina are inextricably linked to the rise of the “Green Wave” movement itself. Although the earliest vestiges of the Green Wave can be traced to the 1970s,⁸⁹ the birth of the modern movement is often attributed to 2005, when the National Campaign for the Right to Legal, Safe, and Free Abortion (the Campaign) was created.⁹⁰ The aim of the Campaign was to form a massive civil-society collective advocating for the decriminalization of abortion, principally by marching in the streets, lobbying in government settings, disseminating key messages through major media channels, conducting petition-signing drives, partnering with public-health organizations, and biannually presenting its own abortion-legalization bill to Congress.⁹¹ Notably, although the Campaign would eventually boast the backing of over three-hundred supporters,⁹² some of the first endorsers were transgender-advocacy organizations like *Asociación de Travestis, Transexuales y Transgéneros de Argentina* (Association of Transvestites, Transsexuals, and Transgenders of Argentina).⁹³ Their actions were

89. See Cecilia Nowell, *Argentina’s Decades-Long Fight to Legalize Abortion Ends in Victory*, THE NATION (Jan. 1, 2021), <https://www.thenation.com/article/world/argentina-abortion-feminism> [<https://perma.cc/844N-ADUH>]. (“The campaign to legalize abortion began sometime in the late 1970s, when the ‘grandmothers’ of the green wave were living in exile across Europe.”).

90. See Ana Cecilia Dinerstein, *La creciente marea verde: la lucha por la justicia reproductiva en Argentina* [*The Growing Green Tide: the Fight for Reproductive Justice in Argentina*], CLASCO (May 6, 2021), <https://www.clasco.org/en/la-creciente-marea-verde-la-lucha-por-la-justicia-reproductiva-en-argentina> [<https://perma.cc/JG23-Q4BP>].

91. See María Alicia Gutiérrez, *Politics of Recognition: The National Campaign for the Right to Legal, Safe, and Free Abortion in Argentina*, 122 S. ATL. Q. 386, 386-96 (2023).

92. See Gabriela De Cicco, *Argentina: For the Right to Legal, Safe and Free Abortion*, AWID (Sept. 23, 2011), <https://www.awid.org/news-and-analysis/argentina-right-legal-safe-and-free-abortion> [<https://perma.cc/3G7L-D4B7>] (“[W]hile [the Campaign] was launched by feminist groups[,] now there are 300 social organizations working in and supporting it . . .”).

93. See *3^{er} Mes de la Campaña Nacional por el Derecho al Aborto Legal, Seguro y Gratuito* [*3rd Month of the National Campaign for the Right to Legal, Safe and Free Abortion*], INDYMEDIA ARG. (July 28, 2005, 7:23 AM), <https://archivo.argentina.indymedia.org/news/2005/07/312355.php> [<https://perma.cc/6FHD-3CQW>].

synergistic—the Campaign supported LGBTQ+ efforts like the push for Argentina’s equal-marriage⁹⁴ and gender-identity⁹⁵ laws, and LGBTQ+ organizations contributed significantly to abortion-decriminalization efforts.⁹⁶

Although the Green Wave’s campaign for abortion liberalization in Argentina has been characterized by its scale and intersectionality,⁹⁷ it is clear that the road to including transgender and other gender-diverse persons was rife with challenges. Interviews with Green Wave activists detail several difficult conversations on the issue of whether and how to recognize the experiences of gender-diverse persons with a capacity for pregnancy in Campaign discourse.⁹⁸ Some organizers advocated vehemently for gender-inclusive language and alliances with LGBTQ+ groups.⁹⁹ For these individuals, it was (1) necessary to acknowledge how the abortion-rights movement and the feminist struggle more broadly had changed in response to new perspectives on gender and sexuality, and (2) strategic to partner with the LGBTQ+ community in light of its legislative success in lobbying Congress for same-sex marriage and gender-identity laws.¹⁰⁰ Nevertheless, some organizers were resistant. In their view, “the issue was ‘political protagonism’ and ‘strategy’”¹⁰¹—adopting more gender-inclusive abortion-rights rhetoric seemed normatively concerning because it risked shifting the focus away from cisgender women and politically

94. See Law No. 26618, *Matrimonio Civil (Matrimonio Igualitario)* [Civil Marriage (Equal Marriage)], July 21, 2010, (Arg.).

95. See Law No. 26743, *Identidad de Género* [Gender Identity], May 23, 2012, (Arg.).

96. See Alba Ruibal, *Abortion in Argentina: Movement Expansion, the Green Wave and Legalization*, *Fòs FEMINISTA* 1, 10 (Sept. 2022), <https://fosfeminista.org/wp-content/uploads/2023/05/Fos-Feminista-Policy-Brief-Argentina-ENG-v4.pdf> [<https://perma.cc/LL4F-LSUD>].

97. See Dinerstein, *supra* note 90 (“Intersectional spaces were opened where women of all ages and races, gays and lesbians, the non-binary and trans community, as well as the general public contributed their various perspectives to the Campaign . . .”).

98. See Barbara Sutton & Elizabeth Borland, *Queering Abortion Rights: Notes from Argentina*, 20 *CULTURE, HEALTH & SEXUALITY* 1378, 1384-87 (2018).

99. *Id.*

100. *Id.*

101. *Id.* at 1387.

inexpedient because it threatened to lose the votes of conservative lawmakers.¹⁰²

Debates over how to frame the abortion-rights rhetoric of the Campaign reached a boiling point in 2014, when the movement's organizers considered calls to revise the model abortion-rights bill that they had biannually been submitting to Congress.¹⁰³ That year, gender-diverse activists in Argentina became increasingly more visible in public conversations around abortion, with a focus on challenging the women-centric, transgender-exclusive perspectives that previously defined the movement. For instance, during a roundtable titled "Men Discuss Voluntary Abortion," Argentine philosopher and trans activist Blas Radi called for overcoming patterns of "cissexism" (prejudice or discrimination against transgender persons) within feminist activism, arguing that transgender struggles and abortion-rights struggles generally share a common ground in their pursuit of bodily autonomy.¹⁰⁴ Moreover, Radi posited that breaking exclusive associations between cisgender women and pregnancy would be strategically advantageous for the women's liberation movement: "If we do not want to think of women as forcefully reproductive then we should question why we continue to hold that in order to reproduce one must be a woman."¹⁰⁵ Meanwhile, other gender-diverse activists focused on framing gender-inclusive abortion-rights rhetoric as part of a comprehensive approach to gender-inclusive healthcare.¹⁰⁶

102. *Id.*

103. *Id.* at 1386 ("Manuel, a gay Campaign activist and LGBT advocate, brought up sexual and gender identity when talking in 2014 about the Campaign's need to update its bill. He argued that it was outdated (at eight years old): Initially, 'when it was presented, abortion was not massively practiced with pills, and . . . the indisputable and . . . unambiguous subject of abortion was the heterosexual woman.' Lesbians or trans men who abort or seek the right to do so put the subject of legislation and advocacy into debate.").

104. See Blas Radi, *Abortion and Trans Men*, YOUTUBE (July 3, 2014), https://www.youtube.com/watch?v=wXSz_BmTiq8 [https://perma.cc/H7A5-RC5Q].

105. *Id.* at 11:33-11:51.

106. See, e.g., Francisco Sfeir, *¿Qué tiene para decir un puto trans sobre el derecho al aborto?* [What Does a Trans Person Have to Say About the Right to Abortion?], PÁGINA12 (June 20, 2014), <https://www.pagina12.com.ar/diario/suplementos/soy/1-3490-2014-06-20.html> [https://perma.cc/Z3WV-P8EG].

In response to increased visibility in 2014, transgender and other gender-diverse abortion-rights advocates realized significant victories in the ensuing years. First, in 2015, Argentina’s National Ministry of Health updated its “Protocol for the Comprehensive Care of People with the Right to Legal Interruption of Pregnancy” so that it explicitly recognized the experiences of transgender persons and all other “persons with the ability to carry a pregnancy.”¹⁰⁷ Then, in 2016, the National Campaign for the Right to Legal, Safe, and Free Abortion made a major adjustment to the model bill that it had been presenting to Congress. The 2016 bill’s language remained women-centered, but it included an article that extended abortion rights to all “persons who can become pregnant.”¹⁰⁸ Even more promising, while the bill was still under debate within the House of Representatives in 2018, its language was modified to be more inclusive; its separate article for transgender persons was deleted and instead every reference to women in the main text was changed to “women and pregnant persons.”¹⁰⁹

The astounding rhetorical progressivism in the House of Representatives’ 2018-2019 bill was a product of the inroads that gender-diverse abortion-rights advocates had made—and were continuing to make—by that time. Although the Senate ultimately voted to reject the 2018-2019 bill, the stage had been set for the Voluntary Interruption of Pregnancy Law that ultimately passed in 2020. Not only had “the cultural battle over abortion . . . undoubtedly [been] won that year,”¹¹⁰ but the rhetorical battle had as well.¹¹¹

107. *Protocolo para la Atención Integral de las Personas con Derecho a la Interrupción Legal del Embarazo*, [Protocol for the Comprehensive Care of People with the Right to Legal Interruption of Pregnancy] MINISTERIO DE SALUD DE LA NACIÓN 11, 11 (Apr. 2015), <https://www.argentina.gob.ar/sites/default/files/senaf/materiales-otros-organismos/Protocolo%20para%20la%20atenci%C3%B3n%20integral%20de%20las%20personas%20con%20derecho%20a%20la%20interrupci%C3%B3n%20integral%20del%20embarazo.pdf> [https://perma.cc/54ZZ-EW38].

108. See Ruibal, *supra* note 96, at 11.

109. *Id.*

110. Mariela Belski, *Latin America Can Now Lead the Way on Abortion Rights*, AL JAZEERA (June 29, 2022), <https://www.aljazeera.com/opinions/2022/6/29/latin-america-can-now-lead-the-way-on-abortion-rights> [https://perma.cc/6GTD-RX3G].

111. See Verónica Gago, *What Latin American Feminists Can Teach American Women About the Abortion Fight*, THE GUARDIAN (May 10, 2022, 6:21 AM ET), <https://www.theguardian.com/commentisfree/2022/may/10/abortion->

In other words, the 2020 VIPL's gender-inclusive outcome was never guaranteed; it was deliberately crafted and compelled by the persistence of gender-diverse activists over several years and across various advocacy channels. These bold individuals had forged a sociopolitical context in which legislators and other key parties could no longer view the National Campaign for the Right to Legal, Safe, and Free Abortion as solely a women's issue. The result was a landmark abortion-rights victory that not only launched the pro-choice "Green Wave" movement across Latin America but also established a powerful linguistic template for nations like Mexico and Colombia to follow when deciding which groups to include in their respective abortion decrees.

B. Mexico

1. Landmark Supreme Court Decisions in the States of Coahuila and Sinaloa

In September 2021, the Mexican Supreme Court issued two unanimous opinions that expanded access to abortion in the states of Coahuila and Sinaloa. First, on September 7, the Court declared unconstitutional Article 196 of the Penal Code of Coahuila, which had previously mandated a sentence of up to three years in prison for any woman who voluntarily underwent an abortion.¹¹² This was the first time that Mexico's highest court had ruled in favor of decriminalizing abortion in any of the nation's states.¹¹³ Then, two days later—largely on the basis of its ruling in the Coahuila case—the Court declared unconstitutional a provision within the

roe-v-wade-latin-america [https://perma.cc/84JC-JRME] ("New language became common sense, using gender-neutral terms...and specifically speaking of gestating persons, thanks to the struggle of non-binary people and trans men.").

112. *Acción de Inconstitucionalidad 148/2017, Despenalización del Aborto*, Pleno de la Suprema Corte de Justicia [SCJN], 7 de septiembre de 2021 (Mex.). For a full English translation see CONSTITUTIONAL PRECEDENT IN THE MEXICAN SUPREME COURT 293 (2022), <https://www.sitios.scjn.gob.mx/cec/biblioteca-virtual/constitutional-precedent-mexican-supreme-court> [https://perma.cc/4YYB-LWY4].

113. See Melissa Galván, *Sinaloa y Coahuila: ¿Qué sigue tras los fallos de la Corte sobre el aborto?* [Sinaloa and Coahuila: What's Next After the Court's Rulings on abortion?], EXPANSIÓN POLÍTICA (Sept. 9 2021, 5:33 PM), <https://politica.expansion.mx/mexico/2021/09/09/sinaloa-y-coahuila-que-sigue-tras-los-fallos-de-la-corte-sobre-el-aborto> [https://perma.cc/P5G6-XCZV].

Constitution of Sinaloa that “protect[ed] the right to life from the moment an individual is conceived.”¹¹⁴ The latter decision did not *per se* imply the decriminalization of abortion in Sinaloa or in states where similar constitutional provisions existed, but it did establish that any pregnant person whose abortion was denied or prosecuted based on the “right-to-human-life-from-conception” standard would be eligible to pursue an *amparo* (a form of constitutional review and injunction that defends Mexican citizens against human-rights violations).¹¹⁵

Like Argentina’s VIPL in 2020, the Mexican Supreme Court’s two landmark abortion rulings in 2021 were significant not only for their transformative legal substance but also for their gender-inclusive language. In the Coahuila decision, for instance, the Court began by differentiating between sex and gender in a way that laid the foundations for the entire opinion: “it is essential to express that this High Court guides its analysis and decision from the obligation to . . . detect and eliminate all barriers and obstacles that discriminate against people based on sex *or* gender.”¹¹⁶ In the paragraph that immediately followed—one of the most groundbreaking segments of the decision, because of the paradigm-shifting approach that the Court took in defining the population affected by its ruling—the Court made it clear why it felt the need to distinguish between the concepts of sex and gender:

[I]n terms of gender and intersectionality, **the spectrum of this Court’s decision includes both women and people with the capacity to gestate**, a fundamental concept of inclusive language in which the underlying purpose is recognition and visibility for those people who, belonging to diverse gender identities other than the traditional concept of women, nevertheless have bodies with the capacity to gestate **(for example, transgender men, non-binary people, among others)**.¹¹⁷

Although the Mexican Supreme Court perhaps could have reserved its use of gender-inclusive language to the foregoing prefatory paragraphs, it was adamant about referencing the full spectrum of affected persons

114. Acción de Inconstitucionalidad 106/2018 y su acumulada 107/2018, Pleno de la Suprema Corte de Justicia [SCJN], 9 de septiembre de 2021, página 16, 52 (Mex.).

115. *Id.* at 52.

116. Acción de Inconstitucionalidad 148/2017, *supra* note 112, at para. 46 (emphasis added).

117. *Id.* at para. 47 (emphasis added).

whenever relevant. Intriguingly, it often did so by adding parentheticals to any statement that otherwise might have been interpreted as applying solely to women at the exclusion of other “persons with gestational capacity,” as the following excerpt demonstrates: “The **woman’s right to decide (and whose exercise of that right extends, of course, to all persons with gestational capacity)** is the result of a particular combination of different rights and principles”¹¹⁸ And when the Court later explicated the various “rights and principles” at issue, it never missed an opportunity to recognize the gender-diverse range of individuals implicated in its reasoning:

Human dignity. “Human dignity recognizes the specificity of these unique conditions and is based on the central idea that **women and people with the capacity to gestate** can freely dispose of their bodies.”¹¹⁹

Autonomy and free development of one’s personality. “The right to decide serves as an instrument to exercise the free development of one’s personality, personal autonomy and the protection of privacy, in a way that allows the **woman or the person with the capacity to gestate**, to choose **who she/he wants to be**”¹²⁰

Legal equality. “Gender equality privileges **the female capacity (and those corresponding to any other gender identity)** to make responsible decisions about their life plan and bodily integrity.”¹²¹

Right to (psychological and physical) health and reproductive freedom. The health of **women and of people with the capacity to gestate**, as an essential link to be able to choose whether to continue or annul the gestation process, must be assessed as the right to maintain an optimal psycho-emotional state.¹²²

The impact of the Mexican Supreme Court’s gender-inclusive language was felt swiftly. When the time came to rely on the Coahuila and Sinaloa

118. CONSTITUTIONAL PRECEDENT IN THE MEXICAN SUPREME COURT, *supra* note 112, at 295-96 (emphasis added); *see also id.* at 296 (“In accordance with Articles 1 and 4 of the Constitution, the exclusive **right of women and people with the capacity to gestate** to self-determination in **matters of motherhood (reproductive autonomy)** is recognized.”) (emphasis added).

119. *Id.* at 296 (emphasis added).

120. *Id.* at 297-98 (emphasis added).

121. *Id.* at 299 (emphasis added).

122. *Id.* at 300 (emphasis added).

precedents in challenging other states' abortion restrictions,¹²³ one of the first groups to do so was a collective of twelve transgender men in the state of Chihuahua.¹²⁴ The transgender plaintiffs presented two collective *amparos* before a federal court demanding the complete decriminalization of abortion in Chihuahua and the provision of “free and safe” voluntary abortion services for all persons with a capacity for pregnancy in the state.¹²⁵ These *amparos* were the first lawsuits in the nation to demand the provision of inclusive abortion services for transgender and other gender-diverse persons, a key milestone that Erick Márquez—a representative of the Trans Solidarity Network of Ciudad Juárez—said “is important . . . because we [often] leave out many populations that we do not see in our immediate reality” but who nonetheless have reproductive capacities.¹²⁶ Of course, there is no way of knowing whether this transgender collective would have brought their historic *amparos* in the absence of the gender-inclusive language found in the Mexican Supreme Court's abortion rulings, but it seems (1) highly likely that they would have felt less empowered to do so and (2) almost certain that their legal cases would have been undermined by technical, formalistic arguments that abortion protections applied only to “women” rather than transgender men.¹²⁷

123. Although the Coahuila and Sinaloa rulings were historic and precedential, they applied only to those respective states. *See* Galván, *supra* note 113. Advocates seeking abortion decriminalization across Mexico would have to either (1) rely on those decisions—particularly the Coahuila case—in bringing *amparos* across the states that had not yet legalized abortion; (2) lobby the legislatures of states that had not yet legalized abortion to voluntarily update their penal codes; or (3) advocate that a national law be passed by the General Congress of the United Mexican States (the legislature of the federal government of Mexico).

124. *See* Óscar Rosales, *Hombres trans presentan los primeros amparos en México para exigir el derecho al aborto* [Trans Men Present the First Protections in Mexico to Demand the Right to Abortion], PIE DE PÁGINA (Nov. 30, 2022), <https://piedepagina.mx/hombres-trans-presentan-los-primeros-amparos-en-mexico-para-exigir-el-derecho-al-aborto/> [https://perma.cc/Z8RT-HQ5W].

125. *Id.*

126. *Id.*

127. *See supra* notes 106-108, *infra* notes 149-151, and accompanying text in both locations for discussion of such overly narrow interpretations of women-centric, gender-exclusive abortion language in Argentina and Colombia.

2. Abortion Decriminalization Nationwide

Similar to the *amparos* pursued by the transgender collective in Chihuahua, the months following the 2021 Coahuila and Sinaloa rulings were marked by groups like GIRE, TERFU, Cultivando género, Cecadec, and other NGOs going state by state presenting lawsuits that sought to eliminate the crime of abortion from various penal codes. Some of these *amparos* were successful—for instance, on August 30, 2023, Aguascalientes became the twelfth of Mexico’s thirty-two states to decriminalize abortion¹²⁸—but the process was slow. On September 6th, 2023, abortion-rights advocates in Mexico realized a more sweeping victory when the Supreme Court struck down the portion of Mexico’s federal penal code that criminalized abortion.¹²⁹ This ruling did not compel decriminalization in the twenty Mexican states that had yet to revise their local penal codes, but it was nonetheless viewed as a nationwide expansion of abortion access because it created an across-the-board landscape in which even women in hold-out states could now legally seek abortions in federal hospitals and clinics.¹³⁰ The ruling also prohibited employees at federal facilities from being penalized for performing abortions.¹³¹

The Mexican Supreme Court’s 2023 ruling was not only an expansion of its 2021 decisions; it was also an extension of the gender-inclusive abortion-rights rhetoric in those opinions. The Court’s holding was unequivocal: “The legal system that regulates the crime of abortion in the federal criminal code is unconstitutional because it is contrary to the right to decide of **women and people with the capacity to gestate.**”¹³² The Court used equally

128. See Sarah Morland, *Mexican State of Aguascalientes Becomes 12th to Decriminalize Abortion*, REUTERS (Aug. 30, 2023, 8:35 PM ET), <https://www.reuters.com/world/americas/mexicos-aguascalientes-becomes-12th-state-decriminalize-abortion-2023-08-30> [https://perma.cc/64HG-HXNB].

129. See Amparo en Revisión 267/2023, Primera Sala de la Suprema Corte de Justicia [SCJN], 6 de septiembre de 2023 (Mex.).

130. See Simon Romero & Emiliano Rodríguez Mega, *Mexico’s Supreme Court Decriminalizes Abortion Nationwide*, N.Y. TIMES (Sept. 6, 2023), <https://www.nytimes.com/2023/09/06/world/americas/mexico-abortion-decriminalize-supreme-court.html> [https://perma.cc/N955-6HVS].

131. *Id.*

132. See Press Release, *The Legal System that Regulates the Crime of Abortion in the Federal Criminal Code is Unconstitutional Because It Is Contrary to the Right to*

gender-inclusive language when posting on X (formerly Twitter): “The First Chamber of #LaCorte resolved that the legal system that criminalizes abortion in the Federal Penal Code is unconstitutional, since it violates the human rights of **women and people with the capacity to gestate**.”¹³³

As in the Coahuila decision that formed the basis for this latest edict, the Court rooted its rationale in “the right[] to human dignity, [the right to] reproductive autonomy and free development of personality, the right to health[,] and the right to equality and non-discrimination.”¹³⁴ In one portion of the opinion, for instance, the Court noted:

[H]uman dignity . . . is based on the central idea that women and people with the capacity to bear children can freely take command of their bodies and can build their identity and destiny autonomously, free of impositions or transgressions, since it starts from recognizing the elements that define them and the exercise of the minimum freedoms for the development of their life to the fullest.¹³⁵

Remarkably, the Court used the phrases “women and persons with a capacity for pregnancy” or “women and persons with a capacity to conceive” no less than eighty-seven times in total.

3. Historical Parallels with Argentina

In its 2021 Coahuila case, the Mexican Supreme Court was unequivocal in citing Argentina’s VIPL as the source from which it was deriving its gender-inclusive abortion-rights rhetoric:

In the field of comparative law, recently the use of such [gender-inclusive] expressions (specifically the use of “pregnant person” to refer to all people who are capable of undergoing this biological process) stands out in Argentina’s Law of Voluntary Interruption of

Decide of Women and People with the Capacity to Gestate, SUPREMA CORTE DE JUSTICIA DE LA NACIÓN (Sept. 6, 2023) (emphasis added), <https://www.internet2.scjn.gob.mx/red2/comunicados/comunicado.asp?id=7504> [<https://perma.cc/E924-7XLG>].

133. Suprema Corte de Justicia de la Nación (@SCJN), TWITTER (Sept. 6, 2023, 3:54 PM), <https://x.com/SCJN/status/1699511329558581595?s=20> [<https://perma.cc/W4RU-LQXZ>].

134. See Press Release, *supra* note 132.

135. Amparo en Revisión 267/2023, *supra* note 129, at 22.

Pregnancy, passed by the National Congress of that country on December 30, 2020.¹³⁶

It was perhaps no surprise that the Mexican Supreme Court's abortion rulings would reference Argentina's similarly pioneering Voluntary Interruption of Pregnancy Law, considering the shared influences and inextricable origin stories. As in Argentina, the abortion-rights victories achieved in Mexico were largely driven by the advocacy efforts of the "Green Wave."¹³⁷ Moreover, as in Argentina, the gender-inclusive language in Mexico's Supreme Court opinions partly reflected how the Green Wave's transverse structure allowed the needs and demands of gender-diverse persons to be highlighted alongside more conventional voices.¹³⁸ Many who saw what happened in Argentina demanded that Mexico go further by not only referencing "pregnant persons"¹³⁹ but also specifying who was included in that group—"for example, transgender men, non-binary people, among others."¹⁴⁰ The Court did not disappoint.

C. Colombia

1. Sentencia C-055-22: A Momentous Ruling by the Constitutional Court

Colombia was last but certainly not least among the three Green Wave countries that legalized abortion between 2020 and 2022.¹⁴¹ On February

136. *Acción de Inconstitucionalidad 148/2017*, *supra* note 112, at 19 n.11.

137. *See Casas*, *supra* note 69.

138. *See* María Ruiz, *Por el aborto para todas, todes, todos, y contra discursos de odio, trans toman las calles* [*For Abortion for All Women, All Non-Binary, All Men, and Against Hate Speech, Trans Take to the Streets*], *PIE DE PÁGINA* (Sept. 29, 2022), <https://piedepagina.mx/por-el-aborto-para-todas-todes-todos-y-contra-discursos-de-odio-trans-toman-las-calles/> [<https://perma.cc/Y7AE-NFPL>].

139. Law No. 27610, *Acceso a la Interrupción Voluntaria Del Embarazo* [*Access to the Voluntary Interruption of Pregnancy*], Dec. 30, 2020, (Arg.).

140. *Acción de Inconstitucionalidad 148/2017*, *supra* note 112, at para. 46.

141. Note that Chile came close to being the fourth country to join the wave—by way of a proposed new constitution that would have legalized abortion, adopted universal health care, mandated gender parity in government offices, and reestablished autonomous Indigenous territories, among nearly 100 other constitutional rights—but its constitutional referendum failed in

21, 2022, Colombia's Constitutional Court issued a narrow 5-4 ruling decriminalizing the procedure before the twenty-fourth week of pregnancy.¹⁴² Previously, under the precedent set by a 2006 Constitutional Court ruling, abortions had only been permitted under three circumstances: (1) when the pregnancy was a result of rape or incest, (2) when the fetus was deformed, or (3) when the woman's life was threatened. In its latest decision, the Constitutional Court expanded abortion access by offering abortions on request before the twenty-four-week gestational limit and recognizing the legality of abortions after twenty-four weeks only under the three limited circumstances originally articulated in 2006.¹⁴³ The expansion was forecast to have overwhelmingly positive implications for hundreds of Colombian residents who previously would have been subject to criminal action.¹⁴⁴

The Court's February 2022 decision was the culmination of a lawsuit filed in September 2020 by Causa Justa, an advocacy group comprising more than 200 organizations and activists.¹⁴⁵ Causa Justa had argued that the criminalization of abortion discriminates against women and girls by unduly restricting their right to health and reproductive care. The Constitutional Court not only agreed with this fundamental proposition, but

September 2022. See John Otis, *Chileans Have Rejected a New, Progressive Constitution*, NPR (Sept. 5, 2022, 9:56 AM ET), <https://www.npr.org/2022/09/04/1121065756/chile-constitution-referendum> [https://perma.cc/AJ8U-CLRZ].

142. Corte Constitucional [C.C.] [Constitutional Court], febrero 21, 2022, Sentencia C-055-22 (Colom.).

143. See *id.* at 1.

144. See Joe Parkin Daniels, *Colombia Legalises Abortion in Move Celebrated as 'Historic Victory' by Campaigners*, THE GUARDIAN (Feb. 21, 2022 10:05 EST), <https://www.theguardian.com/global-development/2022/feb/22/colombia-legalises-abortion-in-move-celebrated-as-historic-victory-by-campaigners> [https://perma.cc/7V6H-NGJL].

145. See *El movimiento Causa Justa de Colombia interponedemanda para eliminar el delito de aborto del Código Penal* [The Just Cause Movement of Colombia Files a Lawsuit to Eliminate the Crime of Abortion from the Penal Code], CAUSA JUSTA (Sept. 20, 2020), <https://causajustaporelaborto.org/demanda-ante-la-corte-constitucional-el-movimiento-causa-justa-le-pide-a-corte-constitucional-que-el-aborto-deje-de-ser-un-delito-en-el-codigo-penal-colombiano-como-un-cambio-favorable-para-las-muje/> [https://perma.cc/S8NZ-MQ56].

it went a step further in its final opinion by adding a third category of aggrieved persons: “women, girls, *and pregnant persons*.”¹⁴⁶

2. A Familiar Origin Story

The origin story behind the Colombian Court’s gender-inclusive language is a familiar one. Not only were “women and girls” front and center in the Green Wave abortion-rights movement that spread through Colombia, but transgender and other gender-diverse persons were as well¹⁴⁷—and these were precisely the persons whom the Constitutional Court had in mind when broadly alluding to “pregnant persons.”¹⁴⁸ The efforts of the Alianza Trans Abortera de Colombia (ATAC)—also known as the Trans Male Abortion Alliance of Colombia—were particularly instrumental in this victory, as they recognized that the fight for abortion-rights in Colombia could and should be linked to the struggle for transgender visibility. For instance, together with Profamilia, ATAC conducted the first-ever comprehensive study on access to abortion for transgender men and non-binary persons in Colombia.¹⁴⁹ The staggering

146. *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], febrero 21, 2022, Sentencia C-055-22, at 4 (Colom.). (“It is up to the Court to determine whether, despite the conditioning contained in the third operative paragraph of Judgment C-355 of 2006, the classification of consensual abortion, under the terms of article 122 of the Penal Code, (i) is contrary to the obligation to respect for the right to health and the reproductive rights of **women, girls and pregnant persons** . . .”) (emphasis added).

147. Guillermo L. Acevedo, *¿Dónde queda la experiencia trans y no binaria en la lucha por el aborto?* [Where is the Trans and Non-Binary Experience in the Fight for Abortion?], MANIFIESTA (Nov. 17, 2021, 5:57 PM), <https://manifiesta.org/experiencia-trans-masculina-no-binaria-aborto-manifiesta/> [https://perma.cc/U38G-MPM4].

148. Pilar Cuartas Rodríguez, *¿Quiénes son las “personas gestantes” en la sentencia que despenalizó el aborto?* [Who Are the “Pregnant Persons” in the Ruling That Decriminalized Abortion?], EL ESPECTADOR (Feb. 22, 2022, 3:30 PM), <https://www.elespectador.com/judicial/quienes-son-las-personas-gestantes-en-la-sentencia-que-despenalizo-el-aborto-aborto-en-colombia-aborto-legal/> [https://perma.cc/Y2JH-6PRD].

149. Report of Profamilia & Alianza Trans Abortera de Colombia, *Acceso al aborto seguro para hombres trans y personas no binarias: un estudio exploratorio en Colombia* [Access to Safe Abortion for Trans Men and Non-Binary People: An Exploratory Study in Colombia], PROFAMILIA (2021),

findings from this report revealed widespread barriers that largely stemmed from both the social and legal exclusion of gender-diverse persons in Colombia.¹⁵⁰

As visibility and awareness-raising efforts by the ATAC empowered gender-diverse persons to come forward with tales of their unique barriers to abortion care, several anecdotes reached a concerning consensus—the language of Colombia’s abortion law under its 2006 ruling on the subject was facilitating bigotry, discrimination, and harm. As explained by one transgender advocate:

In 2006, the Constitutional Court of Colombia ruled, in judgment C-355, that abortion is not a crime in three cases, [including] when the continuation of the pregnancy constitutes a danger to the life or health of the *woman*, . . . [b]ut the Court forgot something: the rest of the pregnant people. We, the masculine and non-binary trans people, were not named in the sentence and were left in a certain limbo, or legal vacuum.¹⁵¹

Others echoed these sentiments, noting that the “legal vacuum” left by the 2006 ruling was encouraging overly literal, deliberately narrow readings of the law that denied gender-diverse persons access to abortion even in those instances when “women” otherwise would have qualified.

Hence, when it came time for the Colombian Constitutional Court to issue an opinion in the 2022 *Causa Justa* case, there was a hope that it would learn from the mistakes of its 2006 ruling—as well as the examples set by Argentina and Mexico—by including unambiguous gender-inclusive language in its reasoning. Like the Mexican Supreme Court, it did not disappoint.

<https://profamilia.org.co/wp-content/uploads/2021/06/INFORME-ABORTO-PERSONAS-TRANS-JUNIO-1-2021.pdf>. [<https://perma.cc/4KDH-TH8V>].

150. *See id.* at 8-10.

151. Acevedo, *supra* note 147.

D. *The United States*

1. Supreme Court Rulings

a. *Dobbs v. Jackson Women's Health Organization*

On June 24, 2022, the U.S. Supreme Court issued its landmark decision in *Dobbs v. Jackson Women's Health Organization*.¹⁵² At issue in the case was Mississippi's 2018 Gestational Age Act, which generally prohibited abortion of fetuses with a gestational age of more than fifteen weeks.¹⁵³ The Center for Reproductive Rights had initially brought suit in federal district court on behalf of Jackson Women's Health Organization—the last remaining abortion clinic in Mississippi—citing cases like *Roe*¹⁵⁴ and *Casey*¹⁵⁵ in arguing that “the 15 week ban unconstitutionally deprive[d] women of the right to an abortion before viability.”¹⁵⁶ The district court granted summary judgment in Jackson Women's Health Organization's favor,¹⁵⁷ the United States Court of Appeals for the Fifth Circuit affirmed,¹⁵⁸ and the Supreme Court granted certiorari to address one central question: “[w]hether ‘all pre-viability prohibitions on elective abortions are unconstitutional.’”¹⁵⁹

In a 6-3 ruling, the Supreme Court sided with Mississippi and twenty-five other states who had argued that state abortion restrictions like the fifteen-week ban imposed by the Gestational Age Act were permissible. In so doing, the Court accepted Mississippi's invitation to overturn *Roe v. Wade* and *Planned Parenthood v. Casey*, effectively eliminating a federal constitutional right to abortion.¹⁶⁰ Writing for the majority, Justice Samuel

152. 597 U.S. 215 (2022) (overturning *Roe v. Wade* and *Planned Parenthood v. Casey* and eliminating a federal constitutional right to abortion).

153. See MISS. CODE ANN. § 41-41-191 (2018).

154. *Roe v. Wade*, 410 U.S. 113 (1973).

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

156. Amended Complaint at 8-9, 48, *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, No. 18-cv-00171 (S.D. Miss. Apr. 9, 2018).

157. *Currier*, 349 F. Supp. 3d 536 (granting summary judgement in favor of Jackson Women's Health Organization and permanently enjoining the enforcement of Mississippi's Gestational Age Act).

158. *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019).

159. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 234 (2022).

160. *Id.* at 300-02.

Alito asserted that “*Roe* was egregiously wrong from the start” and that “far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.”¹⁶¹ As such, Justice Alito was unequivocal about what the Court’s majority deemed to be the proper resolution in this case:

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. . . . It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.¹⁶²

The decision in *Dobbs* produced three concurring opinions and a blistering dissent. Chief Justice Roberts, who concurred in the judgement but disapproved of the majority’s reasoning, would have taken “a more measured course” by upholding the Mississippi Gestational Age Act and permitting fifteen-week gestational limits while nevertheless refraining from overturning *Roe* and *Casey* altogether.¹⁶³ Unlike Chief Justice Roberts, Justice Kavanaugh signed on to the full majority opinion, but he still wrote separately to clearly express his “additional views about why *Roe* was wrongly decided, why *Roe* should be overruled at this time, and the future implications of [this] decision.”¹⁶⁴ Similarly, Justice Thomas agreed with the majority opinion’s decision to overturn *Roe* but wrote separately to clarify his views, emphasizing that he believed the Court “in future cases . . . should reconsider all of [its] substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*”¹⁶⁵—a proposition that sparked immediate controversy and consternation nationwide.¹⁶⁶ Justices Breyer,

161. *Id.* at 231.

162. *Id.* at 231-32.

163. *Id.* at 348, 357 (Roberts, C.J., concurring in judgement).

164. *Id.* at 336 (Kavanaugh, J., concurring).

165. *Id.* at 332 (Thomas, J., concurring).

166. See, e.g., Sheryl Gay Stolberg, *Thomas’s Concurring Opinion Raises Questions About What Rights Might Be Next*, N.Y. TIMES (June 24, 2024), <https://www.nytimes.com/2022/06/24/us/clarence-thomas-roe-griswold-lawrence-obergefell.html> [<https://perma.cc/B56Y-B9HC>]; Aaron Blake, *Clarence Thomas Undercuts Justices’ Assurances About Post-Roe Rulings*, WASH. POST (June 24, 2022, 1:40 PM EDT), <https://www.washingtonpost.com>

Sotomayor, and Kagan, in a rare jointly authored dissenting opinion, were unambiguous regarding their reasons for fiercely eschewing the other Justices' opinions:

[The Court today] eliminates a 50-year-old constitutional right that safeguards women's freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Court's legitimacy. . . . In overruling *Roe* and *Casey*, this Court betrays its guiding principles.¹⁶⁷

Perhaps none of the above was surprising. After all, an initial draft majority opinion by Justice Alito had been leaked by the political news outlet POLITICO in May 2022, and there were few changes between that draft and the final majority opinion released in June.¹⁶⁸ As for the other opinions, research confirms that, as the Court has grown more ideological and polarized, it has become easier to predict how each individual Justice would rule on hot-button issues, such that the 6-3 conservative-liberal split in *Dobbs* was arguably a foregone conclusion.¹⁶⁹

Here's an observation that *is* surprising, at least in light of the foregoing rhetorical trends evinced in Argentina, Mexico, and Colombia¹⁷⁰: in this monumental 213-page decision that was widely considered "one of the most consequential cases before the [C]ourt in the last five decades"¹⁷¹—

/politics/2022/06/24/thomas-opinion-post-roe/ [https://perma.cc/DV5A-S2U7]; Zack Beauchamp, *Could Clarence Thomas's Dobbs Concurrence Signal a Future Attack on LGBTQ Rights?*, Vox (June 24, 2022, 2:36 PM EDT), https://www.vox.com/2022/6/24/23181723/roe-v-wade-dobbs-clarence-thomas-concurrence [https://perma.cc/ZK2G-HLZW].

167. *Dobbs*, 597 U.S. at 416 (Breyer, Sotomayor & Kagan, JJ., dissenting).

168. See Gerstein & Ward, *supra* note 15.

169. See Vincent Martin Bonventre, *Supremely Divided: Court's Conservative Bent Intensifies*, 93-Oct N.Y. STATE BAR J. 6 (2021); Roger Guimerà & Marta Sales-Pardo, *Justice Blocks and Predictability of U.S. Supreme Court Votes*, 6(11) PLoS ONE (2011); Oriana González and Danielle Alberti, *The Political Leanings of the Supreme Court Justices*, AXIOS (June 24, 2022), https://www.axios.com/2019/06/01/supreme-court-justices-ideology [https://perma.cc/EZ45-Z3G3].

170. See discussion *supra* Sections II.A.-II.C.

171. Gerstein & Ward, *supra* note 15. See also *Dobbs*, 597 U.S. at 349 (2022) (Roberts, C.J., concurring in judgement) (noting the "dramatic and consequential" nature of the Court's ruling).

not only for women, but for *all* persons with a capacity for pregnancy and a need for reproductive care¹⁷²—not a single reference was made to any group other than women. Even several of the *Dobbs* amicus briefs that centered their discussion on “women’s rights” were cognizant and considerate enough to at least include a footnote acknowledging the gender-diverse array of persons affected by the case.¹⁷³ In fact, one amicus brief earnestly beseeched the Court to update its abortion-rights language in hopes that the nation’s laws, policies, and jurisprudence might soon reflect the lived realities of the many gender-diverse persons in need of abortion care.¹⁷⁴ Another amicus brief, filed by an agglomeration of LGBTQ organizations, offered statistics demonstrating why abortion access is of critical importance for transgender and other gender-diverse persons.¹⁷⁵

When the decision came down by the Supreme Court, these persons were—depending on your interpretation of the matter—either presumed to be subsumed within the Court’s discussion of women or simply elided from consideration altogether. Neither explanation for the oversight is particularly consoling for a population whose existence, autonomy, and self-determination have been undermined time and time again.

b. Other Notable Cases

Dobbs was not the first abortion-rights case in which the Court neglected—or perhaps refused—to use the sort of gender-inclusive language that has become commonplace in the law and policy of the Latin American “Green Wave” nations. Indeed, it was not even the first case of the 2020s.

In *June Medical Services LLC v. Russo*, the Court examined a challenge to a Louisiana law, the Louisiana Unsafe Abortion Protection Act (Act 620), which required physicians who perform abortions in the state to have

172. *Dobbs v. Jackson Women’s Health Organization*, AM. CIV. LIBERTIES UNION (June 27, 2022), <https://www.aclu.org/cases/dobbs-v-jackson-womens-health-organization> [<https://perma.cc/N5BA-AW8C>].

173. *See, e.g.*, Brief Amici Curiae of Advocates for Youth, Inc. and Neo Philanthropy, Inc. d/b/a We Testify at 2 n.3, *Dobbs* 597 U.S. 215 (No. 19-1392) (“References to ‘women’ in this brief may include certain trans and non-binary persons who have had abortions.”).

174. *See* Brief of amici curiae of Reproductive Justice Scholars at 5 n.3, *Dobbs* 597 U.S. 215 (No. 19-1392).

175. *See* Brief amici curiae of LGBTQ Organizations and Advocates at 22-23, *Dobbs* 597 U.S. 215 (No. 19-1392).

“active admitting privileges” at a hospital within thirty miles of the facility where the doctor provides abortions.¹⁷⁶ The Court, in a majority opinion authored by Justice Stephen Breyer, held that the admitting privileges requirement imposed an undue burden on a woman’s constitutional right to choose to have an abortion.¹⁷⁷

In justifying its ruling in *June Medical*, the majority relied heavily on the recent precedent of *Whole Woman’s Health v. Hellerstedt*.¹⁷⁸ In that case, the Court invalidated a Texas admitting-privileges law that was almost word-for-word identical to Louisiana’s Act 620.¹⁷⁹ Notably, however, *June Medical* and *Whole Woman’s Health*’s similarity was not limited to the nearly identical language of the underlying statutes at issue; they were also similar in the language of the majority opinions themselves—both authored by a liberal justice, unlike *Dobbs*—which excluded any mention of the fact that cisgender women were not the only group implicated in the Court’s decision.¹⁸⁰

Although the omission of transgender persons from the Court’s opinions in *Whole Woman’s Health* could perhaps be attributed to the Justice’s unfamiliarity with transgender issues and rhetoric at the time,¹⁸¹

176. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2112-13 (2020), *abrogated by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

177. *See id.* at 2132.

178. *See id.* at 2133 (citing 579 U.S. 582 (2016), *abrogated by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022)) (“This case is similar to, nearly identical with, *Whole Woman’s Health*. And the law must consequently reach a similar conclusion. Act 620 is unconstitutional.”).

179. *See Whole Woman’s Health*, 579 U.S. at 590-91.

180. To be clear, transgender and gender-diverse pregnancies also received no mention in the concurrences and dissents that emerged from *June Medical* and *Whole Woman’s Health*. In *June Medical*, for instance, the various opinions mentioned “women” 127 times, with not even so much as a footnote—as was seen in some amicus briefs—to acknowledge the vast array of persons who do not identify with this gender label.

181. Unlike in *Dobbs* and *June Medical*, none of the amici briefs in *Whole Woman’s Health* sought to clarify that various gender-diverse persons beyond cisgender women were capable of pregnancy and in need of abortion. Moreover, the Court had not yet issued an opinion grappling with transgender issues directly—*Bostock v. Clayton County* was a 2020 decision, *see* 590 U.S. 644 (2020) (holding that an employer violates Title VII by firing an individual for being homosexual or being a transgender person), and even *Gloucester County School Board v. G.G.*, which the Court initially punted by vacating and

there are two major reasons why this explanation is unpersuasive in the case of *June Medical*. First, as in *Dobbs*, several amici in *June Medical* alerted the Court to the reproductive capacity and abortion-related needs of persons who are not cisgender women, including the same Reproductive Justice Scholars group that submitted a humble entreaty for gender-inclusive language in *Dobbs*.¹⁸² Second, the Court's ruling in *June Medical* came just two weeks after its decision in *Bostock v. Clayton County*—the landmark case in which the Court held that an employer violates Title VII by firing an individual for being homosexual or being a transgender person.¹⁸³ The latter observation in particular suggests that the phenomenon at issue in this Section is not necessarily an across-the-board elision of transgender persons in the Court's jurisprudence but, rather, a more specific—though still troubling—form of transgender invisibility that pervades the contexts of pregnancy and abortion.

2. Legislative Actions

In the wake of the Supreme Court's decision to overturn *Roe* and *Casey*, the U.S. Congress considered three major proposals to enshrine a right to abortion into federal law by way of legislative action rather than judicial mandate.¹⁸⁴ Although all three efforts failed, they remain instructive for purposes of studying the safeguards that they sought to establish and the *language* that they used. Ultimately, this Section tells a tale of Congress becoming increasingly more moderate in its drafting, gradually moving

remanding and later dodged by denying cert, did not arrive until two months after the decision in *Whole Woman's Health* was issued, see Petition for a Writ of Certiorari, *Gloucester Cnty.* 137 S. Ct. 1239 (2017) (presenting the question of whether the Department of Education's specific interpretation of Title IX and 34 C.F.R. § 106.33 at the time, which provided that a funding recipient providing sex-separated facilities must "generally treat transgender students consistent with their gender identity," should be given effect).

182. See Brief Amici Curiae of Reproductive Justice Scholars at 5 n.2, *June Medical*, 140 S. Ct. 2103 (Nos. 18-1323, 18-1460) (emphasis added) (citations omitted); cf. Brief of amici curiae of Reproductive Justice Scholars at 4 n.3, *Dobbs*, 597 U.S. 215 (No. 19-1392) (expressing a similar "hope that, in the near future, the nation's laws, policies, and jurisprudence will reflect th[e] reality" of transgender and other gender-diverse pregnancies).

183. See *Bostock*, 590 U.S. at 683.

184. See discussion *infra* Sections II.D.2.a. (Women's Health Protection Act), II.D.2.b. (Ensuring Access to Abortion Act), II.D.2.c. (Reproductive Freedom for All Act).

from gender-inclusive to gender-neutral and, finally, to trans-exclusionary language. Because all three federal measures failed, the Supreme Court's edict that "the authority to regulate abortion must be returned to the people and their elected representatives"¹⁸⁵ has thus far seen the greatest legislative action at the state level, where fourteen states have passed near-total bans and at least eleven others were considered likely to impose similar restrictions as of April 2023.¹⁸⁶ The lesson from the three Latin American "Green Wave" nations—particularly Argentina, where abortion access was expanded through legislation—is not only that the United States Congress would do well to reenter the fray and restore more uniform federal safeguards for abortion, but also that, in doing so, it should opt for the more protective, gender-inclusive language evinced in its initial proposal.

a. Women's Health Protection Act

The first, and most expansive, abortion-rights legislation considered by Congress in recent years was the Women's Health Protection Act (WHPA).¹⁸⁷ The WHPA sought to create a statutory right for health care providers to provide abortion care, and a right for their patients to receive that care, free from medically unnecessary restrictions that single out abortion and impede access. For instance, under the WHPA, governments "may not limit a provider's ability to prescribe certain drugs, offer abortion services via telemedicine, or immediately provide abortion services when the provider determines a delay risks the patient's health."¹⁸⁸ Similarly, governments may not require a provider to "perform unnecessary medical procedures, provide medically inaccurate information, comply with credentialing or other conditions that do not apply to providers whose services are medically comparable to abortions, or carry out all services connected to an abortion."¹⁸⁹ In addition, governments "may not (1) require

185. *Dobbs*, 597 U.S. at 292.

186. *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (2023), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/Z8GQ-CKR6>].

187. Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021).

188. *Summary: H.R.3755—117th Congress (2021-2022)*, CONG. RSCH. SERV. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/3755> [<https://perma.cc/JH37-PAGL>].

189. *Id.*

patients to make medically unnecessary in-person visits before receiving abortion services or disclose their reasons for obtaining such services, or (2) prohibit abortion services before fetal viability or after fetal viability when a provider determines the pregnancy risks the patient's life or health."¹⁹⁰

Congress has considered some version of the WHPA every year since its initial appearance in 2021. The Women's Health Protection Act of 2021¹⁹¹ was spurred by the Texas Heartbeat Act (SB 8),¹⁹² the Women's Health Protection Act of 2022¹⁹³ was introduced in swift response to the Supreme Court's opinion in *Dobbs*,¹⁹⁴ and the Women's Health Protection Act of 2023¹⁹⁵ was elicited by the wave of state bans on abortion that arose in the months following *Dobbs*¹⁹⁶. The text of the WHPA was largely preserved from the 2021 version to the 2022 version, and both versions were passed by the House of Representatives after being sponsored by Democratic Representative Judy Chu of California. In both instances, however, the

190. *Id.*

191. H.R. 3755.

192. See Emily Caldwell, *Women's Health Protection Act, Pushed in Response to Texas' New Abortion Law, Fails in U.S. Senate*, THE DALL. MORNING NEWS (Feb. 28, 2022, 8:09 PM CST), <https://www.dallasnews.com/news/politics/2022/02/28/womens-health-protection-act-pushed-in-response-to-texas-new-abortion-law-fails-in-us-senate/> [<https://perma.cc/JB93-7G95>] ("The legislation first passed out of the House in September [2021]. House Speaker Nancy Pelosi, D-Calif., promised to bring the bill to the floor after Texas' SB 8 went into effect on Sept. 1 and the Supreme Court refused to block it.").

193. Women's Health Protection Act of 2022, H.R. 8296, 117th Cong. (2022).

194. See Clare Foran & Kristin Wilson, *House Passes Bills to Protect Abortion Access After Roe v. Wade Overturned*, CNN (July 15, 2022, 2:10 PM EDT), <https://www.cnn.com/2022/07/15/politics/house-abortion-access-legislation-vote/index.html> [<https://perma.cc/HBE7-VP4P>].

195. Women's Health Protection Act of 2023, S. 701, 118th Cong. (2023).

196. See Press Release, Baldwin, Blumenthal Lead 47 Members in Introducing Legislation to Restore and Protect Americans' Right to an Abortion Nationwide, Tammy Baldwin U.S. Senator for Wisconsin (Mar. 8, 2023), <https://www.baldwin.senate.gov/news/press-releases/baldwin-blumenthal-lead-47-members-in-introducing-legislation-to-restore-and-protect-americans-right-to-an-abortion-nationwide#> [<https://perma.cc/HQX3-DGW9>] ("[The] Women's Health Protection Act of 2023... would restore reproductive rights to the millions of Americans currently living in states with abortion bans.").

WHPA failed to advance in the Senate after falling short of the sixty votes needed to overcome the filibuster. Unlike its predecessors, the Women's Health Protection Act of 2023 originated in the Senate—not the House—with modest alterations designed to appease past opponents of the Act,¹⁹⁷ but its text nonetheless maintained elements worthy of analysis here.

The 2021 and 2022 iterations of the Women's Health Protection Act are notable for containing the most progressive, gender-inclusive language of any abortion-rights legislation considered by Congress in the past three years. Consider the following assertion from the Findings and Purpose sections of both bills:

The terms “woman” and “women” are used in this bill to reflect the identity of the majority of people targeted and affected by restrictions on abortion services, and to address squarely the targeted restrictions on abortion, which are rooted in misogyny. However, access to abortion services is critical to the health of every person capable of becoming pregnant. **This Act is intended to protect all people with the capacity for pregnancy—cisgender women, transgender men, non-binary individuals, those who identify with a different gender, and others—who are unjustly harmed by restrictions on abortion services.**¹⁹⁸

This was consistent with the WHPA's intentionally broad opening description as an Act “to protect a *person's* ability to determine whether to continue or end a pregnancy,” and not simply a *woman's* ability to do so.¹⁹⁹

For a brief period, the WHPA of 2021 and 2022 offered advocates of gender-inclusive abortion-rights rhetoric hope that the United States was on a similar path as the “Green Wave” nations. Note the similarities between the foregoing WHPA excerpts and the Argentinian Voluntary Interruption of Pregnancy Law's purpose of “regulat[ing] access to voluntary termination of pregnancy and post-abortion care . . . [for] women and people with other gender identities with the ability to gestate,” or the Mexican Supreme Court's assertion that “the spectrum of this Court's decision includes both

197. It is unclear at this time whether the recent alterations to the WHPA will make a difference. The Women's Health Protection Act of 2023 was introduced by Democratic Senator Tammy Baldwin on March 8, 2023, and the Act has not yet been put to a Senate-wide vote.

198. Women's Health Protection Act of 2021, H.R.3755, 117th Cong. § 2.8 (2021) (emphasis added); Women's Health Protection Act of 2022, H.R. 8296, 117th Cong. § 2.12 (2022) (emphasis added).

199. *Id.* (emphasis added).

women and people with the capacity to gestate... (for example, transgender men, non-binary people, among others).” The parallels were strikingly clear.

The Women’s Health Protection Act of 2023, however, was less ambitious than its predecessors. Perhaps in an attempt to win the votes of those who previously opposed the WHPA,²⁰⁰ the 2023 iteration of the Act excluded the prior versions’ gender-inclusive language and opted for more modest, gender-neutral language. For instance, gone was the previous “Findings and Purpose” statement that “[t]his Act is intended to protect all people with the capacity for pregnancy,” and ditto for all mentions of the various gender identities implicated by the law. To be sure, the bill still described itself broadly as “protect[ing] a *person’s* ability to determine whether to continue or end a pregnancy” and listed among its purposes “permit[ting] *people* to seek and obtain abortion services”²⁰¹—language that many advocates prefer over exclusive references to “women,” as it at least tacitly acknowledges the existence of gender-diverse persons with a capacity for pregnancy—but it was certainly a step back from the more progressive 2021 and 2022 WHPA’s explicit mention of transgender and nonbinary persons.

b. Ensuring Women’s Right to Reproductive Freedom Act

The U.S. House of Representatives passed the Ensuring Women’s Right to Reproductive Freedom Act (EWRRFA)—originally introduced as the Ensuring Access to Abortion Act of 2022—on the same day as the Women’s Health Protection Act of 2022.²⁰² Though the bill later failed to pass the Senate, it was intended to “prohibit[] anyone acting under state law from interfering with a person’s ability to access out-of-state abortion

200. The broad, gender-inclusive language was certainly a point of criticism among some legislators. *See, e.g.,* Peter Christian, *Daines—GOP Senators Decry ‘Women’s Health Protection Act’*, HYDE-SMITH SENATE, <https://www.hydesmith.senate.gov/daines-gop-senators-decry-womens-health-protection-act>. [<https://perma.cc/XG4Y-SQDV>].

201. Women’s Health Protection Act of 2023, S. 701, 118th Cong. (2023) (emphasis added).

202. Ensuring Women’s Right to Reproductive Freedom Act, H.R. 8297, 117th Cong. (2022).

services.”²⁰³ Specifically, the bill would have prohibited a wide array of actions “prevent[ing], restrict[ing], imped[ing], or retaliat[ing] against” health care providers, persons, or entities engaged in the pursuit or provision of out-of-state abortions.²⁰⁴ In many ways, the EWRRFA was a complement to the WHPA of 2022.

Nevertheless, rather than the unabashedly gender-inclusive language included in the WHPA of 2022, the text of the EWRRFA more closely approximated the gender-neutral language seen in the WHPA of 2023. For instance, the text refrained from any explicit mention of transgender persons and similar “people with the capacity for pregnancy.” At the same time, however, aside from the Act’s name, neither did it contain any explicit mention of “women.” Instead, the text broadly protected “any *person’s* ability to travel across a State line for the purpose of obtaining an abortion service that is lawful in the State in which the service is to be provided,” and “any person’s or entity’s ability to assist another *person* traveling across a State line for the purpose of obtaining an abortion service that is lawful in the State in which the service is to be provided.”²⁰⁵ In this regard, the EWRRFA was not the most expansive bill rhetorically, but it at least avoided the singular, exclusive focus on “women” that advocates warn could potentially be used to restrict services for transgender men and nonbinary persons, as was the case in Colombia prior to its Constitutional Court expanding abortion in gender-inclusive terms.²⁰⁶

c. Reproductive Freedom for All Act

In August 2022, a bipartisan group of Senators introduced the Reproductive Freedom for All Act (RFAA) in an attempt to create a middle ground between Republicans and Democrats.²⁰⁷ The bill sought to codify the holdings of *Roe* and *Casey* by preventing state action that would impose

203. *Summary: H.R.8297—117th Congress (2021-2022)*, CONG. RSCH. SERV. (2022), <https://www.congress.gov/bill/117th-congress/house-bill/8297> [<https://perma.cc/8YHB-2D5P>].

204. *Id.*

205. H.R. 8297 at § 2(a)(4) (emphasis added).

206. *See supra* notes 147-151 and accompanying text.

207. Reproductive Freedom for All Act, S. 4688, 117th Cong. (2022). The RFAA was co-authored by Senators Tim Kaine (D-Va.), Kyrsten Sinema (D-Ariz.), Susan Collins (R-Me.) and Lisa Murkowski (Alaska).

an “undue burden” on pre-viability abortions.²⁰⁸ The bill also included protections for access to contraception with the intention of “provid[ing] statutory authority for the Court’s holdings in *Griswold v. Connecticut* [the right of married couples to obtain contraception], *Eisenstadt v. Baird* [the right of single persons to obtain contraception], [and] *Carey v. Population Services International* [the right of minors to obtain contraception].”²⁰⁹ The 2022 version of the RFAA failed to gain traction, but the initial co-authors reintroduced the bill in February 2023²¹⁰ following President Joe Biden’s State of the Union Address, in which he urged Congress to pass legislation that guaranteed access to abortion.²¹¹

The rhetoric in both the 2022 and 2023 versions of the RFAA was scattered, at least from the perspective of gender-inclusive language advocates. The Act starts promisingly, noting broadly its intentions “to guarantee that *Americans* have the freedom to make certain reproductive decisions without undue government interference,”²¹² and it doubles down by later declaring that “all *persons* shall have the right to make certain reproductive decisions without undue government interference, consistent with the provisions of this Act.”²¹³ In many other critical sections, however, the Act abandons its neutral rhetoric for the sort of trans-exclusionary, “women”-centric language that some advocates distrust:

A State . . . shall not impose an undue burden on the ability of a **woman** to choose whether or not to terminate a pregnancy before fetal viability; . . . [but a State] may enact reasonable regulations to further the health or safety of a **woman** seeking to terminate a pregnancy, unless such regulations impose an undue burden . . . [in the sense that] the purpose or effect of such law is to place a

208. *Id.* at § 4.

209. *Id.* at § 2.

210. See Reproductive Freedom for All Act, S. 317, 118th Cong. (2023).

211. See *President Biden’s State of the Union Address*, THE WHITE HOUSE (Feb. 7, 2023), <https://www.whitehouse.gov/state-of-the-union-2023/> [<https://perma.cc/ZRD7-GMCV>] (“Congress must restore the right that was taken away in [the overturning of] *Roe v. Wade*—and protect *Roe v. Wade*. Give every woman the constitutional right.”).

212. S. 317, at § 2 (emphasis added).

213. *Id.* at § 4(a) (emphasis added).

substantial obstacle in the path of *a woman* seeking to terminate a pregnancy before fetal viability.²¹⁴

3. Executive Orders

Two weeks following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, President Joe Biden signed Executive Order 14076, "Protecting Access to Reproductive Healthcare Services."²¹⁵ Therein, the President directs the U.S. Department of Health and Human Services and several other administrative entities to take a series of actions restoring the rights either abrogated or threatened by *Dobbs*. Specifically, the Executive Order includes directives to (1) safeguard access to reproductive health care services, including abortion and contraception; (2) protect the privacy of patients and their access to accurate information; (3) promote the safety and security of patients, providers, and clinics; and (4) coordinate the implementation of federal efforts to protect reproductive health and access to health care.²¹⁶

The rhetoric of Executive Order 14076 is neither gender-inclusive nor gender-neutral. Framed in terms of the Congressional proposals examined earlier, it neither makes explicit reference to "*all people with the capacity for pregnancy—cisgender women, transgender men, non-binary individuals, those who identify with a different gender, and others—*" in the spirit of the Women's Health Protection Act of 2022,²¹⁷ nor does it tacitly incorporate such gender-diverse persons under broad aims of "protect[ing] *a person's* [right to choose]" in the spirit of the Women's Health Protection Act of 2023.²¹⁸ To the contrary, EO 14076 is riddled with the sort of traditional, "women"-centric language that renders transgender, nonbinary, and other gender-diverse persons invisible in the eyes of the law:

[T]oday, fundamental rights—to privacy, autonomy, freedom, and equality—have been denied to millions of *women* across the country . . . It remains the policy of my Administration to support

214. *Id.* at § 4(b) (emphasis added).

215. Exec. Order No. 14076, 87 FR 42053 (July 8, 2022).

216. *Id.*

217. Women's Health Protection Act of 2022, H.R. 8296, 117th Cong. § 2(a)(12) (2022) (emphasis added).

218. Women's Health Protection Act of 2023, S. 701, 118th Cong. (2023) (emphasis added).

women's right to choose and to protect and defend reproductive rights.²¹⁹

Despite evidence that the Biden Administration clearly recognizes and protects the interests of transgender and other gender-diverse persons in *some* contexts, his recent Executive Orders demonstrate a repeated failure to recognize them in the abortion-rights context. Some might argue that this rhetorical omission holds less significance for the Executive than for the Supreme Court or for Congress, as gender-diverse persons could likely still rely on the Biden Administration to enforce their rights in practice even if they are absent from EOs 14706 and 14709 in rhetoric. This, however, discounts the fact that legal textual invisibility is still an injustice and disservice that raises concerns for various reasons covered in Part III of this Note. Argentina, Mexico, and Colombia realized this and took appropriate action by using some of the most gender-inclusive language possible when they expanded abortion access in recent years. In contrast, the United States—in rhetoric as in substance—has lagged behind.

E. Can This Rhetorical Divergence Be Explained? A Brief Sociopolitical Analysis

Social-science theories of change relevant to advocacy and policy-change efforts can generally be grouped into two major categories: (1) global theories, which explain observed changes in terms of the structural, systemic, sociopolitical, and historical conditions in which they occur; and (2) tactical theories, which focus on the specific advocacy strategies employed on the ground.²²⁰ Because the Green Wave's grassroots-activism tactics have already been extensively analyzed elsewhere²²¹ and briefly illustrated in Sections II.A., II.B., and II.C. of this Note, this Section focuses on explaining the Green Wave's rhetorical progressivism and the United States' relative inertia in terms of two global, sociopolitical differences between the countries. First, it discusses the nations' historical contexts and varying receptivity to "debt-of-democracy" claims. Second, it analyzes the judicial

219. Exec. Order No. 14076, 87 FR 42053 (July 8, 2022) (emphasis added).

220. Sarah Stachowiak, *Pathways for Change: 10 Theories to Inform Advocacy and Policy Change Efforts*, CTR. EVALUATION INFO. (Oct. 2013), <https://www.evaluationinnovation.org/wp-content/uploads/2013/11/Pathways-for-Change.pdf> [<https://perma.cc/6SFC-HBG3>].

221. See, e.g., Chang et al., *supra* note 73; Belski, *supra* note 110; Gago, *supra* note 111.

philosophies surrounding the institutional roles of their highest courts. To maximize the impact of their activism tactics, it is integral that U.S. organizers keep these features in mind and adapt accordingly when mobilizing in favor of the same substantively and rhetorically expansive vision of abortion rights that was secured in the Green Wave nations.

1. Historical Context and Modern Receptivity to “Debt-of-Democracy” Claims

Latin America’s history of political instability, civil wars, and military dictatorships in the 20th century, followed by democratization processes, has deeply influenced social movements like the Green Wave.²²² One of the most notable developments has been “the notion of democracy as fundamentally defined by its protection of human rights,”²²³ which has produced a political environment where framing human-rights issues as “debts of democracy” is considered remarkably persuasive. Indeed, several commentators have remarked that activists in Latin America “faced a more conducive context for their demands after the transition to democracy,”²²⁴ so long as they were effectively presented in terms that echoed an expectation that democracy would guarantee protection of human rights after years of brutal dictatorship.²²⁵

Although this “debt-of-democracy” framework has become a “master frame” in Latin American social movements,²²⁶ it has been especially effective in fueling successes within the LGBTQ+ and abortion-rights contexts. For instance, Columbia Law School Lecturer Kelsey M. Jost-Creegan notes that “[w]hen advocating for anti-discrimination provisions in the Buenos Aires constitution, LGBT activists adopted the human rights frame and forced legislators to take a public stand because they ‘believed that it would be very difficult for these individuals to oppose publicly their

222. See Cora Fernandez Anderson, *Beyond Choice: Abortion Rights in Latin America*, UNIV. MINN. GENDER POL’Y REP. (June 30, 2022), <https://genderpolicyreport.umn.edu/beyond-choice-abortion-rights-in-latin-america/> [<https://perma.cc/B4HV-5L4V>].

223. Kelsey M. Jost-Creegan, *Debts of Democracy: Framing Issues and Reimagining Democracy in Twenty-First Century Argentine Social Movements*, 30 HARV. HUM. RTS. J. 165, 218 (2017).

224. KATHRYN SIKKINK, THE JUSTICE CASCADE 81-82 (2011).

225. See Barbara Sutton & Elizabeth Borland, *Abortion and Human Rights for Women in Argentina*, 40 FRONTIERS J. WOMEN STUD. 27, 38 (2019).

226. Jost-Creegan, *supra* note 223, at 169.

demand given the saliency of human rights in post transitional Argentina.”²²⁷ Similarly, in the realm of abortion rights, not only has the National Campaign for the Right to Legal, Safe, and Free Abortion asserted that the legalization of abortion is a “debt of democracy,”²²⁸ but abortion-rights activists for decades have been drawing contrasts between the democratic present and the undesirable, authoritarian past as powerful tools to delegitimize influential opposition forces like the Catholic Church. For instance, at the 1993 National Women’s Meeting,²²⁹ activists criticized “[t]he doublespeak of the church that claims to defend life but forgets the ecclesiastic hierarchy’s complicity during the military dictatorship, when it silenced the torture and death of pregnant women in captivity.”²³⁰

This receptivity to “debt-of-democracy” human-rights arguments partially explains the legislative success of the Green Wave in Argentina. At the time that the Campaign started calling the legalization of abortion a “debt of democracy,” and at the point that gender-diverse activists began playing a more vocal role in establishing their place within the Campaign, many individuals in Argentina would have drawn associations with seemingly related, fairly recent LGBTQ+ movements that adopted similar “debt of democracy” language. In other words, they would have viewed abortion legalization and the recognition of LGBTQ+ persons through gender-inclusive language as part of a larger, inextricable, post-transitional debt—a connection that the Campaign made fairly clear by building a transversal, trans-friendly movement and by incorporating gender-inclusive language in its model legislation.

227. *Id.* at 195 (quoting JORDI DÍEZ, *THE POLITICS OF GAY MARRIAGE IN LATIN AMERICA: ARGENTINA, CHILE, AND MEXICO* 115 (2015)).

228. Dora Barrancos, *Mujeres: Los Nuevos Derechos y los que Aguarda*, in *LAS CONQUISTAS DE LAS MUJERES EN LOS 30 AÑOS DE DEMOCRACIA* 136 (Susana Pérez Gallart ed., 2015).

229. National Women’s Meetings (*Encuentros Nacionales de Mujeres*) have occurred annually in Argentina since 1986. See Barbara Sutton & Elizabeth Borland, *Framing Abortion Rights in Argentina’s Encuentros Nacionales de Mujeres*, 39 *FEMINIST LEGAL STUD.* 194, 195 (2013). In the past decade, due largely to the increased visibility of gender-diverse activists in Argentina’s abortion-rights movement, the gathering was renamed the “Plurinational Meeting of Women, Lesbians, Transvestites, Trans, Bisexuals, Intersexuals, and Non-Binaries” (*Encuentro Plurinacional de Mujeres, Lesbianas, Travestis, Trans, Bisexuales, Intersexuales y No Binaries*). See Barbara Sutton, “*Marea Verde*”, *Resistencias Feministas y Futuros Emancipatorios*, 54 *LASA FORUM* 18, 20 (2023).

230. Sutton & Borland, *supra* note 229, at 219.

The Green Wave nations' sensitivity to "debt-of-democracy" claims also partially explains the success of the judicial movements in Colombia and Mexico. Consistent with their emphasis on addressing outstanding "debts of democracy," both of these nations have incorporated international human-rights treaties into their constitutions or given them constitutional status, making courts more receptive to human-rights arguments.²³¹ For instance, after the Inter-American Court of Human Rights advised governments to establish efficient and inexpensive legal gender-recognition procedures, Colombia's Constitutional Court cited to the IACHR's advisory opinion when issuing a landmark ruling that recognized a non-binary gender marker and emphasized the need to protect gender-diverse identities against discrimination.²³² Similarly, recall that the Mexican Supreme Court's landmark abortion rulings were centered on "the right[] to human dignity, [the right to] reproductive autonomy and free development of personality, the right to health[,] and the right to equality and non-discrimination," often making direct references to international human rights rules and decisions.²³³

In contrast, the U.S. Supreme Court's approach to constitutional interpretation—especially in the realm of abortion, which has traditionally been rooted in individual rights and privacy—differs significantly from the human-rights and social-justice frameworks adopted by the courts in Mexico and Colombia.²³⁴ What mattered to the majority in *Dobbs* was whether abortion was "deeply rooted in this Nation's history and tradition,"²³⁵ not whether it was mandated by international human-rights obligations or broader notions of what it means to safeguard fundamental

231. See Anderson, *supra* note 222.

232. See Corte Constitucional [C.C.] [Constitutional Court], 4 de febrero de 2022, Sentencia T-033/22 (Colom.). ("Creation of a third sex marker to integrate non-binary identity into the citizen identification system.").

233. See Press Release, *supra* note 132.

234. See Anderson, *supra* note 222; see also John Ringer & Meghna Chakrabarti, *In Latin America, Abortion Access is Expanding. Why is the U.S. Moving in the Opposite Direction?*, WBUR ON POINT 24:03 (May 9, 2022), <https://www.wbur.org/onpoint/2022/05/09/in-latin-america-abortion-access-is-expanding-why-is-the-u-s-going-in-the-opposite-direction> [<https://perma.cc/4GKP-ZTU5>] ("When I think about, as an American, where we have fallen short, it's been in allowing the battle over abortion to be fought in abstractions. I mean, choice doesn't have a face.").

235. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, (1997)).

democratic ideals. Notably, in the wake of *Dobbs*, legal scholars have begun calling for an increased role of human rights in U.S. legal advocacy and constitutional interpretation.²³⁶ In a similar vein, several amicus briefs featured human-rights arguments and appeals to international treaties as part of the litigation surrounding *Dobbs*.²³⁷ Injecting more explicit “debt-of-democracy”-style human-rights arguments into the U.S. legislative and judicial debate on abortion rights and transgender visibility might be valuable, though it is important to acknowledge that the underlying structural features that made the Green Wave nations more receptive to these arguments—fairly recent, politically fraught transitions to democracy, particularly in Argentina and Colombia—are absent from the U.S. context.

2. Judicial Philosophies Regarding the Institutional Roles of the Courts

The second explanation explored in this Note for the presence of gender-inclusive abortion-rights rhetoric in the Green Wave countries focuses on these nations’ distinct philosophies regarding the institutional roles of their high courts. Courts in both Mexico and Colombia, where abortion access was expanded by judicial mandate, have been more activist than the U.S. Supreme Court when adjudicating issues of human rights and fundamental liberties.²³⁸ This judicial activism has been especially

236. See, e.g., Kelly Keglovits, Note, *A Way Forward After Dobbs: Human Rights Advocacy and Self-Managed Abortion in the United States*, 18 DUKE J. CONST. L. & PUB. POL’Y 73 (2022); Meredith Sullivan, *Does Dobbs Put the United States in Violation of its International Human Rights Obligations?*, BERKELEY J. INT’L L. TRAVAUX BLOG (Feb. 24, 2023), <https://www.berkeleyjournalofinternationallaw.com/post/does-dobbs-put-the-united-states-in-violation-of-its-international-human-rights-obligations> [https://perma.cc/82KK-5ENF].

237. See *International Human Rights and Abortion: Spotlight on Dobbs v. Jackson Women’s Health*, CTR. REPROD. RTS. (Nov. 24, 2021), <https://reproductive-rights.org/supreme-court-case-mississippi-abortion-ban-international-human-rights/> [https://perma.cc/P66N-LQKB] (cataloguing “international and human rights briefs” submitted as part of the *Dobbs* litigation).

238. See Alberto Abad Suárez Ávila, *The Mexican Supreme Court as a Protector of Human Rights*, 4 MEX. L. REV. 239, 239 (2011); Rebecca A. Reid, *Human Rights and Court Activism in the Mexican Supreme Court*, in OPEN JUDICIAL POLITICS (2021); Rodrigo M. Nunes, *Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health*, 52, LATIN AM. POL. & SOC’Y 67, 82-92 (2010).

prevalent in the realms of public health generally and sexual or reproductive health specifically.²³⁹ For instance, landmark cases that have gained international attention for placing Mexico at the forefront of sexual and reproductive rights in recent years—beyond its nationwide decriminalization of abortion—include the legalization of gay marriage and adoption²⁴⁰ and the recognition of a fundamental right of transgender individuals to change their officially recognized sex on public documents.²⁴¹ Similarly, Colombia's Constitutional Court has drawn in equal parts ire²⁴² and approval²⁴³ for its increasingly expansive activism toward claims rooted in “the right to health” and related liberties. In both nations, this jurisprudential evolution seems to reflect a shift away from a belief that courts should play “traditional court-of-law” roles—with weak sociopolitical influence and marginal participation in controversial issues—and a gradual acceptance of “the institutional conception that it is the judiciary's role to help fulfill the promises of the constitutional text.”²⁴⁴

The Mexican Supreme Court and Colombian Constitutional Court's tendencies to prioritize overarching, at times penumbral, principles like “the fundamental right to health,” “the right to free development of one's personality,” “and the right to human dignity” reveal a special

239. See Alejandro Madrazo & Estefanía Vela, *The Mexican Supreme Court's (Sexual) Revolution?*, 89 TEX. L. REV. 1863, 1863-69 (2011) (describing how Mexico's Supreme Court has helped to facilitate “a revolution in sexual and reproductive [rights]” across the nation); Alicia Ely Yamin & Oscar Parra-Vera, *Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates*, 33 HASTINGS INT'L & COMP. L. REV. 431, 431-33 (2010); Nunes, *supra* note 238.

240. See Tesis de Jurisprudencia 1a 43/2015, 10a época, Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN], 3 de junio de 2015 (Mex.).

241. See *Summary of the Amparo en Revisión 1317/2017*, SUPREMA CORTE DE JUSTICIA DE LA NACIÓN (Oct. 17, 2018), <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/summary/2020-12/Summary%20AR1317-2017%20HRO.pdf> [<https://perma.cc/8TP7-XXC9>].

242. See Javier Tamayo Jaramillo, *The Colombian Constitutional Court, A Sovereign Without Control*, BERKELEY L. ROBBINS COLLECTION (2017), <https://www.law.berkeley.edu/research/the-robbins-collection/the-colombian-constitutional-court-a-sovereign-without-control> [<https://perma.cc/X8GP-UQVC>].

243. See Alba Ruibal, *Using Constitutional Courts to Advance Abortion Rights in Latin America*, 23 INT'L FEMINIST J. POL. 579, 579 (2021).

244. Nunes, *supra* note 238, at 67.

predisposition toward gender-inclusive abortion-rights rhetoric. Recall from earlier sections that public-health and “debt-of-democracy” human-rights or human-dignity arguments were featured prominently in the advocacy strategies of Mexican and Colombian activists. The Courts in these nations would have found claims presented in these terms especially compelling, and they would have been more inclined than other high courts to draw on their vast repertoire of fundamental rights when adjudicating them, even if it meant venturing into socially or politically contested waters. The result was a judicially endorsed, rhetorically progressive vision of abortion access that guaranteed not only the rights to health of all parties affected—“women and people with the capacity to gestate”²⁴⁵—but also, in a more abstract sense, the “right to exist” that transgender activists have frequently associated with legal visibility.²⁴⁶

III. WHY THIS MATTERS

A. *Law’s Expressive and Educative Functions: Legal Recognition as a Means of Countering Stigma, Discrimination, and Harm*

Gender-inclusive abortion-rights rhetoric matters because legal recognition can play an important role in countering stigma, discrimination, and harm. Various scholars have written about the law’s expressive power for LGBTQ+ persons, meaning its ability to make statements about values as well as to encourage or deter actual behavior.²⁴⁷ The idea emerges from the work of Cass Sunstein, who has argued that laws can “be designed to change social norms,” particularly where “good norms” are lacking independently of the law—such as, in Sunstein’s example, community norms regarding littering, or in the case of this Note, bad social norms that encourage the mistreatment of transgender persons.²⁴⁸ Related are the ideas of Christopher Eisgruber and other scholars who have noted the “educative” function of the law—and especially of the Supreme Court—in “offering *ad*

245. *Acción de Inconstitucionalidad 148/2017*, *supra* note 112, at para. 46.

246. See Inés M. Pousadela, *From Embarrassing Objects to Subjects of Rights: The Argentine LGBT Movement and the Equal Marriage and Gender Identity Laws*, 23 DEV. PRAC. 701, 716 (2013).

247. See, e.g., Carla Spivack, *The Dilemma of the Transgender Heir*, 33 QUINNIPIAC PROB. L.J. 147 (2020); Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793 (2017).

248. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024-25 (1996).

hominem lessons capable of inspiring Americans to honor their values.”²⁴⁹ This is consistent with social-science literature documenting the “legitimation” power of the Supreme Court, whereby its pronouncements on controversial issues can slowly shape public opinion in favor of certain values and ideologies.²⁵⁰ Collectively, these works suggest that “the law might be enlisted as a corrective” to “reconstruct existing norms and to change the social meaning of actions through a legal expression or statement about appropriate behavior.”²⁵¹

The stakes of these norm-changing and behavior-shaping functions are high for transgender and other gender-diverse persons. A recent wave of scholarship has been devoted to examining how the institutional erasure of transgender pregnant persons fuels strongly gendered norms around pregnancy that create significant challenges for this population.²⁵² According to these studies, current cultural and structural features of our society perpetuate anti-transgender stigma, animate transphobia and violence, and facilitate institutional structures that do not recognize the possibility of transgender men becoming pregnant.²⁵³ These issues present severe impediments to gender-diverse persons’ ability to navigate the healthcare system,²⁵⁴ which exacerbates the wide array of health inequities

249. See Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 961 (1992).

250. See Joseph Daniel Ura, *Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions*, 58 AM. J. POL. SCI. 110 (2014); Jeffery J. Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POL. RSCH. Q. 675 (1994); Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751 (1989).

251. Sunstein, *supra* note 248, at 2031.

252. See Hoffkling et al., *supra* note 43 (examining this literature).

253. See *id.*

254. See Monica Hahn, Neal Sheran, Shannon Weber, Deborah Cohan & Juno Obedin-Maliver, *Providing Patient-Centered Perinatal Care for Transgender Men and Gender-Diverse Individuals*, 134 OBSTETRICS & GYNECOLOGY, 959 (2019) (“Transgender and gender-diverse individuals routinely face stigma and discrimination navigating the health care system, including gender insensitivity, denial of services, and verbal abuse in medical visits. In a national survey, 23% of respondents reported avoiding seeking care owing to fear of mistreatment as a transgender person. Prenatal care for transgender men may be further complicated by cultural beliefs of pregnancy as a “woman-only” experience.”).

that they already experience at disproportionate rates relative to their cisgender peers.²⁵⁵

A vast array of literature has also begun demonstrating the ways in which changing our current discourse and behaviors—beginning with raising awareness of gender-diverse pregnancies—can counter the norms that negatively shape people’s responses to pregnant men. The consensus is that support and affirmation of transgender people is associated with positive health outcomes.²⁵⁶ For instance, a 2021 survey of transgender youth reported that youth who had access to social support and gender affirmation—including use of gender-affirming pronouns and clothing and access to legal name and gender changes—were significantly less likely to attempt suicide.²⁵⁷

Put simply, visibility and affirmation are important, especially in the highly stigmatized or otherwise underrecognized realm of transgender pregnancy. In contrast with increasing social, political, and clinical visibility, the observations in Section II.D. of this Note suggest that gender-diverse pregnant persons remain largely invisible across some of the United States’ most notable judicial, legislative, and executive statements on abortion rights. This is a missed opportunity. Scholars like Sunstein and Eisgruber have demonstrated that changes in the law can serve norm-setting (expressive) and informational (educative) functions similar to those associated with the foregoing changes in U.S. social, political, and clinical discourse. It is time to harness those powerful expressive and educative

255. See Heather Walter-McCabe & Alexander Chen, *Transgender Health Equity and the Law*, 50 J.L. MED. & ETHICS 401 (2022) (“Transgender people already experience health inequities at a disparate rate compared to their cisgender peers, including increased rates of mental health disorders, substance use disorders, sexual and physical violence, and sexually transmitted infections. Transgender people, particularly transgender women, experience violent injury and death at a disturbingly disparate rate. Suicidality rates are also alarming, with the most recent survey of transgender adults in the United States finding a suicide attempt rate nearly nine times that of the general population, and nearly 35% of transgender youth reporting a suicide attempt in a 2017 Centers for Disease Control study.”).

256. See, e.g., Kristina R. Olson, Lily Durwood, Madeleine DeMeules & Katie A. McLaughlin, *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 PEDIATRICS 3 (2016).

257. Amit Paley, *National Survey on LGBTQ Youth Mental Health 2021*, TREVOR PROJECT (2021), <https://www.thetrevorproject.org/survey-2021/> [<https://perma.cc/EZX8-52S4>].

functions by adopting more gender-inclusive abortion-rights rhetoric in the spirit of Argentina, Mexico, and Colombia.

B. Legal Implications of Exclusion

The second reason gender-inclusive abortion-rights rhetoric matters is because language that excludes transgender and other gender-diverse persons has serious legal implications.

1. Denial of Benefits

Various legal scholars and practitioners have noted how gender-exclusive language encourages narrow interpretations of the law and the subsequent denial of legal benefits. For instance, ACLU Staff Attorney Chase Strangio has described how a 2015 New York State law that regulated access to hysterectomies on sexed terms presented significant barriers for transgender Medicaid recipients in the state.²⁵⁸ Under that iteration of New York's Medicaid scheme, hysterectomies were not covered where the sole purpose of the procedure was to prevent further pregnancies, but they were available and reimbursable under certain conditions where "the woman was sterile before the hysterectomy was performed."²⁵⁹ The issue, of course, was that the coding of a recipient's sex as male would expose that person to a high risk of being denied access to coverage for hysterectomies. To be sure, the language of the law did not explicitly preclude coverage for persons not classified as women, but Strangio reported that many practitioners had observed a pattern of overly literal statutory interpretations leading to coverage denial for gender-diverse persons—not only for hysterectomies, but also for gynecological exams, obstetric exams, and mammograms.²⁶⁰

Similar coverage denials have also been analyzed in the context of federal laws and private insurance. Paradigmatic examples of federal laws that have been criticized on these grounds, as highlighted by scholars like

258. See Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 241-42 (2016).

259. *Id.* (quoting N.Y. COMP. CODES R. & REGS. tit. 18, § 505.2(h)(2)(ii)(a) (2015)).

260. *Id.*

David Fontana and Naomi Schoenbaum,²⁶¹ include (1) the Family and Medical Leave Act, which mentions only “expectant mothers” in its protections for prenatal leave;²⁶² (2) the Pregnancy Discrimination Act, which amended Title VII to protect against pregnancy discrimination but by its own terms covered only “women”;²⁶³ and (3) the Patient Protection and Affordable Care Act, which contained several regulations that exclusively mentioned “pregnant women” when mandating that covered employers offer insurance plans with various pregnancy-related benefits.²⁶⁴ Anecdotal evidence from transgender and other gender-diverse persons supports what scholars have postulated.²⁶⁵

Recall that this was the case in Colombia as well. Prior to the Colombian Constitutional Court’s landmark, gender-inclusive abortion-rights ruling in 2022, providers were using deliberately narrow readings of the Court’s 2006 ruling to deny gender-diverse persons access to abortion even when “women” would otherwise have qualified. Hence, when the Colombian Constitutional Court issued its most recent ruling, it made clear that the legal protections therein extended to “women, girls, *and pregnant persons*.”²⁶⁶ Essentially, the Constitutional Court recognized that gender-exclusive abortion language can facilitate unintended discrimination—among other harms—and that troubling recognition inspired change. It is time for the same to occur in the United States.

2. Debilitation of Strategy

Beyond its role in facilitating the denial of benefits, a related legal implication of gender-exclusive language is that it impedes what many

261. See Fontana & Schoenbaum, *supra* note 37; see also Dorothy Cornwell, *Proposed Rule on ACA Nondiscrimination: Coverage for Transgender Individuals*, 57 NO. 12 DRI FOR DEF. 49, 54 (2015) (“Many commenters responding to the HHS request for information noted that transgender individuals are routinely denied coverage for medically appropriate sex-specific health services due to their gender identity or because they are enrolled in their health plans as one sex because the health services are generally associated with another sex.”).

262. 29 C.F.R. § 825.120(a)(4).

263. 42 U.S.C. § 2000e(k) (2012).

264. See, e.g., Patient Protection and Affordable Care Act § 2713(a), 42 U.S.C. § 300gg-13 (2012).

265. See Lieberman, *supra* note 47.

266. See *supra* notes 141-151 and accompanying text.

believe to be the strongest strategy for advancing institutional change: unified, intersectional, coalition-based advocacy. Recall that this was one of the foundational pillars of the Green Wave, and that it had benefits for transgender persons and women alike. When asked about the size and solidarity-based structure of the movement, one of the Green Wave leaders described the situation as follows: “It took many years but we saw the coming together of different political generations We were very strategic in looking for alliances which could amplify our rights, amplify our arguments and reach more people,” including *Pibas* (teenagers), *históricas* (feminists from older generations who had been most active in the seventies), and transgender persons of all ages.²⁶⁷ In this way, Green Wave advocates clearly understood the strategic benefit of gender-inclusive rhetoric and advocacy.

Scholars and advocates in the U.S. have similarly begun calling attention to the strategic benefits of gender-inclusive rhetoric. One core premise of this strategic argument is that legal and social movements are stronger when various groups affected by an issue gather together in a unified struggle for institutional change. Another essential premise of the strategic argument for gender-inclusive abortion rhetoric is that assaults on transgender rights and abortion rights “come from the same playbook.”²⁶⁸

If there were any doubt that assaults on transgender and abortion rights are indeed part of a broader interwoven movement, one need only look at the brief filed by the State of Alabama in *Eknes-Tucker v. Alabama*.²⁶⁹ *Eknes-Tucker* arises out of a challenge to Alabama’s Vulnerable Child Compassion and Protection Act (V-CAP), which makes it a felony for any person to “engage in or cause” specified types of medical care for transgender minors.²⁷⁰ The Department of Justice filed a complaint alleging that V-CAP discriminates against transgender youth by denying them access to certain forms of medically necessary care “while allowing non-transgender minors to access the same or similar procedures.”²⁷¹ The District Court issued an

267. Daniella Lock, *Alliances for Abortion Rights*, STRENGTH AND SOLIDARITY (May 13, 2022), <https://strengthandsolidarity.org/blog/alliances-for-abortion-rights> [https://perma.cc/DS9B-KHMP] (quoting Victoria Tesoriero).

268. See Facci, *supra* note 20.

269. Opening Brief of State Defendants, *Eknes-Tucker v. Alabama*, No. 22-11707, 2022 WL 2399551 (11th Cir. 2022).

270. ALA. CODE § 26-26-4 (2022).

271. Press Release, *Justice Department Challenges Alabama Law that Criminalizes Medically Necessary Care for Transgender Youth*, DEP’T JUST. (Apr. 29, 2022),

injunction preventing the state from enforcing the law, and, on appeal, Alabama cited the Supreme Court's decision in *Dobbs*.²⁷² Just as Justice Alito had argued that there is no Fourteenth Amendment right to abortion because such a right is not "deeply rooted in this Nation's history and tradition,"²⁷³ Alabama argued in *Eknes-Tucker* that "no one—adult or child—has a right to transitioning treatments that is deeply rooted in our Nation's history and tradition."²⁷⁴ According to Alabama, this meant that "[t]he State can thus regulate or prohibit those [gender-affirming] interventions."²⁷⁵

Eknes-Tucker serves as a clear example of a case in which the Supreme Court's *Dobbs* opinion, thought by many to implicate a "war on women," is cited in support of a state law many view as part of a war on transgender persons and their right to medically necessary gender-affirming treatment. Notably, Alabama's V-CAP is just one of 315 anti-LGBTQ+, and especially anti-transgender, bills that the Human Rights Campaign tracked in 2022.²⁷⁶ The pace increased in 2023: 340 anti-LGBTQ+ bills were introduced between January 1st and February 15th alone.²⁷⁷ Similarly, several sources tracked a wave of more than 500 anti-abortion laws introduced in the first few months of 2022.²⁷⁸ It is time for the transgender-rights and abortion-rights movement to unite in a shared crusade for bodily autonomy and full

<https://www.justice.gov/opa/pr/justice-department-challenges-alabama-law-criminalizes-medically-necessary-care-transgender> [<https://perma.cc/2NWM-J74A>].

272. Opening Brief, *Eknes-Tucker*, 2022 WL 2399551, at *27-50.

273. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

274. Opening Brief, *Eknes-Tucker*, 2022 WL 2399551, at *5.

275. *Id.*

276. See HRC Staff, *Human Rights Campaign Working to Defeat 340 Anti-LGBTQ+ Bills at State Level Already, 150 of Which Target Transgender People—Highest Number on Record*, HUM. RTS. CAMPAIGN (Feb. 15, 2023), <https://www.hrc.org/press-releases/human-rights-campaign-working-to-defeat-340-anti-lgbtq-bills-at-state-level-already-150-of-which-target-transgender-people-highest-number-on-record> [<https://perma.cc/S79S-PEV5>].

277. *See id.*

278. See Elizabeth Nash, Lauren Cross & Joerg Dreweke, *2022 State Legislative Sessions: Abortion Bans and Restrictions on Medication Abortion Dominate*, GUTTMACHER INST. (May 26, 2022), <https://www.guttmacher.org/article/2022/03/2022-state-legislative-sessions-abortion-bans-and-restrictions-medication-abortion> [<https://perma.cc/RR68-LA6Q>].

access to reproductive care. Gender-inclusive abortion-rights rhetoric is one important, strategic way of demonstrating this unified struggle, in the spirit of the Latin American Green Wave.

C. *Advancing Fundamental Principles of Good Legal Writing and Advocacy*

A third reason gender-inclusive abortion-rights rhetoric matters is its role in advancing fundamental principles of good legal writing and advocacy. A growing base of scholarship has demonstrated the parallels between the values espoused in various inclusive-writing guides and those encountered in some of the canonical legal-writing texts—including commitments to precision, clarity, equity, and respect.²⁷⁹ Similar arguments have been advanced as part of the longstanding push for “gender-neutral” writing in the law,²⁸⁰ which can be traced to the modern feminist movement of the 1970s. Feminist language reformers framed their arguments primarily in terms of political utility, noting that gender-neutral language was essential to raise consciousness, denounce sexism, and empower women, but they also noted that their efforts presented a “win-win” opportunity for those who cared about clarity, accuracy, and respect in legal writing.

At the intersection of scholarship on inclusive writing broadly and gender-neutral drafting in the law is a small base of recent literature that seeks to modernize the “gender-neutral” movement of the 1970s in light of the growing visibility of LGBTQ+ persons, especially transgender persons.²⁸¹ This includes arguments for legal writers to use litigants’ preferred pronouns or to use the singular “they” and “their” in place of

279. See Anna F. Connolly, *An Idea for Legal Writing*, VT. BAR. J., Summer 2022, at 12 (comparing inclusive language principles with principles of “Plain English” legal writing—a method taught widely in law schools today—and discovering that these “have a lot in common”); Monica B. Towle, *Language Inclusivity in the Practice of Law*, S.C. LAW., May 2022, at 28 (“[T]he American Psychological Association (APA) has published comprehensive guidelines for language inclusivity based on scientific research on individual responses to specific terminology. These guidelines can be easily applied to the legal profession.”).

280. See, e.g., William B. Hill, *A Need for the Use of Nonsexist Language in the Courts*, 49 WASH. & LEE L. REV. 275, 276 (1992).

281. See, e.g., Donald L. Revell & Jessica Vapnek, *Gender-Silent Legislative Drafting in A Non-Binary World*, 48 CAP. U. L. REV. 103, 105 (2020).

gendered alternatives.²⁸² As noted in a recent article by Donald Revell and Jessica Vapnek, many scholars “believe that the trajectory of recent language changes to account for women’s rights should guide and inspire the next wave of language transformation to take account of LGBTQIA+ rights” so that legislative drafting reflects and supports the legal status of transgender and other gender-diverse persons.²⁸³ Again, these scholars root their arguments in fundamental principles of legal writing and advocacy, including precision, clarity, respect, dignity, fairness, and justice. This Section continues that trend, with a focus on highlighting how gender-inclusive abortion-rights language achieves the foregoing objectives.

1. Precision

Traditional, women-centric descriptions of pregnancy and abortion rights are imprecise. It presents an incomplete picture of reality to state that “above all others, women lacking financial resources will suffer from [the] decision [to overturn *Roe v. Wade*],” as the *Dobbs* dissent did,²⁸⁴ without at least acknowledging the similar impacts on transgender persons facing financial challenges and assaults on their bodily autonomy.²⁸⁵ And it is altogether incorrect to frame legal arguments in terms that reinforce the inconceivability fallacy by suggesting that only women are capable of pregnancy.

It is particularly imprecise to exclude transgender and other gender-diverse persons from these discussions in light of the fact that they face some of the most significant repercussions of abortion restrictions. Indeed, data suggests that transgender persons already face the greatest barriers to accessing reproductive care, including financial struggles, lower rates of medical insurance, and systemic discrimination in the healthcare system.²⁸⁶ Many experts believe that this situation will only worsen in the post-*Roe* medical-legal landscape. For instance, in states with six-week abortion

282. See Heidi K. Brown, *Get with the Pronoun*, 17 LEGAL COMM’N & RHETORIC: JALWD 61 (2020).

283. Revell & Vapnek, *supra* note 281, at 105.

284. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 361 (2022).

285. Indeed, some contend that under-resourced transgender persons are likely to suffer just as much if not more than other groups from assaults on bodily autonomy and access to reproductive care. See *supra* Sections III.A., III.B.

286. See *supra* notes 43-44.

bans—like the aforementioned Texas Heartbeat Act²⁸⁷ or the “Fetal Heartbeat” law upheld by Georgia’s Supreme Court²⁸⁸—transgender men are at a disproportionately high risk of missing the brief gestational period during which they can access legal abortion services. This is because many transgender men experience menstrual cessation as a result of hormone replacement therapy,²⁸⁹ meaning that there are many cases in which there are no abnormal changes in the menstrual cycle to indicate pregnancy before the six-week cutoff. Considering that the southern United States has both (1) the highest number of transgender persons in the nation,²⁹⁰ and (2) many of the strictest abortion laws,²⁹¹ it is not difficult to grasp the significance of this problem, nor is it challenging to perceive the recent wave of anti-abortion laws as a women’s-rights issue *and* a transgender-rights issue.

2. Clarity

Interwoven with the idea of precision in legal writing is the idea of clarity. To maximize clarity, one should convey their intended meaning in

287. See Texas S.B. No. 8, <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00008F.pdf> [<https://perma.cc/PHV9-RZHB>].

288. See Georgia House Bill 481, <https://www.legis.ga.gov/api/legislation/document/20192020/184245>; *Georgia’s Highest Court Reinstates Ban on Abortions After 6 Weeks*, NPR (Nov. 23, 2022, 2:41 PM ET), <https://www.npr.org/2022/11/23/1139039767/georgia-supreme-court-reinstates-abortion-ban> [<https://perma.cc/M4VL-8XPS>].

289. See Shazia Ahmad & Matthew Leinung, *The Response of the Menstrual Cycle to Initiation of Hormonal Therapy in Transgender Men*, TRANSGENDER HEALTH, 2017, at 176-79 (finding that the initiation of low to moderate testosterone was sufficient in leading to menstrual cessation in the majority of patients by six months and nearly all by one year).

290. See Jody L. Herman, Andrew R. Flores & Kathryn K. O’Neill, *How Many Adults and Youth Identify as Transgender in the United States?*, UCLA SCH. OF L. WILLIAMS INST. 9-10 (June 2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf> [<https://perma.cc/EH4E-8BK4>].

291. See *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (2023), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/42DK-6397>].

the most direct terms possible.²⁹² The conventional wisdom is to “say what you mean and mean what you say.”²⁹³

This “say what you mean and mean what you say” principle is operative here. If transgender- and gender-diverse persons are included in our legal doctrines, then advocates, judges, legislative drafters, and other legal writers should make this clear by explicitly mentioning them. The alternative approach, which renders these populations invisible in the eyes of the law, creates ambiguity around whether their omission was intentional—meaning that abortion protections should not extend to them—or whether it was simply believed that they would be incorporated within all references to “women.” Being subsumed under a category is not respectful, empowering, or dignifying; nor is it the clearest way of articulating the population at issue. Therefore, the strongest legal writing in this area would follow the lead of Argentina, Mexico, and Colombia in extending abortion protections to gender-diverse persons in the most inclusive, visible ways possible.

3. Respect, Dignity, Fairness, and Justice

Although the previous two sections demonstrate the benefits of gender-inclusive abortion-rights rhetoric in advancing principles of precision and clarity, it should be stated unequivocally that respect, dignity, fairness, and justice are the strongest values undergirding such rhetoric. These concepts are foundational to the ethos of legal writing, legal advocacy, and the legal system writ large.²⁹⁴ Indeed, traces of these values—especially dignity—

292. See CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 265 (5th ed. 2006) (“[Y]ou must select the words and phrases that precisely convey your intended meaning.”).

293. ANTONIO GIGI & HENRY WEIHOFEN, *LEGAL WRITING STYLE* (3d ed. 2018).

294. See Karin Ciano, *Legal Writing Notebook: What’s Up with the Singular ‘They’ These Days?*, MINN. LAW. (2018), <https://minnlawyer.com/2018/05/07/legal-writing-notebook-whats-up-with-the-singular-they-these-days> [<https://perma.cc/KV42-JG3U>] (“What’s a writer to do? How about what a good writer always does: accurately reflect the facts while respecting both our readers and the people we write about.”); Susan Smith Blakely, *The Power of Decency in the Legal Profession*, ABA J. (Nov. 19, 2020, 3:32 PM), <https://www.abajournal.com/columns/article/the-power-of-decency-in-the-legal-profession> [<https://perma.cc/2ZRY-64EU>] (“[A]s lawyers, we likely have greater access to the precepts of honorable behavior and concepts of decency and equity than members of the society at large. Isn’t that what the ABA Model Code of Professional Responsibility are all about?”).

have played critical roles in shaping some of the Supreme Court's most storied opinions in the realms of equal protection and antidiscrimination. In *Brown v. Board of Education*, for instance, the Supreme Court relied in large part on African-American schoolchildren's "feeling of inferiority as to their status in the community" in holding that racially segregated educational facilities are inherently unequal and thus violate the Equal Protection Clause of the Fourteenth Amendment.²⁹⁵ Similarly, attention to dignity, respect, fairness, and justice has been evident in the Supreme Court's opinions concerning LGBTQ+ equality, where laws that "demean the[] existence [of]"²⁹⁶ or otherwise "serve[] to disrespect and subordinate"²⁹⁷ LGBTQ+ persons have been deemed unconstitutional in large part because of the "dignitary wounds"²⁹⁸ that they inflict.

As University of Virginia Law professor Rachel Bayefsky has noted, "dignity and respect can be understood in multiple ways"²⁹⁹—a statement that this Note would argue is equally true for abstract principles of fairness and justice as well. Accordingly, a vast array of legal scholarship has been devoted to understanding the myriad meanings that these concepts have possessed as philosophical, social, and constitutional terms over time.³⁰⁰ Extrapolating from these works, this Note suggests that the power of gender-inclusive abortion-rights rhetoric in promoting principles of respect, dignity, fairness, and justice can be thought of along three axes: (1) external, socioexpressive accounts of dignity; (2) internal, psychosocial

295. 347 U.S. 483, 492-94 (1954).

296. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

297. *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

298. *Id.* at 678.

299. Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1289 (2021).

300. See, e.g., Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172-73 (2011); AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 3-4 (Daniel Kayros trans., 2015); Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 671 (2005); Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 10, 28 (Michael J. Meyer & William A. Parent eds., 1992); William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS, *supra*, at 47, 71; Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36 (1977); Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036, 3058-59 (2014); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1160-64 (2004).

accounts of dignity; and (3) philosophical, inherent-worth accounts of dignity.

a. The Philosophical, Inherent-Worth Account

The philosophical, inherent-worth account views dignity as an innate attribute based on characteristics like humanity, autonomy, or moral capacity. It has strong ties to the moral theory articulated by eighteenth-century philosopher Immanuel Kant.³⁰¹ Under this view, the dignitary consequences of disrespectful, unfair, or unjust treatment matter independently of such treatment's external or internal effects on the individual.³⁰² Rather, gender-exclusive language that renders someone invisible or that denies their existence is normatively concerning because it violates our basic "moral commitments to respect the equality and dignity of our fellow persons."³⁰³ LGBTQ+ advocates often frame this in terms of "courtesy"—a seemingly simple commitment to utilizing language that recognizes and affirms the lived experience of gender-diverse persons. Traces of this philosophical, inherent-worth account are evident in the following excerpt from Cazembe Murphy Jackson, a transgender community organizer focused on reproductive justice for all persons with a capacity for pregnancy:

I think what trans people are asking for inside of the reproductive justice movement is the bare minimum Just recognize that we

301. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 42 (Mary Gregor trans. & ed., 1997); see also Victor Chidi Wolemonwu, *Richard Dean: The Value of Humanity in Kant's Moral Theory*, 23 *MED., HEALTH CARE & PHIL.* 221, 222 (2019) ("Kant views dignity as an inherent moral worth, which defines the humanity (humanness) of *all* human beings.").

302. See Erik Encarnacion, *Boilerplate Indignity*, 94 *IND. L.J.* 1305, 1325-28 (2019) (distinguishing between conceptions of dignity rooted in "an inalienable attribute of every human person" and those rooted in societal status); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 *CALIF. L. REV.* 957, 967 (1989) ("[D]ignitary harm does not depend on the psychological condition of an individual plaintiff, but rather on the forms of respect that a plaintiff is entitled to receive from others.").

303. Chan Tov McNamarah, *Some Notes on Courts and Courtesy*, 107 *VA. L. REV. ONLINE* 317, 328 (2021) (describing "courtesy").

exist, we're here, we're a part of this movement, too. We need access to this healthcare just like everybody else."³⁰⁴

b. The External, Socioexpressive Account

Instead of the philosophical, inherent-worth account, Bayefsky argues that advocates should attempt “to capture the social experience of dignity and its absence.”³⁰⁵ Bayefsky’s view encapsulates what this Note refers to as the external, socioexpressive account of dignity. Under this framework, dignitary harm troubles us because of its effect in shaping social attitudes and encouraging the potentially discriminatory or otherwise odious behavior of others toward the disrespected group. This view is redolent of Section III.A.’s discussion of law’s expressive and educative functions in countering stigma, discrimination, and harm. As that Section already offered an extensive discussion of the role that gender-inclusive abortion-rights rhetoric can play in promoting respect, dignity, fairness, and justice, this Section will not belabor those points. It will simply note that readers interested in additional evidence of dignitary benefits flowing from gender-inclusive rhetoric can find several examples in existing scholarly works.³⁰⁶

c. The Internal, Psychosocial Account

The internal, psychosocial account of dignity is similarly rooted in “the social experience of dignity and its absence,” but it focuses more on the individual, psychological impact that certain experiences have in causing embarrassment, anxiety, depression, and other forms of emotional distress.

304. Jacquelyne Germain, *'We're a Part of This Movement, Too.'* *Transgender and Nonbinary People Say They Feel Excluded from the Abortion Fight*, CNN (Aug. 27, 2022, 3:01 AM ET), <https://www.cnn.com/2022/08/27/us/transgender-nonbinary-abortion-reproductive-care-reaj/index.html> [https://perma.cc/2H2B-MBST] (quoting Cazembe Murphy Jackson).

305. Bayefsky, *supra* note 299, at 1289.

306. *See, e.g.*, Pat K. Chew & Lauren K. Kelly-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643, 646 (2007) (reporting results showing that judges, lawyers, and legal scholars “continue to use male-gendered words” and that this language “effectively reinforces our acceptance of its debilitating messages about women,” which can result in “very real and damaging effects”). *See supra* Section III.A., for more targeted examples of women-centric language’s effect on transgender and gender-diverse persons rather than male-centric language’s effect on women, which tends to be the focus in much of the literature on gender-neutral or gender-inclusive language.

Although difficult to measure, a growing base of research and community testimony highlights the dignitary harms of gender-exclusive language—and conversely, the dignitary benefits of gender-*inclusive* language. For instance, a study that examined the pregnancy and chestfeeding experiences of twenty-two transgender people who were assigned female at birth revealed that medical providers’ use of women-centric, gender-exclusive terminology—words like “she,” “mom,” and “breasts”—intensified gender-related psychological distress.³⁰⁷ Staggeringly, 35% of this participant sample reported postpartum depression, suggesting the importance of adopting inclusive language to avoid inflicting harm.³⁰⁸ Similarly, other research suggests that verbal microaggressions like using incorrect pronouns to refer to a transgender person are tied to myriad negative psychological and physical outcomes, including lower self-esteem, greater anxiety and depression, difficulty sleeping, and overall diminished cognitive function.³⁰⁹ In contrast, as noted earlier, various forms of gender affirmation—including use of gender-affirming pronouns and clothing and access to legal name and gender changes—are associated with a 50% decrease in suicide attempts among transgender youth.³¹⁰

Beyond formal studies, examples abound of transgender and other gender-diverse persons expressing how gender-exclusive pregnancy language makes them feel disrespected, undignified, and unfairly or unjustly disregarded. Consider the following anecdote:

I had to have a mammogram done recently, and I was very uncomfortable being placed in a **women’s** only space to have a **women’s** procedure to prevent what is usually considered a **women’s** disease. Because I am nonbinary, I hated being shoved into that female box. While my biological sex is female, my identity is not.³¹¹

307. See Kannon R. MacKinnon et al., *Recognizing and Renaming in Obstetrics: How Do We Take Better Care With Language?*, 14 *OBSTETRIC MED.* 201, 201 (2021).

308. *Id.*

309. See Kevin L. Nadal, Avy Skolnik & Yinglee Wong, *Interpersonal and Systemic Microaggressions Toward Transgender People: Implications for Counseling*, 6 *J. LGBT ISSUES IN COUNSELING* 55, 58-59, 65, 75-78 (2012).

310. See Paley, *supra* note 257.

311. Amber Leventry, *Here’s What I Want People to Know About Trans and Nonbinary Pregnancies*, *PARENTS* (Oct. 16, 2023) (emphasis added), <https://www.parents.com/pregnancy/my-body/pregnancy-health/trans-and-nonbinary-people-can-be-pregnant-too> [<https://perma.cc/X8YS-B49S>].

It is time for the legal profession to join the health profession in recognizing the discomfort, distress, and dismay that our language surrounding pregnancy and abortion can cause. When the legal discourse surrounding abortion rights discusses “*women . . . women . . . women*,”³¹² it does a linguistic disservice that is different in substance—as it is speaking the language of the law, rather than obstetrics—but not in kind from the examples offered above. Either way, transgender and other gender-diverse persons with a capacity for pregnancy are made to feel stigmatized, unwelcome, and either “shoved into that female box”—reduced to the category of the “subsumed, the invisible, . . . the marked”³¹³—or excluded altogether. A genuine commitment to the basic legal principles of respect, dignity, fairness, and justice calls for change.

CONCLUSION: CHANGE IS POSSIBLE

*“Language is power, life and the instrument of culture, the instrument of domination and liberation.”*³¹⁴

This Note has sought to advance the literature on transgender visibility and abortion rights by adopting a comparative-law approach that suggests the United States has much to learn from Latin America’s “Green Wave” nations. Whether as a reflection of the “inconceivability fallacy” rearing its ugly head—with legal authorities in the United States failing to recognize that persons other than cisgender women can get pregnant—or as a strategic decision that eschews gender-inclusive pregnancy language for other reasons, it is clear that transgender, nonbinary, and other gender-diverse persons with a capacity for pregnancy remain largely invisible across some of the United States’ most notable judicial, legislative, and executive statements on abortion rights. In contrast, the recognition of transgender and other gender-diverse persons has become a standard feature of abortion-rights rhetoric in Argentina, Mexico, and Colombia.

Part III of this Note demonstrated several reasons why a change in the United States’ abortion-rights rhetoric is necessary. Part of the power of the

312. *Id.*

313. Anne Pauwels, *Linguistic Sexism and Feminist Linguistic Activism*, in *THE HANDBOOK OF LANGUAGE AND GENDER* 550, 553 (Janet Holmes & Miriam Meyerhoff eds., 2003) (internal quotation marks omitted).

314. Angela Carter, *quoted in* Francisco Macías, *Language is . . . the Instrument of Domination and Liberation*, *LIBR. CONG. BLOGS* (Mar. 30, 2012), <https://blogs.loc.gov/law/2012/03/language-is-the-instrument-of-domination-and-liberation> [<https://perma.cc/L3GZ-37FQ>].

trends emerging from the “Green Wave” nations is that they also offer tangible, inspiring evidence that change is *possible*. Contrary to the criticisms levied by Bette Midler, J.K. Rowling, Helen Lewis, and others who have opposed gender-inclusive pregnancy language, the “Green Wave” nations send a clear message to the world that implementing gender-inclusive pregnancy language in the law does not necessitate an erasure of women, nor does it require an absurd distortion of otherwise intuitive language. Rather, women and gender-diverse persons with similar capacities for pregnancy can coexist in abortion rhetoric, and the law is made all the more effective when it explicitly recognizes this fact.

The ideas expressed in this Note, though part of an emerging scholarship base that is novel and transformative, are far from revolutionary. Even the most vocal critics of gender-inclusive language would have to admit that the demands of this Note are redolent of feminist efforts to replace predominantly male-gendered language with alternatives that duly recognized men and women in the 1970s, ‘80s, and ‘90s.³¹⁵ Those proposed changes were initially met with resistance, but now gender-neutral language is considered standard practice by style guides in the legal profession and beyond, largely in recognition of its importance in advancing the same principles of precision, clarity, respect, dignity, fairness, and justice discussed in Part III of this Note.³¹⁶ This should serve as another inspiring indication that change is possible in the realm of U.S. abortion-rights rhetoric: transgender advocates are simply hoping to achieve for transgender, nonbinary, and other gender-diverse persons today what feminists managed to accomplish for women in the late twentieth century. To the extent that women and many persons who do not identify as women are facing similar substantive assaults on their bodily autonomy, lessons from the Green Wave demonstrate that the strongest rhetorical opposition to these attacks will be rooted in gender-inclusive, coalition-based legal advocacy.

Justice Gorsuch began the Supreme Court’s majority opinion in *Bostock v. Clayton County* with a profound aphorism: “[s]ometimes small gestures can have unexpected consequences.”³¹⁷ This is certainly the case with gender-exclusionary rhetoric, even if the elision is unintentional. Conversely, gender-inclusive rhetoric has transformative ramifications,

315. *See supra* notes 279-280 and accompanying text.

316. *See, e.g.*, BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* 150 (2d ed. 2006) (“It is no longer customary to use a masculine form as a gender-neutral inclusive.”).

317. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 649 (2020).

especially in the underappreciated realm of transgender pregnancy and abortion. Argentina, Mexico, and Colombia all recognized this during their “Green Wave” abortion expansions and adapted their legal rhetoric accordingly. It is time for the United States to “catch the wave,” so to speak, by embracing similar changes.