Abortion's New Criminalization—A History-And-Tradition Right to Healthcare Access After *Dobbs*

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Abstract

Since *Dobbs v. Jackson Women's Health Organization* reversed *Roe v. Wade* as contrary to the nation's history and traditions, efforts to ban abortion appear as calls for a return to tradition. But criminalization after *Dobbs* is not a return to the past; it is a new regime, in certain respects less restrictive, and in others far more so. Today, states criminalize access to urgently needed health care for pregnant patients in ways they never have before.

Is there any constitutional limit on abortion bans that restrict access to health- or life-preserving care? In *Dobbs*, the Court "granted certiorari to resolve the question whether 'all pre-viability prohibitions on elective abortions are unconstitutional.'" This Article shows that *Dobbs*'s account of why states can criminalize "elective abortions" in turn suggests the unconstitutionality of bans that break with past practice in criminalizing terminations that are part of urgently needed health care, under federal and state law.

We show that the nation has long had a tradition of exempting critical forms of health care from criminalization, that this tradition extended to abortion law, and that it was expressed in the many state laws cited in *Dobbs*'s appendices, as well as in the text and case law of the Comstock Act. We show that this tradition extended across jurisdictions and over time. We demonstrate that under *Dobbs* and *Washington v. Glucksberg*, such a tradition can guide interpretation of the Constitution's liberty guarantees, even if access was not historically termed a right. We show that courts in states with abortion bans view history-and-tradition analysis of this kind as faithful to *Dobbs* and have begun to employ it under their own state constitutions.

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Finally, we defend our reading of *Dobbs* and substantive due process law against an originalist reading of *Dobbs*, advanced by Professor Stephen Sachs, asserting that the Fourteenth Amendment only protects rights historically recognized as such at the time of the Fourteenth Amendment's ratification. We argue that Sachs's originalist reading of the Fourteenth Amendment conflicts with important aspects of *Glucksberg* and *Dobbs*, and, in the process, imposes constitutionally offensive status inequalities on the Constitution's liberty guarantees.

Addressing these questions, we suggest, contributes to the broader debate about how history and tradition can guide constitutional inquiry. By no means is history and tradition the sole ground on which Americans can assert the rights in question, yet it is a critical ground—a reminder that criminalizing urgently needed health care is not what Americans traditionally do, even to pregnant women.

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INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*, both the majority and Chief Justice John Roberts's concurrence explained that the Court was resolving "the question whether 'all pre-viability prohibitions on elective abortions are unconstitutional.'"[1] The Court's decision allowing states to criminalize what the Court termed "elective abortions" on grounds of history and tradition gives rise to a new question: under *Dobbs*, do abortion bans that deny access to urgently needed medical care in cases of threats to life or health violate liberty guarantees of federal or state constitutions?

This Article shows that *Dobbs*'s account of why states can criminalize "elective abortions" in turn suggests that bans that break with past practice in criminalizing urgently needed health care are unconstitutional under federal and state law. We uncover a significant body of evidence showing that the nation has long had a tradition of exempting critical forms of health care from criminalization that extended to abortion law and was expressed in the many state laws cited in *Dobbs*'s appendices, as well as in the text and case law of the Comstock Act.[2] We identify entrenched customary understandings embodied not only in statutory exceptions but also in medical judgments and judicial interpretations that often afforded doctors discretion to protect health and life in accordance with professional norms and good faith.[3] We demonstrate that these thick customary understandings were not merely legislative inaction,[4] but instead expressed self-conscious constraints on state action that were reiterated in different bodies of law across institutions and over time.[5] These customary norms allowed judges, prosecutors, and doctors to coordinate before our modern practices of rights-claiming were established, when not all constraints on legislative power came in the form of judicial enforcement of fundamental rights,[6] and when rights were severely circumscribed by forms of status our Constitution no longer recognizes.[7]

As we show, far from returning to the past, the criminalization regime emerging after *Dobbs* is in critical ways far more punitive.[8] Criminalization has always disproportionately burdened the poor and marginalized, even as these burdens change

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[1] 142 S. Ct. 2228, 2244 (2022); *see also id.* at 2310 (Roberts, C.J., concurring).
[2] *See infra* Sections II.A–II.B.
[3] *See id.*
[4] *See id.*
[5] *See id.*
[6] Cf. William Baude, Jud Campbell & Stephen E. Sachs, General Law and the Fourteenth Amendment, 76 Stan. L. Rev. 1185, 1193–1212 (2024) [hereinafter Baude, Campbell & Sachs, General Law] (describing limits imposed by state power, including police-power limitations and "more determinate limits, usually grounded in customary law").
[7] *See infra* note 360 and accompanying text.
[8] *See infra* Section I.A.

shape.[9] Today, early diagnosis of pregnancy, telehealth, and safe and effective abortion medication mitigate the impact of criminalization on some, at least in the early weeks of pregnancy, while harsh criminal sanctions threaten access to health care for those carrying pregnancies to term,[10] particularly for women of color, who face a higher risk of maternal mortality and morbidity because of health harms related to racism, poverty, and a lack of access to quality (or indeed any) health care.[11]

In fact, the criminal law regime emerging after *Dobbs* prevents doctors from addressing urgent health needs of pregnant patients in ways that bans before *Roe did not*.[12] These harms are concentrated in the South and Midwest,[13] but may not remain there. Federal law could nationalize them; and conscience claims could bring them inside blue abortion-rights protecting states.[14] States may continue to enact laws with life exceptions far harsher than those in place before *Roe*.[15] And the Trump administration may repudiate the Biden administration's view that the Emergency Medical Treatment and Labor Act (EMTALA) guarantees access to abortion in certain medical emergencies.[16] And the Trump administration (or litigants) may seek to break from longstanding practice and judicial understanding by enforcing the Comstock Act as a de facto no-exceptions national abortion ban.[17] Facing such threats, pregnant patients and their lawyers will look to federal and state constitutions to challenge how the state has chilled and obstructed access to life-saving medical care.

We demonstrate that under *Dobbs* and *Washington v. Glucksberg*[18] the tradition we identify can guide interpretation of the Constitution's liberty guarantees to protect access to urgently needed health care against criminalization, even if access was not

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[9] *See infra* notes 64–66 and accompanying text.

[10] *See infra* Section I.A.

[11] See, e.g., Khiara M. Bridges, Racial Disparities in Maternal Mortality, 95 N.Y.U. L. Rev. 1229, 1257–1261 (2020) (surveying reasons for racial disparities in maternal mortality). For more on the disparate effects of *Dobbs*, see *infra* note 66 and accompanying text.

[12] *See infra* notes 54–57 and accompanying text.

[13] Alison McCann & Amy Schoenfeld Walker, Tracking Abortion Bans Across the Country, N.Y. Times, https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html (last updated Oct. 7, 2024).

[14] On the potential impacts of expanding conscience provisions, see Reva Siegel & Mary Ziegler, Conservatives Are Getting Comfortable Openly Talking about a National Ban, Slate (Mar. 28, 2024, 10:00 AM), https://slate.com/news-and-politics/2024/03/conservatives-national-abortion-ban-supreme-court-comstock-plan.html. For further discussion of the Court's apparent embrace of a broad understanding of conscience protections, see text accompanying *supra* notes 124–129.

[15] *See infra* Section III.C.

[16] Laurie Sobel et al., How Pending Health-Related Lawsuits Could Be Impacted by an Incoming Trump Administration, KFF (Nov. 25, 2024), https://www.kff.org/medicare/issue-brief/how-pending-health-related-lawsuits-could-be-impacted-by-the-incoming-trump-administration/ (noting that "Project 2025 authors call for the reversal of the Biden administration's EMTALA guidance, which the new Trump administration could do right away, and withdrawal of federal lawsuits challenging state abortion bans without health exceptions").

[17] *See infra* note 120 and accompanying text.

[18] 521 U.S. 702 (1997).

historically understood as a right.[19] We show that courts in states with abortion bans view history-and-tradition analysis of this kind as faithful to *Dobbs*, and have begun to employ it under their own state constitutions to protect urgently needed health care from criminalization.[20]

Finally, we defend our history-and-tradition analysis under *Dobbs* and *Glucksberg* against an originalist account of the cases presented by Professor Stephen Sachs in response to *Dobbs*'s originalist critics.[21] Sachs offers a reading of *Dobbs* and *Glucksberg* that he contends is compatible with original-law originalism, his positivist account of what our constitutional law requires. We evaluate his positivist account and find it to turn on unstated normative criteria. Sachs's reading, we conclude, conflicts with important aspects of *Glucksberg* and *Dobbs*, and, in the process, imposes constitutionally offensive status inequalities on the Constitution's liberty guarantees.[22]

Of course, the history-and-tradition framework is not the only or best way to analyze these questions as a matter of state or federal law. Constitutional challenges to coercive state action targeting pregnant persons could appeal to the liberty interest in bodily autonomy and family decision-making—understanding these traditionally protected forms of freedom at a higher level of generality—as *Roe v. Wade* and *Planned Parenthood v. Casey* did.[23] Challenges to state action imposing reproductive control or compromising reproductive health care might be asserted as claims on the Privileges and Immunities Clause;[24] asserted as challenges to involuntary servitude under the Thirteenth Amendment;[25] or advanced as a challenge to stereotyping under equal protection.[26]

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[19] *See infra* Sections III.A–B.

[20] *See infra* Section III.C.

[21] Stephen E. Sachs, *Dobbs* and the Originalists, 47 Harv. J.L. & Pub. Pol'y (forthcoming 2024) (manuscript at 1–5) (on file with authors) [hereinafter Sachs, Dobbs]. For an endorsement of this view, see Ed Whelan, On Justice Barrett and Originalism, Nat'l Rev. (June 20, 2024, 3:25 PM), https://www.nationalreview.com/bench-memos/on-justice-barrett-and-originalism.

[22] See *infra* Section III.D.

[23] See, e.g., Reva B. Siegel, The History of History and Tradition: The Roots of *Dobbs*'s Method (and Originalism) in the Defense of Segregation, 133 Yale L.J.F. 99, 110 (2023) [hereinafter Siegel, History of History and Tradition] ("*Roe* reasoned about the Fourteenth Amendment's liberty guarantee as a commitment whose meaning can be derived from the nation's history and traditions as those traditions evolve in history.").

[24] See *infra* Section III.D.

[25] *See, e.g.*, Andrew Koppelman, Originalism, Abortion, and the Thirteenth Amendment, 112 Colum. L. Rev. 1917, 1918 (2012) (arguing that the "Thirteenth Amendment prohibits a ban on abortion because such a ban would do to women what slavery did to the women who were enslaved: compel them to bear children against their will"); Michele Goodwin, Opportunistic Originalism: Dobbs v. Jackson Women's Health Organization, 2022 Sup. Ct. Rev. 111, 166–180 (2023) (discussing the relevance of a Thirteenth Amendment claim and faulting *Dobbs* for failing to do "any serious accounting of the Framers' and ratifiers' thinking, objectives, strategies, and plans").

[26] *See, e.g.*, Reva B. Siegel, Serena Mayeri & Melissa Murray, Equal Protection in *Dobbs* and Beyond: How States Protect Life Inside and Outside of the Abortion Context, 43 Colum. J. Gender & L. 67, 91–95

Even so, there are critically important goods served in analyzing state action obstructing urgently needed reproductive health care from an historical vantage point and through *Dobbs*'s history-and-tradition lens. Even at the height of separate-spheres ideology, when American women were not recognized as rights-holders, doctors, lawmakers, prosecutors, and judges coordinated to create limits on state abortion bans that permitted physicians to protect the lives and health of pregnant patients. This widespread and enduring customary practice shows that access to urgently needed healthcare, including abortion, is deeply rooted in our nation's history and tradition, even on *Dobbs*'s own terms.

I. THE 2023 TERM AND THE POST-*DOBBS* ORDER

Dobbs presents banning abortion as a national tradition, asserting that at common law and under state statutes, abortion had "long been a crime."[27] Claims in this Term's abortion cases, *Alliance* and *Moyle*, reinforce the narrative of criminalization as a return to tradition.[28] As Robert Cover famously observed: "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."[29]

We show that, rather than restoring past practice, *Dobbs* has given birth to new and harsher forms of criminalization. This Part begins by sketching salient features of the health care landscape emerging in *Dobbs*'s wake, demonstrating that the new regime is in certain respects easier to circumvent and in others more punitive than the criminal laws that prevailed before *Roe*. We focus on the Texas Supreme Court's decision in *State v. Zurawski* to illustrate differences between the post-*Dobbs* and pre-*Roe* orders.[30] We then discuss claims in *Alliance* and *Moyle* as part of the post-*Dobbs* landscape.[31] We show that each case addresses questions of statutory interpretation, yet is resonant with constitutional concerns.

(2022) (detailing arguments based on sex stereotyping and the determination of the state to "rely on carceral means to protect life," and contending that "equality arguments are of growing significance in vindicating claims of reproductive justice"). Equal protection arguments have a long history in the context of reproductive rights and justice, even in the pre-*Roe* period. For examples, see Melissa Murray, Race-ing *Roe*: Reproductive Justice, Racial Justice, and the Battle for *Roe v. Wade*, 134 Harv. L. Rev. 2025, 2044–45, 2088–89 (2021) [hereinafter Race-ing *Roe*]; Reva B. Siegel, Roe's Roots: The Women's Rights Claims that Engendered *Roe*, 90 B.U. L. Rev. 1875, 1889–91 (2010). See Memorandum & Ord. on Plaintiffs' Motion for Temp. Injunction at 23, Blackmon v. Tennessee (Tenn. Ch. 2024) (No. 23-11916-IV(I)) (finding that pregnant plaintiffs challenging access to emergency medical care under the Medical Emergency Exception of Tennessee's abortion ban "have shown they are 'similarly situated' to non-pregnant women for purposes of their equal protection challenge" under the state's constitution).

[27] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022) (emphasis omitted).

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

[29] Robert M. Cover, The Supreme Court, 1982 Term—Foreword: *Nomos* and Narrative, 97 Harv. L. Rev. 4, 4 (1983).

[30] *See infra* Section I.A.

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

A. After Dobbs: *An Unprecedented Regime of Abortion Criminalization*

Superficially, criminal abortion laws today resemble those before *Roe*. Many employ narrow exceptions for threats to life.[32] Some are literally revived from the pre-*Roe* period.[33] These features of the post-*Dobbs* landscape suggest a story of continuity, in which government includes narrow and unworkable exceptions in abortion bans, not to protect patients but to limit access.[34] We argue that contemporary abortion bans are discontinuous with the past, when exceptions operated quite differently. Indeed, the long history of judicial decisions enforcing these exceptions in abortion bans offers evidence of a *tradition* of protecting against criminalization abortion critically needed to protect life and health.[35]

The carceral regime that *Dobbs* unleashed is thus not a return to the past, but an expression of significant change. Exceptions to abortion bans that judges once interpreted as requiring physicians to act in *good faith* to protect their patients—that is, in the honest belief that they addressed a threat to health—are now interpreted very differently to give physicians almost no discretion, often requiring physicians to meet some version of a reasonableness standard that prosecutors or antiabortion physicians may second-guess.[36] Moreover, physicians are no longer solo practitioners; today most are embedded in institutional licensing regimes that may incur liability for the conduct of doctors practicing within them.[37]

Texas illustrates how these forces combine to deter the ordinary practice of obstetric-gynecological medicine. The state applies multiple, overlapping bans and penalties, the harshest of which authorizes a term of life imprisonment for abortion

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[32] For an overview of the scope of state exceptions, see Mabel Felix, Laurie Sobel & Alina Salganicoff, A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services at 3, KFF (June 6, 2024), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services.

[33] *See infra* note 56 and accompanying text.

[34] Amy Schoenfeld Walker, Most Abortion Bans Include Exceptions. In Practice, Few Are Granted., N.Y. Times (Jan. 21, 2023), https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html (reporting on the ineffectiveness of abortion exceptions); Mary Ziegler, Why Exceptions for the Life of the Mother Have Disappeared, Atlantic (Aug. 2, 2022), https://www.theatlantic.com/ideas/archive/2022/07/abortion-ban-life-of-the-mother-exception/670582 (tracing rising suspicion of exceptions among Americans opposed to abortion).

[35] *See infra* Sections II.A–B.

[36] *See infra* Section II.A (discussing a good-faith standard in the abortion context); *infra* note 211 and accompanying text (discussing a good-faith standard for physicians prescribing devices to protect health, rather than to prevent conception). On the standards physicians must now meet, see *infra* notes 43–50 and accompanying text.

[37] See Dov Fox, Medical Disobedience, 136 Harv. L. Rev. 1030, 1099 (2023) (observing that "the corporatization of healthcare has replaced private, mom-and-pop practices with healthcare conglomerates that strictly enforce the legal rules against workers whose livelihood depends on it. And higher-tech and increasingly restrictive policing tools—from social media surveillance to civil bounty enforcement—make providers more likely to get caught" (footnote omitted)).

offenders.[38] The scope of the state's exceptions for life and health are nevertheless exceptionally ambiguous. In *Zurawski v. Texas*, a group of more than twenty plaintiffs argued that the state's life-and-health exception was constitutional only if it permitted physicians to intervene when they concluded "in their good faith judgment and in consultation with the pregnant person, that continuing the pregnancy poses a risk of death or a risk to their health—including their fertility."[39] Were the statute not to permit such abortions, the plaintiffs further argued, it would violate state protections for life, liberty, and equality.[40]

The Texas Supreme Court rejected the plaintiffs' arguments.[41] Chiding physicians for failing to understand what the justices of the court described as a perfectly clear law,[42] the court held that good faith was not enough—a prosecutor would have to decide whether a doctor objectively used reasonable medical judgment.[43] Even as the Texas Supreme Court urged the Texas Medical Board "to do more to provide guidance in response to any confusion that currently prevails,"[44] the state medical board issued a final rule that still left critical questions unanswered, urging the courts to clarify when physicians can act without fear of prosecution.[45]

Not long after the court's decision, *ProPublica* published the story of two Texas women, twenty-eight-year-old Josseli Barnica and eighteen-year-old Nevaeh Crain, who died from complications related to a post-miscarriage infection.[46] In both cases,

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[38] These include a pre-*Roe* ban, Tex. Rev. Civ. Stat. Ann. arts. 4512.1–.4, 4512.6 (West 2023), a trigger ban, Tex. Health & Safety Code Ann. §§ 170A.001–.007 (West 2023); see also Tex. Penal Code Ann. §§ 12.32–33 (West 2023), and a law permitting anyone to sue a provider or "aid[er] or abett[or]," Tex. Health & Safety Code Ann. §§ 171.002, 171.203, 171.208–.210 (West 2023).

[39] Plaintiffs' Application for Temporary Injunction at 2, Zurawski v. State, No. D-1-GN-23-000968 (Tex. Dist. Ct. Aug. 4, 2023), 2023 WL 4995462.

[40] *Id.* at 13.

[41] State v. Zurawski, 690 S.W.3d 644, 666–71 (Tex. 2024).

[42] *Id.* at 653 ("A physician who tells a patient, 'Your life is threatened by a complication that has arisen during your pregnancy, and you may die, or there is a serious risk you will suffer substantial physical impairment unless an abortion is performed,' and in the same breath states 'but the law won't allow me to provide an abortion in these circumstances' is simply wrong in that legal assessment.").

[43] *Id.* at 662–64. The court defined the standard as placing the burden on the prosecution to demonstrate "that *no* reasonable physician would have concluded that the mother had a life-threatening physical condition." *Id.* at 663.

[44] In re State, 682 S.W.3d 890, 894 (Tex. 2023).

[45] 22 Tex. Admin. Code §§ 165.7–.9 (2024); see also 49 Tex. Reg. 5142 (July 12, 2024). For discussion of the final rule, see Olivia Aldridge, Texas Medical Board Adopts Rule for Doctors Offering Emergency Abortions, KERA News (June 21, 2024, 1:52 PM), https://www.keranews.org/news/2024-06-21/texas-medical-board-adopts-rule-for-doctors-offering-emergency-abortions.

[46] On Crain's death, see Lizzie Presser & Kavita Surana, A Pregnant Teenager Died after Trying to Get Care in Three Visits to Texas Emergency Rooms, ProPublica (Nov. 1, 2024, 6:00 AM), https://www.propublica.org/article/nevaeh-crain-death-texas-abortion-ban-emtala. On Barnica's death, see Casandra Jaramillo & Kavitha Surana, A Woman Died After Being Told It Would Be a Crime to Intervene in Her Miscarriage at a Texas Hospital, ProPublica (Oct. 30, 2024, 5:00 AM), https://www.propublica.org/article/josseli-barnica-death-miscarriage-texas-abortion-ban.

medical experts believed that the patients' deaths were preventable, yet state law deterred physicians from intervening because they could still detect fetal cardiac activity.[47] After publication of the *ProPublica* story, a group of more 112 doctors released a letter urging the legislature to change its law to permit physicians acting in good faith to do more for patients like Crain and Barnica.[48]

Authorities in other conservative states suggest that a doctor's good faith is not sufficient to shield against prosecution. In Oklahoma, for example, the state supreme court has ruled that a doctor must have "a reasonable degree of medical certainty or probability that the continuation of the pregnancy will endanger the woman's life due to the pregnancy itself or due to a medical condition that the woman is either currently suffering from or likely to suffer from."[49] The Idaho Supreme Court reached a similar result, holding that "it is not enough for the defendant alone to believe that self-defense was necessary; he must prove that an objective review of the same circumstance would cause a reasonable person to reach the same conclusion."[50]

State prosecutors have made clear that acting in good faith will not protect physicians from prosecution.[51] For example, in 2023, when Kate Cox petitioned a court for permission to end a pregnancy after her fetus received a diagnosis of trisomy 18, a condition that is usually fatal in the first year after childbirth, her physician believed in good faith that threats to her health and future fertility qualified Cox for an abortion.[52] Cox went to court and secured an order from a judge permitting the termination of her pregnancy.[53] Ken Paxton, the Texas attorney general, responded by threatening any physician who treated Cox with criminal charges[54]—and this at a time

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[47] *See supra* note 46 and accompanying text.

[48] Pooja Salhotra, Texas OB-GYNs Urge Lawmakers to Change Abortion Laws After Report on Pregnant Women's Deaths, Tex. Trib. (Nov. 3, 2024, 5:00 PM) https://www.texastribune.org/2024/11/03/texas-ob-gyn-letter-abortion-laws/. *ProPublica* subsequently reported on a third death tied to Texas's law. Lizzie Presser & Kavita Surana, A Third Woman Died Under Texas's Abortion Ban. Doctors Are Avoiding D&Cs and Reaching for Riskier Miscarriage Treatments, ProPublica (Nov. 25, 2024, 6:00 AM) https://www.propublica.org/article/porsha-ngumezi-miscarriage-death-texas-abortion-ban.

[49] Okla. Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1130 (Okla. 2023).

[50] Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1204 (Idaho 2023).

[51] *See infra* notes 52–55 and accompanying text.

[52] Response to Petition for Writ of Mandamus and Emergency Motion for Temporary Relief at 1-2, 4, In re State, 682 S.W.3d 890 (Tex. 2023) (No. 23-0994), 2023 WL 8874768, at *1-2, *4 ("[T]he District Court here deferred to Ms. Cox's physicians' judgment that the medical exceptions to Texas's abortion bans apply in Ms. Cox's situation.").

[53] Cox v. State, No. D-1-GN-23-008611, 2023 WL 8628762, at *3 (Tex. Dist. Ct. Dec. 7, 2023), *vacated*, *In re State*, 682 S.W.3d at 895.

[54] Ava Sasani, Texas Attorney General Says He Will Sue Doctor Who Gives Abortion to Kate Cox, The Guardian (Dec. 8, 2023, 11:31 PM), https://www.theguardian.com/us-news/2023/dec/08/ken-paxton-texas-abortion-kate-cox (reporting that Paxton's guidance explained that the previous court order "will not insulate hospitals, doctors or anyone else from civil and criminal liability").

when a lower court had already ruled in Cox's favor (the state supreme court subsequently reversed this decision).[55]

Not only do prosecutors assume that physicians caring for pregnant patients have little discretion; the penalties authorized by many state laws are much harsher. Some states have retained pre-*Roe* bans, which often authorize penalties of up to six years in prison.[56] More recent criminal laws, including trigger bans and prohibitions passed after *Dobbs*, designate abortion a felony and impose far more draconian punishments.[57] These severe punishments have had a significant chilling effect on the care received by pregnant women.[58] Surveys conducted by the Kaiser Family Foundation in 2023 found that roughly forty percent of obstetrician-gynecologists in ban states experienced constraints in the care they provided during miscarriage or pregnancy-related emergencies, and roughly fifty-five percent believed that their ability to treat patients within the standard of care had been compromised since *Dobbs*.[59] Research has shown that fewer medical students are applying for residencies in ban states, creating a prospective lack of access for more patients.[60]

Finally, while antiabortion groups maintain that they oppose punishing women for abortion, the post-*Dobbs* period has witnessed a spike in prosecutions for pregnancy-related conduct.[61] A report by the organization Pregnancy Justice identified more than 200 such cases in the year after *Dobbs*—a high watermark for such prosecutions.[62] The prosecutions, which often centered on substance use during pregnancy, disproportionately affected low-income patients in Southern states, and often allowed prosecutors to proceed even absent proof of harm to the fetus.[63]

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[55] *In re State*, 682 S.W.3d at 895.

[56] Oklahoma, Wisconsin, and Texas are prominent examples. See Okla. Stat. Ann. tit. 21, § 861 (West 2024); Wis. Stat. §§ 940.04, 939.50 (2024); Tex. Rev. Civ. Stat. Ann. arts. 4512.1–.6 (West 2023). Perhaps the most prominent example is the 1864 Arizona law recently repealed by the state legislature. See Ariz. Rev. Stat. Ann. § 13-603 (2024), *repealed by* H.B. 2677, 56th Leg., 2d Reg. Sess. (Ariz. 2024).

[57] In Alabama and Texas, state law authorizes penalties of up to life in prison. Ala. Code § 26-23H-4–6 (2021); Ala. Code § 13A-5-6(a)(1) (2023); Tex. Health & Safety Code Ann. §§ 170A.001–.007 (West 2022); Tex. Penal Code Ann. §§ 12.32–.33 (West 2023).

[58] *See infra* notes 59–60 and accompanying text.

[59] Usha Ranji, Alina Salganicoff & Laurie Sobel, Dobbs-era Abortion Bans and Restrictions: Early Insights About Implications for Pregnancy Loss, KFF (May 2, 2024) https://www.kff.org/womens-health-policy/issue-brief/dobbs-era-abortion-bans-and-restrictions-early-insights-about-implications-for-pregnancy-loss.

[60] Kendal Orgera & Atul Grover, States With Abortion Bans See Continued Decrease in U.S. MD Senior Residency Applicants, Am. Ass'n Med. Colls. Rsch. & Action Inst. (May 9, 2024), https://www.aamcresearchinstitute.org/our-work/data-snapshot/post-dobbs-2024.

[61] Wendy A. Bach & Madalyn K. Wasilczuk, Pregnancy As a Crime: A Preliminary Report on the First Year After *Dobbs*, Pregnancy Just. (2024), https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Pregnancy-as-a-Crime.pdf.

[62] *Id.*

[63] *Id.* at 10–17.

In part, the burdens created by *Dobbs* fall heavily on those who have always borne the brunt of criminal abortion laws: low-income people and women of color.[64] Consider the example of interstate travel. The Guttmacher Institute found abortion-related interstate travel roughly doubled between 2020 and the first six months of 2023, much of it to nearby states that permit the procedure.[65] Yet today, as before *Roe*, women of color and low-income patients are disproportionately unable to easily circumvent bans: they are more likely to live in ban states and often lack the resources for interstate travel for care.[66] Women of color are also more likely to lack insurance—and to live in states where bans are exacerbating existing gaps in access to care.[67]

In other ways, however, the burdens of criminalization after *Dobbs* have changed because of developments in technology and in law.[68] Abortion pills now account for well over half of all abortions in the United States.[69] Since *Dobbs*, twenty-two states and the District of Columbia have enacted some sort of shield protection, stipulating that government officials will not cooperate with investigations or prosecutions of abortion providers.[70] Nearly ninety percent of the thousands of patients who receive pills each month from shield-state providers reside in jurisdictions where most abortions are criminalized.[71]

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[64] *See infra* note 66 and accompanying text. Pre-*Roe* abortion bans, too, had a disproportionate effect on people of color and low-income patients. Leslie J. Reagan, When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973, at 137–39, 238–46 (2022).

[65] Kimya Forouzan, Amy Friedrich-Karnik & Isaac Maddow-Zimet, The High Toll of U.S. Abortion Bans: Nearly One in Five Patients Now Traveling Out of State for Abortion Care, Guttmacher Inst. (Dec. 7, 2023), https://www.guttmacher.org/2023/12/high-toll-us-abortion-bans-nearly-one-five-patients-now-traveling-out-state-abortion-care; see also #WeCount Report: April 2022-December 2023 (May 14, 2024), Soc'y of Fam. Plan., https://societyfp.org/wp-content/uploads/2024/05/WeCount-report-6-May-2024-Dec-2023-data_Final.pdf (reporting that abortions increased nationally in the United States between 2022 and 2023).

[66] Latoya Hill, Samantha Artiga, Usha Ranji, Ivette Gomez & Nambi Ndugga, What Are the Implications of the Dobbs Ruling for Racial Disparities?, KFF (Apr. 24, 2024), https://www.kff.org/womens-health-policy/issue-brief/what-are-the-implications-of-the-dobbs-ruling-for-racial-disparities.

[67] *Id.*; *see also* Bridges, *supra* note 11, at 1257–1262 (explaining the impact of a lack of access to quality maternal care).

[68] *See infra* notes 69, 73, 77 and accompanying text.

[69] Rachel K. Jones & Amy Friedrich-Karnik, Medication Abortion Accounted for 63% of All U.S. Abortions in 2023—An Increase from 53% in 2020, Guttmacher Inst. (Mar. 19, 2024), https://www.guttmacher.org/2024/03/medication-abortion-accounted-63-all-us-abortions-2023-increase-53-2020.

[70] Kimya Forouzan & Isabel Guarnieri, State Policy Trends 2023: In the First Full Year Since Roe Fell, a Tumultuous Year for Abortion and Other Reproductive Health Care, Guttmacher Inst. (Dec. 19, 2023), https://www.guttmacher.org/2023/12/state-policy-trends-2023-first-full-year-roe-fell-tumultuous-year-abortion-and-other.

[71] Pam Belluck, Abortion Shield Laws: A New War Between the States, N.Y. Times (Feb. 22, 2024), https://www.nytimes.com/2024/02/22/health/abortion-shield-laws-telemedicine.html; see also #WeCount Report: April 2022–December 2023, *supra* note 65, at 6 (finding that an average of 5,800 telehealth abortions took place each month between October 2023 and December 2023 in ban states).

Abortion pills have little impact on one of the most striking features of abortion's new criminalization: the harms experienced by those with wanted pregnancies. Patients who do not see themselves as abortion seekers have nevertheless faced the brunt of new bans, with physicians refusing to address the complications of miscarriage or stillbirth because of the threat of criminal consequences under state laws.[72] Amanda Zurawski's story is only the most prominent example of this new dimension of the criminalization of abortion. Zurawski was seventeen weeks pregnant when she experienced premature preterm rupture of membranes.[73] Because physicians could still detect fetal cardiac activity, they refused to treat Zurawski, fearing the loss of their medical licenses and serious criminal charges.[74] She became septic, was treated in the intensive care unit, and experienced scarring of one of her ovaries that reduced her chances of becoming a parent later on.[75] Stories like Zurawski's are not uncommon. The *Associated Press* reported that cases of pregnant women being turned away from emergency rooms spiked in the aftermath of *Dobbs*;[76] and Idaho's largest hospital reported airlifting six pregnant patients facing medical emergencies out of state in the first three months of 2024 alone.[77] Bans are most heavily burdening women of color: seven in ten obstetricians-gynecologists report that racial disparities in maternal outcomes have grown worse since the *Dobbs* decision.[78]

Alliance and *Moyle* thus reflect a strange irony of the post-*Dobbs* order. While abortion pills have made abortion bans harder to enforce and expanded access early in pregnancy, their availability has done little for women, like Amanda Zurawski,

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[72] *See infra* notes 73–79 and accompanying text.

[73] Kate Zernike, Five Women Sue Texas Over the State's Abortion Ban, N.Y. Times (Mar. 6, 2023), https://www.nytimes.com/2023/03/06/us/texas-abortion-ban-suit.html.

[74] Zurawski testified that her doctors were afraid to provide care because "the hospital was concerned that providing an abortion without signs of acute infection might not fall within the Texas abortion bans' medical exceptions for abortion." Affidavit of Plainitff Amanda Zurawski in Support of Application for Temporary Injunction at 1–2, Zurawski et al., v. State, No. D-1-GN-23-000968 (Tex. Dist. Ct. Aug. 4, 2023).

[75] *Id.*

[76] Amanda Seitz, Emergency Rooms Refused to Treat Pregnant Women, Leaving One to Miscarry in Lobby Restroom, Associated Press (Apr. 19, 2024, 4:41 PM), https://apnews.com/article/pregnancy-emergency-care-abortion-supreme-court-roe-9ce6c87c8fc653c840654de1ae5f7a1c.

[77] Julie Luchetta, Idaho's Biggest Hospital Says Emergency Flights for Pregnant Patients up Sharply, NPR (Apr. 26, 2024, 8:33 AM), https://www.npr.org/2024/04/25/1246990306/more-emergency-flights-for-pregnant-patients--in-idaho.

[78] Brittni Frederickson, Usha Ranji, Ivette Gomez & Alina Salganicoff, A National Survey of OBGYNs' Experiences After Dobbs, KFF (Jun. 21, 2023), https://www.kff.org/report-section/a-national-survey-of-obgyns-experiences-after-dobbs-report/. These care disparities are likely to be magnified over time: a survey of third and fourth-year medical school students found that nearly sixty percent of students would not apply for residencies in states with abortion bans. Training and Workforce after *Dobbs*, Am. Coll. of Obstetricians and Gynecologists, (Oct. 2024), https://www.acog.org/advocacy/abortion-is-essential/trending-issues/issue-brief-training-and-workforce-after-dobbs. Women of color are already disproportionately likely to live in health care deserts. See Bridges, *supra* note 11, at 1257–1261.

experiencing grave complications late in pregnancy. The burdens of *Dobbs* fall most heavily not only on low-income patients and women of color but also on those bearing children who face medical emergencies.

B. Moyle, Alliance, *and the Post*-Dobbs *Landscape*

The claims out of which *Alliance* and *Moyle* grew reflect this post-*Dobbs* reality. *United States v. Moyle* offers a particularly acute example of a post-*Dobbs* ban interpreted by the Idaho Supreme Court to prohibit virtually all health-preserving abortions.[79] Soon after the Court overruled *Roe*, leaving uncertain constitutional protection for abortion in cases involving urgent threats to life or health, the Biden Administration asserted that the Emergency Medical Treatment and Labor Act (EMTALA), which prohibits hospitals receiving federal funds from denying stabilizing care to patients who seek emergency treatment,[80] could preempt abortion bans that interfered with the statute's mandate to provide that stabilizing emergency care.[81] In *Moyle*, the Administration argued that Idaho's Defense of Life Act was preempted by EMTALA.[82] The case for preemption was rooted in Congress's reasons for enacting the statute.

Inequalities of class, race, and gender produced the problem of hospitals "dumping" patients to which EMTALA responded. As a letter to the editor in the *New England Journal of Medicine* explained in 1985, hospitals too often turned away uninsured patients because of an inability to pay, with patients of color facing the most dire effects.[83] In the late 1980s, following the passage of EMTALA, patient dumping

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[79] Given concerns that Idaho's Defense of Life Act could have been interpreted to prohibit the treatment of ectopic pregnancies or the removal of a dead fetus, the state legislature moved to amend the act in 2023. Idaho Code § 18-622 (2023); see also Kelcie Moseley-Morris, Idaho Senate Committee Advances Bill That Would Change Legal Definition of Abortion, Idaho Cap. Sun (Jan. 16, 2023, 10:34 AM), https://idahocapitalsun.com/2023/01/16/idaho-senate-committee-advances-bill-that-would-change-legal-definition-of-abortion (reporting on the justification for the bill).

[80] *See infra* notes 83–87 and accompanying text.

[81] Memorandum from the Dirs., Quality, Safety, & Oversight Grp. to State Surv. Agency Dirs. 1 (Aug. 25, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf.

[82] Complaint at 10, United States v. Idaho, 623 F.Supp.3d 1096 (D. Idaho 2022) (No. 22-cv-00329), (explaining that "Idaho's criminal prohibition extends even to abortions that a physician determines are necessary stabilizing treatment that must be provided under EMTALA").

[83] Mark Nelson, Letter to the Editor, 312 New Eng. J. Med. 1522, 1523 (1985) ("[M]inority-group members with health insurance are more likely to be 'dumped' than whites, and racial disparities are most striking among the sickest patients."); see also Andrew Jay McClurg, Your Money or Your Life: Interpreting the Federal Act Against Patient Dumping, 24 Wake Forest L. Rev. 173, 174 (1989) ("Patient dumping is the refusal of hospitals, usually private hospitals, to treat patients in need of emergency care (many of them women in labor) because of their inability to pay. Instead of receiving treatment, the indigent, uninsured patient is turned away or shuffled across town to the nearest public hospital . . . ."); Owens v. Nacogdoches Cnty. Hosp. Dist., 741 F. Supp. 1269, 1271 (E.D. Tex. 1990) (finding that a hospital's decision to transfer a pregnant patient to a hospital two hundred miles and a four-hour drive away was "part of a pattern of dumpings of indigent patients").

remained a particularly acute problem facing pregnant and laboring patients.[84] Representative Ted Weiss began a 1987 hearing on patient dumping by telling the story of a pregnant patient turned away while she was in labor only to arrive at a public hospital to learn that her baby had died.[85] Another witness shared the story of a pregnant patient denied care when she went into labor at six months; her child, who was stillborn, would likely have survived if she had received prompt treatment.[86] These horror stories prompted Congress to amend the statute in 1989 to clarify that EMTALA's protections applied to *all* patients in labor.[87]

When the Biden Administration argued in district court that EMTALA preempted Idaho's Defense of Life Act, the state appealed to a legal tradition of separated powers, stressing that the Biden Administration's preemption theory contravened the states' "primary authority over healthcare."[88]

The Supreme Court reached out before judgment in the district court, apparently to protect Idaho's prerogative to enforce its abortion ban.[89] But after argument and just before the end of Term, a fractured Court decided to dismiss Idaho's petition as improvidently granted, with Justices Barrett, Kavanaugh, and Roberts, likely the three deciding votes in the case, writing a separate concurrence explaining why a dismissal was appropriate.[90]

Moyle demonstrates how obstetric care under abortion bans is driven by social-movement politics of the post-*Dobbs* era. The Court's per curiam decision was accompanied by lengthy concurrences in which several blocs of Justices debated the proper disposition of the case.

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[84] For an example, see Stillbirth Traced to "Dumping," S.F. Chron., Dec. 19, 1985, at 42 (attributing a stillbirth to an "ill-advised transfer" of a low-income pregnant patient); see also *infra* notes 85–86 and accompanying text.

[85] Equal Access to Health Care: Patient Dumping Before the Subcomm. on Hum. Res. & Intergovernmental Rels., of the H. Comm. on Gov't Operations, 100th Cong. 1 (1987) (statement of Rep. Ted Weiss).

[86] *Id.* at 43 (statement of Judith Waxman, Managing Att'y, Nat'l Health Law Program).

[87] Compare 42 U.S.C. § 1395dd (1986), with 42 U.S.C. § 1395dd (1989). The 1989 amendments also created two categories of emergency medical conditions, labor and nonlabor emergency medical conditions. 42 U.S.C. § 1395dd(e)(1)(A)-(B). These provisions also incorporated references to the patient's "unborn child," requiring physicians to consider the welfare of both the unborn child and the pregnant patient only in the context of labor-related emergency medical conditions. Scott Aronin, The Labor Divide: EMTALA's Preemptive Effect on State Abortion Restrictions, 19 Stan. J. C.R.-C.L. 189, 193–95 (2023).

[88] Brief for Petitioner Mike Moyle at 53, Moyle v. United States, 144 S. Ct. 2015 (2024) (Nos. 23-726, 23-727); see also Brief of the National Right to Life Committee as Amicus Curiae Supporting Petitioners at 21, *Moyle*, 144 S. Ct. 2015 (2024) (Nos. 23-726, 23-727) (emphasizing how "the implementation and oversight of clinical standards has traditionally fallen under states' jurisdiction.").

[89] Justice Jackson would have reached the merits in the case, rather than dismissing the writ of review as improvidently granted. *Moyle*, 144 S. Ct. at 2023 (Jackson, J., concurring in part and dissenting in part) (concurring in the Court's per curiam decision to lift its stay, but dissenting in part because "the Court is wrong to dismiss these cases as improvidently granted").

[90] *See id.* at 2019–23 (Barrett, J., joined by Roberts, C.J. & Kavanaugh, J., concurring).

The Court's liberal justices reflected the perspective of medical science in emphasizing that abortion is an ordinary and valuable form of healthcare, especially in cases of medical emergency.[91] Writing for Justices Sotomayor and Jackson (who dissented in part[92]), Justice Kagan emphasized the "medical reality" of pregnancy's dangers.[93] Idaho's strict ban had ensured that "hospitals in Idaho have had to airlift medically fragile women to other States to receive abortions needed to prevent serious harms to their health."[94] For the liberals, the case for including abortion as a stabilizing medical condition was straightforward. "The statute simply requires the hospital to offer the treatment necessary to prevent the emergency condition from spiraling downward," Kagan explained in her concurring opinion.[95] "And on rare occasions that means providing an abortion."[96] Justice Jackson likewise underscored the "host of emergency medical conditions that require stabilizing abortions—even when the procedure is not necessarily life-saving."[97] For these Justices the case for patient-protective preemption was clear.

Not surprisingly, in *Moyle*, this view of abortion as sometimes-necessary health care did not command a majority of the conservative Court. The antiabortion movement has long attacked the idea that abortion is health care.[98] In *Moyle*, one bloc of conservative justices spoke from this perspective—expressing a longstanding movement grievance that exceptions for patient health are too often loopholes that simply excuse "abortion on demand"—even as these conservative Justices recognized circumstances in which women who are *not* seeking abortions may nevertheless experience pregnancy complications.[99]

After *Roe*'s companion case, *Doe v. Bolton*, in which the Court emphasized that health included "psychological as well as physical wellbeing,"[100] conservatives objected that health justifications permitted elective abortion and described *mental* health

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[91] For medical and movement arguments of this kind, see Facts Are Important: Abortion Is Healthcare, Am. Coll. Obstetricians & Gynecologists, ACOG, https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare (last visited Nov. 8, 2024) (arguing that "abortion is an essential component of women's health care"); Abortion Is Essential Healthcare, Even with Wanted Pregnancies, Ctr. for Reprod. Rts. (Aug. 1, 2023), https://reproductiverights.org/abortion-health-care-wanted-pregnancies (asserting that "abortion is essential healthcare").

[92] *Moyle*, 144 S. Ct. at 2016 (Kagan, J., concurring); id at. 2023 (Jackson, J., concurring in part and dissenting in part).

[93] *Id.* at 2017 (Kagan, J., concurring).

[94] *Id.*

[95] *Id.* at 2018.

[96] *Id.*

[97] *Id.* at 2024 (Jackson, J., concurring in part and dissenting in part).

[98] *See infra* note 101 and accompanying text.

[99] *See Moyle*, 144 S. Ct. at 2036 (Alito, J., dissenting).

[100] Doe v. Bolton, 410 U.S. 179, 215 (1973).

justifications for abortion as an excuse for any abortion, at any point in pregnancy.[101] Were EMTALA read to require emergency access to address mental-health threats, Justice Barrett reasoned, Idaho would be correct to believe that "emergency rooms would function as 'federal abortion enclaves.'"[102] That the solicitor general "emphatically disavowed the notion that an abortion is ever required as stabilizing treatment for mental health conditions" changed the tenor of the litigation—and helped to explain the three Justices' vote to dismiss.[103]

At the same time, Justice Barrett's concurrence recognized that pregnant patients do face "conditions posing serious jeopardy to a woman's physical health."[104] She mentioned conditions like "PPROM, placental abruption, pre-eclampsia, and eclampsia."[105] This stance echoes the position of antiabortion groups that insist certain life-saving terminations are simply not abortions.[106] The Association of Pro-Life Obstetricians and Gynecologists, a group of antiabortion physicians, and the Charlotte Lozier Institute, a major antiabortion research organization, argue that such

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[101] *Id.* at 191–92 . In the mid-1960s, when states began reforming nineteenth-century criminal bans, abortion opponents criticized health exceptions too—asserting that they were counterproductive because abortion *damaged* mental health—or because abortion was never medically indicated. See, e.g., Group Warns Legislators on Abortion Law Changes, Nat'l Cath. News Serv., Feb. 24, 1968, at 20 (featuring a New York antiabortion group arguing that "proponents of abortion by consent have concentrated on the mental health indication to obtain their objective . . . even though reputable medical opinion states that in today's advanced medical science there does not remain any psychiatric indications for abortion"); Marjorie Fillyew, Florida Lawyers, Doctors Attack Abortion Reform, Nat'l Cath. News Serv., Apr. 11, 1967, at 5 (describing a group of Catholic activists arguing that the terms "physical health" and "mental health . . . are of such general and undefinable meaning that they can be interpreted any way any doctor wanted to interpret them"). *Roe* and *Doe* intensified these concerns because antiabortion advocates believed that *Doe* adopted a *definition* of health that would permit any abortion. In 1981, for example, Joseph Witherspoon, a prominent antiabortion professor cited by the Court in *Dobbs*, see Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2252 n.33 (2022), testified before Congress that *Roe* and *Doe* gave a woman "a constitutional right to destroy her unborn child at any time . . . in light of the Court's definition of the term 'health'" in the Court's opinions. See The Human Life Bill: Hearing Before the S. Judiciary Subcomm. on Separation of Powers, 97th Cong. 628 (1981) (statement of Joseph Witherspoon). In 1995, the National Conference of Catholic Bishops likewise equated "medically necessary" or "health abortions" with "abortion on demand." "Medically Necessary" or "Health" Abortions: Abortion on Demand by a Different Name, NCCB (Nov. 13, 1995), https://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/medically-necessary-or-health-abortions-abortion-on-demand-by-another-name.

[102] *Moyle*, 144 S. Ct. 2015, at 2021 (Barrett, J., joined by Roberts, C.J. & Kavanaugh, J., concurring) (quoting Reply in Support of Emergency Application for A Stay Pending Appeal at 6, *Moyle*, 144 S. Ct. 2015, (No. 23A-470)).

[103] *Id.*

[104] *Id.* at 2021 & n.*. (observing that "[i]f restricted to conditions posing serious jeopardy to a woman's physical health, the Government's reading of EMTALA does not gut Idaho's Act" but adding reservations in a footnote).

[105] *Id.* at 2021.

[106] *See infra* note 108 and accompanying text.

procedures qualify as "maternal fetal separation"[107]—and that medicine should "establish a clear difference between treating an ectopic pregnancy" as well as other life-threatening cases "and elective terminations of intrauterine pregnancies."[108]

But the Justices on the Court's rightmost flank went farther—and read the mere mention of "unborn child" in EMTALA as evidence that Congress intended to prioritize the needs of the unborn patient at the expense of the health and even life of the pregnant patient.[109] Since the 1960s, leaders of the antiabortion movement have sought to establish that the word "person" in the Fourteenth Amendment applies to the fetus—and that the unborn child thus enjoys rights to due process and equal protection of the law.[110] Justice Alito's dissent infused the statute with these constitutional concerns.

Justice Alito's dissent pointed to the language of "unborn child" in the statute and its silence about abortion (the statute doesn't list any medical procedures) as evidence that EMTALA does not preempt state abortion bans, no matter how they are drafted, because "the text of EMTALA conclusively shows that it does not require hospitals to perform abortions."[111] He arrived at this conclusion without ever discussing the statute's reference to the "unborn child" in the context of its concerns about "labor" (in the title), "delivery," and hospitals' dumping of uninsured pregnant patients in the midst of giving birth.[112] EMTALA includes only one passing reference to the "unborn child" outside the context of labor, otherwise discussing the "unborn child" in the birthing context: differentiating obligations regarding patients in "active labor," when "delivery is imminent" and when "transfer may pose a threat to the safety of the mother or unborn child."[113] Alito mentioned none of this. He invoked the

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[107] AAPLOG Practice Guideline no. 10: Concluding Pregnancy Ethically, Am. Ass'n of Pro-Life Obstetricians & Gynecologists (Aug. 2022), https://aaplog.org/wp-content/uploads/2020/12/FINAL-AAPLOG-PB-10-Defining-the-End-of-Pregnancy.pdf.

[108] Ingrid Skrop, Fact Sheet: Medical Indications for Separating a Mother and Her Unborn Child, Charlotte Lozier Inst. 1 (May 17, 2022), https://lozierinstitute.org/fact-sheet-medical-indications-for-separating-a-mother-and-her-unborn-child.

[109] *See infra* notes 115–117 and accompanying text.

[110] *See* Mary Ziegler, Personhood: The New Civil War over Reproduction (forthcoming 2025).

[111] Moyle v. United States, 144 S. Ct. 2015, 2028–30 (2024) (Alito, J., dissenting).

[112] See *supra* notes 84–87 and accompanying text; see also Brief for the Respondent at 41–42, *Moyle*, 144 S. Ct. 2015 (2024) (arguing that three of EMTALA's four references to an "unborn child" "direct hospitals to considers risks to an 'unborn child' in determining whether a woman in labor may be permissibly transferred before delivery" (quoting, 42 U.S.C. § 1395dd(c)(1)(A)(ii))).

[113] The 1989 amendments explain that emergencies will be defined "with respect to a pregnant woman, the health of the woman or her unborn child[] in serious jeopardy" but do not expressly require any balancing of the interests of the patient and unborn child. 42 U.S.C. § 1395dd(e)(1)(A). Indeed, for the most part, the transfer and stabilization provisions of EMTALA differentiate labor and non-labor related emergency medical conditions. Aronin, *supra* note 87, at 193–97. For example, Congress expressly cabined concern about the welfare of the unborn child "in the case of labor." See 42 U.S.C. § 1395dd(c)(2). The Supplemental House Report affirms this reading of the distinction between laboring and non-laboring patients. H.R. Rep. No. 101-247, at 1034 (1989) (requiring consideration of the welfare of the unborn child "in the case of a pregnant woman in labor").

statute's reference to "unborn child" as if the statute were discussing abortion, reading into the law a particular movement perspective on personhood, one that erases the pregnant patient at the mere mention of the term "unborn child."[114] EMTALA, Alito wrote, "obligates Medicare-funded hospitals to *treat*, not abort, an 'unborn child.'"[115] Reasoning from this concern, he emphasized Idaho's interest in applying abortion bans with the narrowest of life exceptions, and rejected the view that EMTALA preempts abortion bans like Idaho's.[116] On Alito's reading, the statute creates a kind of fetal personhood that renders invisible the personhood of the pregnant patient—and leaves a pregnant woman to fend for herself in the face of a medical emergency, while obliging doctors "to protect her 'unborn child' from harm," a position *more* extreme than other ardent personhood proponents espouse.[117]

Life and health exceptions played a critical, if more subtle, role in the Court's other abortion case this Term, *FDA v. Alliance for Hippocratic Medicine*.[118] In that case, the Alliance, an association of antiabortion doctors who challenged the FDA's authorization of medication abortion, argued that mailing abortion-related materials violated the Comstock Act—a postal obscenity statute from 1873.[119] In the Supreme Court, Alliance Defending Freedom's brief for the Alliance claimed that the Comstock law was a no-exceptions national abortion ban. The Alliance asserted that the postal obscenity ban on mailing abortion-related material applied to *all* abortions, whether

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[114] *See infra* notes 115–117 and accompanying text.

[115] *Moyle*, 144 S. Ct. at 2028 (Alito, J., dissenting); see also Texas v. Becerra, 89 F.4th 529, 544 (5th Cir. 2024) (concluding when presented with evidence that hospitals were not treating patients with ectopic pregnancies that "the text speaks for itself: EMTALA requires hospitals to stabilize both the pregnant woman and her unborn child").

[116] See *Moyle*, 144 S. Ct. at 2038–39 (Alito, J. dissenting) (pointing out that "Idaho has always permitted abortions that are necessary to preserve the life of a pregnant woman, but it has not allowed abortions for other non-life-threatening medical conditions" and objecting that "[b]y requiring Idaho hospitals to strike a different balance," the district court's decision preliminarily to enjoin the Idaho law "thwarts the will of the people of Idaho as expressed in law by their elected representatives").

[117] *Id.* at 2029. We observe that Alito's reading of EMTALA's unborn-child language as implying a complete lack of protection for the pregnant patient appears to go further than the positions taken by even the most ardent abortion opponents. See Brief of Amici Curiae of Scholars of Jurisprudence John M. Finnis and Robert George at 33, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (recognizing that "the mother's constitutional rights could require States to allow urgent or life-saving medical interventions even when these would unavoidably result in fetal death"); David French, The Supreme Court Puts the Pro-Life Movement to the Test, N.Y. Times (June 30, 2024), https://www.nytimes.com/2024/06/30/opinion/moyle-idaho-abortion-emtala.html ("As the Idaho case progresses, the anti-abortion movement will have to make a choice: Will it love mothers as much as it loves children, or will it violate the fundamental moral principle that undergirds this American republic—that all people are created equal?").

[118] 144 S. Ct. 1540 (2024).

[119] *See infra* Section II.B.

lawful or unlawful, disparaging the many federal cases that say otherwise.[120] During argument of the case, two Justices appeared to credit these Comstock claims; but the Court's final decision was conspicuously silent—neither encouraging nor foreclosing future claims of this kind.[121]

In *Alliance*, the Court ruled unanimously that the plaintiffs had not suffered injury conferring standing to sue.[122] Its decision included lengthy passages of dicta discussing conscience objections to performing abortion that healthcare providers might advance.[123] In pointing out that "the plaintiff doctors have *not* shown that they could be forced to participate in an abortion or provide abortion-related medical treatment over their conscience objections," Justice Kavanaugh's opinion introduced several pages of commentary on federal conscience laws, observing that doctors were not required to "follow a time-intensive procedure to invoke federal conscience protections," even in a "healthcare desert," and even in the dire emergencies in which EMTALA applies.[124] The commentary diverges from the Court's approach to conscience in prior cases. Until the Court's composition most recently changed, Supreme Court decisions addressed conscience-based objections *and* the interests of those who might suffer dignitary or material harm by conscience-based refusal.[125] *Alliance* makes no mention of such balancing. The "doctor," Kavanaugh writes, "may simply refuse."[126] In *Moyle*, Justice Barrett spotlighted the solicitor general's affirmation that "federal conscience protections, for both hospitals and individual physicians, apply in the EMTALA context."[127]

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120 Brief for the Respondents at 56–57, FDA v. All. for Hippocratic Med., 144 S. Ct. 1540 (2024) (Nos. 23-235, 23-236). The Alliance opposed the argument that "Comstock applies only to 'unlawful abortions'" on the ground that "the text contains no such limitation." *Id.*

121 Transcript of Oral Argument at 26–30, 48, 90, *All. for Hippocratic Med.*, 144 S. Ct. 1540 (2024) (Nos. 23-235, 23-236) (reporting Justice Alito echoing the interpretation of Comstock as a ban on mailing abortion-related items and Justice Thomas stating that the manufacturer of mifepristone might face a "Comstock problem").

122 *All. for Hippocratic Med.*, 144 S. Ct. at 1551–52, 1565.

123 *See infra* notes 124–126 and accompanying text.

124 *All. for Hippocratic Med.*, 144 S. Ct. at 1559–61 (emphasis added).

125 See, e.g., Zubik v. Burwell, 578 U.S. 403, 408 (2016) (urging adoption of "an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage'") (quoting Supplemental Brief for the Respondents at 1); see also Douglas NeJaime & Reva B. Siegel, Religious Exemptions and Antidiscrimination Law in *Masterpiece Cakeshop*, 128 Yale L.J.F. 201, 216–18 (discussing the concern the Court has repeatedly expressed about religious refusals that inflict third-party harm). See generally NeJaime & Siegel, *supra*, at 202–03 (showing that "[p]assages of the majority opinion [in *Masterpiece Cakeshop*] repudiate longstanding arguments advanced by exemption advocates and instead affirm an approach to public accommodations law that limits religious accommodation to prevent harm to other citizens who do not share the objector's beliefs," and pointing out that these passages were critical to securing the coalition of justices who signed on to the majority opinion, affirming earlier case law on conscience claims).

126 *All. for Hippocratic Med.*, 144 S. Ct. at 1559–61.

127 Moyle v. United States, 144 S. Ct. 2015, 2021 (2024).

It is clear—from dicta in *Moyle* and in the opinions discussing agreements voided by the Court's decision dismissing review in *Alliance*—that conscience matters to the conservative majority. Dicta in *Moyle* and *Alliance* suggest that the new majority has an appetite to change law in ways likely to provide less protection, if any, for Americans injured by conscience refusals of employers or doctors.[128]

But the majority's interest in protecting the conscience of health-care providers is one-sided. In *Moyle* and *Alliance*, we see calls for the law to respect the conscience of healthcare providers by protecting the discretion of doctors *who refuse to care for pregnant patients* in ways that the law does not protect the conscientious judgments of doctors who care for pregnant patients with urgent health care needs: "Conscientious providers find scarce refuge in the manifold safeguards to practice medicine according to conscience."[129]

In the aftermath of *Moyle* and *Alliance*, it seemed inevitable that the Supreme Court would once again consider the questions at issue in both cases. But the incoming Trump Administration is likely to withdraw the Biden Administration's EMTALA guidance and end the federal government's involvement in EMTALA challenges.[130] At the same time, a second Trump Administration may further expand conscience protections for physicians who refuse care to pregnant patients, building on a precedent set during Trump's first time in office.[131]

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[128] *See supra* note 125 and accompanying text.

[129] Fox, *supra* note 37, at 1035; accord Elizabeth Sepper, Taking Conscience Seriously, 98 Va. L. Rev. 1501, 1532 (2012) (explaining that the law does not consistently protect "providers [who] may judge their participation to be morally required and perform these procedures in good conscience").

Before *Roe*, "conscience" was the rallying cry of ministers and doctors who sought to provide health care. In this era, faith leaders and physicians invoked religious conscience *as a reason for helping women access safe abortion*, then still unlawful. Before Roe v. Wade: Voices that Shaped the Debate Before the Supreme Court's Ruling 29–31 (Reva B. Siegel & Linda Greenhouse eds., 2010) [hereinafter Before *Roe*] (chronicling the work of the Clergy Consultation Service); accord Tom Davis, Sacred Work: Planned Parenthood and Its Clergy Alliances 126–36 (2005); Gillian Frank, The Pastoral Was Political: Religious Rights and Reproductive Freedom Before *Roe*, J. Am. Acad. Religion (forthcoming) (on file with authors).

[130] Project 2025, a blueprint for an incoming Trump Administration, called for the withdrawal of both the Biden Administration's EMTALA guidance and the suits it had filed. Heritage Found., Project 2025, Mandate for Leadership: The Conservative Promise 473–74 (Paul Dans & Steven Groves eds., 2023), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf [https://perma.cc/2P7H-U87E]. The Trump Administration could take this step soon after Trump takes office. Laurie Sobel et al., How Pending Health-Related Suits Will Be Affected by an Incoming Trump Administration, KFF (Nov. 25, 2024), https://www.kff.org/medicare/issue-brief/how-pending-health-related-lawsuits-could-be-impacted-by-the-incoming-trump-administration.

[131] Robert Pear & Jeremy W. Peters, Trump Gives Health Workers New Religious Liberty Protections, N.Y. Times (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/us/health-care-office-abortion-contraception.html (explaining the Trump Administration's work to expand "religious freedom protections for doctors, nurses and other health care workers who object to performing procedures like abortion and gender reassignment surgery").

This asymmetry of concern is itself a new feature of the post-*Dobbs* order, breaking with a history and tradition in which, as we show, the law protected the discretion of doctors to save their patients' life and health—even at the height of abortion's criminalization. It is to that history we now turn.

II. EXEMPTING HEALTH CARE FROM CRIMINALIZATION: AN AMERICAN TRADITION

We now consider history from the first era of criminalization that (1) highlights how criminalization today differs from the laws of past and (2) prompts questions about the constitutionality of those changes. The history we review demonstrates that the nation has customarily exempted access to critical forms of health care from criminal laws of general application, including, importantly, laws criminalizing abortion. Section II.A examines how abortion bans in the nineteenth century afforded physicians considerable discretion in terminating pregnancy on the good-faith understanding they were acting to protect patients' lives and health. Section II.B identifies evidence of a tradition exempting from criminalization access to life- and health-preserving care under the Comstock Act, a federal postal obscenity law. This Section builds on history we present in a forthcoming article in the *Yale Law Journal* on the Comstock Act[132] while developing new evidence from a wide range of sources: from statutes, judicial decisions, newspaper reports, and market practices. Section II.C canvasses examples of exemptions protecting health care in other statutory contexts.

This account identifies substantial evidence of a tradition of exempting critically important forms of health care from criminalization that can guide interpretation of liberty guarantees in federal and state constitutions. Nineteenth-century Americans did not describe these constraints on state action in the language of rights. Even so, the evidence we array shows far more than inaction.

The evidence we present demonstrates that American law made self-conscious commitment—expressed across jurisdictions and over time—to restrict the criminal law so that doctors could protect patients' life and health. Durable customary norms supported the practice of exempting physician judgments—and even over-the-counter sales of health-related goods—from criminalization under both state and federal laws of general application. We will refer to these practices under federal and state law as a tradition of protecting access to health care against criminalization.

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[132] See Reva B. Siegel & Mary Ziegler, Comstockery: How Government Censorship Gave Birth to the Law of Reproductive and Sexual Freedom, and May Yet Threaten It, 134 Yale L.J. (forthcoming 2025) [hereinafter Siegel & Ziegler, Comstockery].

A. Physician Discretion in the First Era of Criminalization

Today, laws criminalizing abortion allow physicians relatively little discretion.[133] But such discretion was a key feature of the criminal abortion laws in place across the United States by the end of the nineteenth century.[134]

Arguing that abortion bans would protect fetal life, shore up the traditional roles of women in marriage, and ensure the nation's demographic future, a social movement led by the physicians of the American Medical Association had succeeded in making abortion a crime, even early in pregnancy, in most states.[135] But the same regulatory regime was embedded in a network of customary understandings, developed by and shared among doctors, legislators, and prosecutors, that protected physicians acting in good faith to preserve a patient's life—and these actors construed "life" generously and with deference to physician professional judgment.[136]

The system that resulted was not without its tensions: arrests and investigations were unusual but more common than convictions;[137] regular physicians worried that non-physician abortion providers would damage the reputation of an emerging profession[138] while assuming that regular physicians themselves deserved wide latitude in making decisions about when the life of a patient was threatened.[139] Courts and legislatures devised doctrinal rules to establish that defendants lacked good faith while underlining, in many cases, that physicians were entitled to use their

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

[134] Monica Eppinger argues that this discretion reflected an older common law understanding of exceptions for health. Monica Eppinger, The Health Exception, 17 Geo. J. Gender & L. 665, 692–707 (2016) (charting the rise of a "curative intent" doctrine in the context of a health exception).

[135] *See* Reagan, *supra* note 64, at 10–18 (describing waves of criminalization in the nineteenth century); Janet Farrell Brodie, Contraception and Abortion in Nineteenth-Century America 267–87 (1994) (detailing the criminalization campaign of the nineteenth century).

[136] Prior to the 1860s, some abortion bans did not include explicit exceptions for the life of the patient but focused almost entirely on the regulation of "poisons" or "noxious or destructive substance[s]" and thus also reflected concern for patient health. See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2285–2300 (2022). Leslie Reagan and James Mohr's seminal works suggest one reason for the seemingly paradoxical position of medical professionals who campaigned for criminalization while demanding discretion in interpreting these laws: regular physicians were anxious about competition from midwives, homeopaths, and other practitioners, James Mohr, Abortion in America: The Origins and Evolution of National Policy 175–92 (1979), and worried that abortion providers would damage the reputation of a fledgling medical profession, Reagan, *supra* note 64, at 164–65. Regular physicians thus expected criminal abortion laws to strictly regulate the practice of their competitors while protecting the discretion of regular physicians.

[137] Reagan, *supra* note 64, at 164–65. As Reagan reports, this system also involved the shaming and intimidation of women, who were often forced to testify against their doctors. *Id.* at 210–30.

[138] *Id.* at 130–40 (detailing the "anxiety [within the medical profession] about the damage done by physician-abortionists to the reputation of the medical profession as a whole").

[139] See, e.g., Wm. H. Parrish, Communications: Criminal Abortion, 68 Med. & Surgical Rep. 644, 645–46 (1893) ("I grant that there is room for difference of opinion in the medical profession as to what conditions justify the production of abortion. The resort to an abortion may be reprehensible but not criminal; for instance, when it is performed by a practitioner of medicine under the mistaken, though honest, opinion that an abortion is necessary to save the life of the mother.").

professional judgment to protect life and health.[140] There were also clear racial disparities in prosecutions: as the historian Alicia Gutierrez-Romine has shown, female midwives and Black physicians were more likely to face prosecutions, conviction, and harsh penalties.[141] The precise contours of this customary regime governing access to abortion in cases of threats to life or health were contested and fluid, but before 1973 every state assumed that such access was required, and most exempted doctors acting in good faith.[142]

These exemptions helped delineate criminal acts of abortion. Criminal abortion laws often referred to the crime of "procuring of abortion."[143] In the late nineteenth century, "abortion" was synonymous with miscarriage.[144] Alexander Burrill's *A New Law Dictionary and Glossary*, one of the main law dictionaries of the era, defined the *crime* of abortion as requiring a miscarriage "procured or produced with a malicious design or for an unlawful purpose."[145] *Black's Law Dictionary* long employed a similar definition.[146]

Key treatises provided that the law should exempt physicians who acted with the intent to save their patients. A prominent treatise coauthored by Horatio Storer, leader of the campaign against abortion in the states,[147] made clear that the law should

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[140] Some states required that a defendant have consulted with at least one other physician before proceeding in order to establish good faith; those who failed to consult other doctors would be guilty absent an actual medical necessity. Edwin Hale reported that Ohio, New Hampshire, and Michigan had such laws as of 1866. Edwin M. Hale, A Systematic Treatise on Abortion 323–37 (Chicago, C.S. Halsey 1866); see also Hatchard v. State, 48 N.W. 380, 382 (Wis. 1891) (detailing the workings of such a statutory scheme); Guiffrida v. State, 7 S.E.2d 34, 36 (Ga. Ct. App. 1940) (requiring that a procedure be life-saving or advised by other physicians to be such); Rice v. State, 234 N.W. 566, 568 (Neb. 1931) (same). Other states provided examples of circumstantial evidence that would establish a lack of good faith, such as the fact that a woman was known to be healthy when consulting with a defendant. Recent Cases, Criminal Law—Abortion—Preservation of Health as a Justification, 6 U. Chi. L. Rev. 109, 109–11 (1938). Other states did not allow lay practitioners a presumption of good faith. See, e.g., State v. Rowley, 198 N.W. 37, 39 (Iowa 1924); Territory v. Hart, 35 Haw. 582, 585 (1940) ("[T]here is no presumption of good faith or legitimate purpose where a layman performs an abortion.").

[141] Alicia Gutierrez-Romine, From Back Alley to the Border: Criminal Abortion in California, 1920–1969, at 56–110 (2020).

[142] *See infra* notes 156–174 and accompanying text.

[143] *See infra* notes 189–93 and accompanying text.

[144] Chauncey Goodrich & Noah Porter, New Illustrated Edition of Dr. Webster's Unabridged Dictionary 5 (London, Bell & Daldy 1864); see also Noah Porter, Webster's International Dictionary of the English Language 5 (London, Bell & Sons 1891) (defining abortion as the "act of giving premature birth; . . . miscarriage").

[145] Alexander M. Burrill, A New Law Dictionary and Glossary 10 (New York, John S. Voorhies 1850).

[146] The 1910 edition of *Black's Law Dictionary* defined abortion as "[t]he miscarriage or premature delivery of a woman who is quick with child . . . brought about with a malicious design, or for an unlawful purpose." Abortion, Black's Law Dictionary (2d ed. 1910).

[147] Reagan, *supra* note 64, at 11; Sara Dubow, Ourselves Unborn: A History of the Fetus in Modern America 16–20 (2010).

exempt defendants from prosecution when "abortion [was] necessitated at the hands of physicians to save the mother's life."[148]

In most cases, physicians acted lawfully where it could be shown that they acted in good faith to provide urgently needed health care. Edwin Hale's 1866 treatise on abortion reported that Mississippi, Arkansas, and Kansas exempted physicians in cases where abortion was "necessary to preserve the life of" the mother or when it was "advised by a regular physician to be necessary."[149] Hale further observed that Virginia, Connecticut, and Ohio also "exempted from punishment any physician, or person, where the act is done in good faith, to preserve the life of either mother or child."[150]

State statutes sometimes made this discretion explicit, in some cases permitting abortion when "advised by two physicians to be necessary for [such] purpose"[151] or when "advised by a respectable physician" or a "physician to be necessary for that purpose."[152] Still others exempted any procedure "[deemed] necessary" by a physician[153] or if a physician had the "intent to save the life of such woman, or to prevent serious and permanent bodily injury to her."[154] Other states, which simply exempted procedures necessary to preserve life, did not spell out what "life" meant or impose any explicit limits on physicians' discretion.[155]

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[148] Horatio Storer & Franklin Fiske Heard, Criminal Abortion: Its Nature, Its Evidence, and Its Law 89 n.1 (Boston, Little, Brown & Co. 1868); see also Hale, *supra* note 140, at 314 (arguing that abortions were exempt from prosecution when "justified by the rules of medicine, whether to save the life of the mother or her child").

[149] Hale, *supra* note 140, at 327, 331.

[150] *Id.* at 323–24. The wording of each state's exception varied slightly. See *id.*

[151] An Act to Prevent and Punish Feticide or Criminal Abortion, No. 130, 1876 Ga. Laws 113; N.Y. Rev. Stat. pt. 4, ch. 1, tit. 2, § 9 (1829); *id.* at pt. 4, ch. 1, tit. 6, § 21; Mich. Rev. Stat. tit. 30, ch. 153, §§ 33–34 (1846); Act to Punish Certain Crimes Therein Named, ch. 743, §§ 1–2, 1848 N.H. Laws p. 708; Wis. Rev. Stat., ch. 164, § 11 (1858); Act to Provide for the Punishment of Crime, ch. 3, § 11, 1868 Fla. Laws 61, 64.

[152] Alabama, for example, used the "respectable physician" language, see An Act Regulating Punishment Under the Penal System, ch. 6, § 2, 1840 Ala. Laws 103, 143, while Kansas referred to procedures "advised by a physician." An Act Regulating Crimes and Punishment of Crimes Against the Persons of Individuals, ch. 28, §§ 10, 37, 1859 Kan. Sess. Laws 231, 233, 237. Missouri referred to procedures "advised by a physician to be necessary for" preserving life. Mo. Rev. Stat., ch. 15, art. 2, § 1825 (1899).

[153] An Act Concerning Crimes and Punishments, § 42, 1863–1864 Idaho Terr. Sess. Laws 435, 443; Criminal Practice Acts, § 41, 1864 Mont. Terr. Laws 176, 184; Howell Code, ch. 10, § 45 (1865).

[154] An Act Defining Crime and Providing for the Punishment Thereof, § 25, 1869 Wyo. Terr. Sess. Laws 98, 104.

[155] See Brief for Amici Curiae Historians with Expertise in the History of Abortion Medicine, Law, and Regulation in Support of Appellees, at 6–17, State v. Zurawski, 690 S.W.3d 644 (Tex. 2024) (No. 23-0629).

State courts interpreted many such statutes to protect physicians' discretion.[156] In a majority of the jurisdictions we reviewed, states protected not only physicians who could establish an actual medical necessity but also those who acted in *good faith* to protect their patients—that is, in the sincere and honest belief that they protected patient health—with most jurisdictions requiring prosecutors to prove that an abortion was not done for life-saving reasons.[157]

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[156] State courts often exempted procedures believed in good faith to be life-saving. See State v. Meek, 70 Mo. 355, 357 (1879) ("An indictment which should charge simply that the defendant produced an abortion, would charge no offense under the statute; for abortion is an offense only when it is not necessary, and is not advised by a physician to be necessary to save the life of the mother. For the same reason it would be insufficient to charge only that abortion was produced when it was unnecessary to save the life of the mother, as it may have been advised by a physician to be necessary to save the mother's life . . . ."); People v. Hagenow, 86 N.E. 370, 376 (Ill. 1908) (explaining that Illinois courts required evidence to rebut the presumption that the defendant "in good faith caused the miscarriage or produced an abortion . . . to save [the patient's] life"); State v. Aiken, 80 N.W. 1073, 1074 (Iowa 1899) (explaining the same of Iowa courts); State v. Wells, 100 P. 681, 685 (Utah 1909) (requiring proof of more than the procuring of miscarriage and the fact of pregnancy to negative the potential intent of the defendant to preserve life); State v. Clements, 14 P. 410, 415 (Or. 1887) ("Proof that a physician, in his professional treatment of a woman pregnant with a child, had used means, with the intent thereby to destroy the child, and the death of the child was thereby produced, is not evidence that the treatment was not necessary to preserve the life of the mother; nor, if it produced the death of the mother, that it was not an honest effort on the part of the physician to preserve her life."); People v. Hawker, 43 N.Y.S. 516, 521 (N.Y. App. Div. 1897) (Ingraham, J., dissenting) (explaining that physicians were protected when acting "upon the bona fide belief of the physician that they are necessary for the protection of the life and health of the patient"), *rev'd on other grounds*, 46 N.E.607 (1897), *aff'd*, 170 U.S. 189 (1898); State v. Nossaman, 243 P. 326, 327 (Kan. 1926) (describing the defense as applying to defendants acting "in good faith to preserve the life of the woman, or [those who] had . . . been advised by physicians to be necessary to save her life"). Still other states appeared to apply a good faith standard while requiring that such a belief was reasonable. See State v. Hart, 175 P.2d 944, 950–51 (Wash. 1946) (explaining that good faith was not a defense unless "meant to imply a reasonable belief that the operation is necessary to save the life of the mother"); People v. Hunt, 147 P. 476, 479 (Cal. Dist. Ct. App. 1915) ("The right of persons to perform or attempt to perform surgical operations upon others, in the honest and reasonable belief that such operations are necessary in order to save the life of those needing such ministrations, is not confined to those who are licensed by the state to perform surgical operations of the nature of that attempted in this case.").

[157] Treatises of the era established that "the majority of courts hold that the burden is on the prosecution to prove the absence of such necessity for the operation." See, e.g., Elmer D. Brothers, Medical Jurisprudence: A Statement of the Law of Forensic Medicine 188 (1914). State courts often exempted procedures believed in good faith to be life-saving. See *Meek*, 70 Mo. at 357 ("An indictment which should charge simply that the defendant produced an abortion, would charge no offense under the statute; for abortion is an offense only when it is not necessary, and is not advised by a physician to be necessary to save the life of the mother. For the same reason it would be insufficient to charge only that abortion was produced when it was unnecessary to save the life of the mother, as it may have been advised by a physician to be necessary to save the mother's life . . . ."); *Hagenow*, 86 N.E. at 376 (explaining that Illinois courts required evidence to rebut the presumption that the defendant "in good faith caused the miscarriage or produced an abortion . . . to save [the patient's] life"); *Aiken*, 80 N.W. at 1074 (explaining the same of Iowa courts); *Wells*, 100 P. at 685 (requiring proof of more than the

In 1878, for example, the Illinois Supreme Court explained that if "abortion was produced or attempted in good faith [in the belief that] it were necessary to preserve the life of the mother, there would be no crime."[158] The Iowa Supreme Court clarified a similar principle, at least as far as regular physicians were concerned. In a 1928 case, the court detailed the burden of proof as follows: the state had "not only to prove that the operation was not necessary to save the patient, but that [the defendant] did not in good faith believe that it was necessary."[159] Other courts likewise sought evidence of "an honest effort on the part of the physician to preserve [the patient's] life"[160]—or what the Massachusetts Supreme Judicial Court in 1876 called "the honest belief that his acts" were "necessary to save such pregnant woman from great peril to her life or health."[161]

Some medical commentators connected exemptions from prosecution in cases of threats to life or health to a common law "right to self-preservation." As the Court stressed in *District of Columbia v. Heller*, William Blackstone recognized "the natural right of resistance and self-preservation,"[162] and Framers from James Wilson[163] to Alexander Hamilton described the right to self-preservation as "paramount to all positive forms of government."[164] In the nineteenth century, with the increasing criminalization of abortion, physician commentators connected access in cases of threats to life and

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procuring of miscarriage and the fact of pregnancy to negative the potential intent of the defendant to preserve life); *Clements*, 14 P. at 415 ("Proof that a physician, in his professional treatment of a woman pregnant with a child, had used means, with the intent thereby to destroy the child, and the death of the child was thereby produced, is not evidence that the treatment was not necessary to preserve the life of the mother; nor, if it produced the death of the mother, that it was not an honest effort on the part of the physician to preserve her life."); *Hawker*, 43 N.Y.S. at 521 (Ingraham, J., dissenting) (explaining that physicians were protected when acting "upon the bona fide belief of the physician that they are necessary for the protection of the life and health of the patient"), *rev'd on other grounds*, 46 N.E.607 (1897), *aff'd*, 170 U.S. 189; *Nossaman*, 243 P. at 327 (describing the defense as applying to defendants acting "in good faith to preserve the life of the woman, or [those who] had . . . been advised by physicians to be necessary to save her life"). Still other states appeared to apply a good faith standard while requiring that such a belief was reasonable. *See Hart*, 175 P.2d at 950–51 (explaining that good faith was not a defense unless "meant to imply a reasonable belief that the operation is necessary to save the life of the mother"); *Hunt*, 147 P. at 479 ("The right of persons to perform or attempt to perform surgical operations upon others, in the honest and reasonable belief that such operations are necessary in order to save the life of those needing such ministrations, is not confined to those who are licensed by the state to perform surgical operations of the nature of that attempted in this case.").

158 Beasley v. People, 89 Ill. 571, 577 (1878).

159 State v. Dunklebarger, 221 N.W. 592, 593–94 (Iowa 1928); accord State v. Shoemaker, 138 N.W. 381, 381 (Iowa 1912).

160 *Clements*, 14 P. at 415.

161 Commonwealth v. Brown, 121 Mass. 69, 77 (1876).

162 554 U.S. 570, 594 (2008) (quoting 1 William Blackstone, Commentaries *139).

163 2 James Wilson, Of the Natural Rights of Individuals, *in* The Works of James Wilson 296, 330 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896).

164 The Federalist No. 28 (Alexander Hamilton). For an account of these arguments, see Evan Bernick, Book Review, 17 Federalist Soc'y Rev. 52, 55–57 (2016).

health to "the right to the mother to self-preservation."[165] Invoking the law of self-defense, another physician spoke of the "inherent right of self-preservation possessed by the pregnant woman in common with all other human beings, which . . . she is by no means obliged to resign in order to attempt to bring into existence a merely possible life."[166] Courts did not tend to frame exceptions as a matter of right, but some physicians understood access in certain cases against the background of custom and common law principles governing self-defense.[167]

That states arrested or prosecuted physicians at all might suggest a *lack* of deference to physicians, standards of good faith in defining life exceptions notwithstanding. But state cases of any kind were the exception, and appellate decisions suggest that these episodic prosecutions evinced concern that providers might use life exceptions to justify *elective* procedures not needed to protect health.[168] State courts developed doctrinal rules to distinguish procedures done in good faith for the preservation of life and health from procedures done for other purposes.[169]

In the medical profession's understanding, life exceptions in abortion bans gave regular physicians latitude to respond to a wide array of conditions.[170] In 1871, one medical journal listed as justifications "deformity of the pelvis," "excessive and uncontrollable vomiting," and kidney conditions—in a word, anything that would damage the "life or permanent health of the mother."[171] In 1914, the *Lancet*, a

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165 Charles S. Bacon, The Legal Responsibility of the Physician for the Unborn Child, 46 JAMA 1981, 1984 (1906); see William A. Guy, Principles of Forensic Medicine 145 (New York, Harper & Bros. 1845) (explaining that in cases of threats to life, "the female herself may use her right of self-preservation, and choose whether her own life or that of her child shall fall a sacrifice").

166 William R. Nicholson, When, Under the Present Code of Medical Ethics, Is It Justifiable to Terminate Pregnancy Before the Third Month; What Should Our Attitude Be Toward a Patient Upon Whom a Criminal Operation Has Been Performed; What Should Be Our Attitude Toward Those Suspected of the Performance of Criminal Operations?, 69 Am. J. Obstetrics & Diseases Women & Child. 1004, 1005 (1914).

167 *See supra* notes 161 and accompanying text.

168 *See, e.g.*, State v. Wells, 100 P. 681, 685–87 (Utah 1909) (concluding that additional circumstantial evidence beyond the fact of an intentional pregnancy termination was required to distinguish elective and health-preserving procedures); People v. Hagenow, 86 N.E. 370, 376–77 (Ill. 1908) (exploring evidence that a defendant advertised abortion services for a range of purposes in discerning whether a procedure was done in good faith to preserve health or life).

169 *See supra* note 168 and accompanying text.

170 *Id.*; *see also* Kristin Luker, Abortion and the Politics of Motherhood 36 (1984) ("The removal of the abortion decision from public scrutiny by defining it as a question of 'medical judgment,' combined with the semantic ambiguity built into the phrase to 'save the life of the mother,' meant that a wide range of practices on abortion could be undertaken in good faith."); Reagan, *supra* note 64, at 13 ("Physicians had won the criminalization of abortion and retained for themselves alone the right to induce abortions when they deemed it necessary.").

171 L. Dennis, Department of Obstetrics and Gynecology: Ethics of Abortion, Am. J. Materia Medica & Rec. Med. Sciences, Oct. 11, 1871, at 115, 118–19; see also Robert Campbell Eve, Original Communications: The Medico-Legal, Legal, and Moral Aspects of Criminal Abortion and Infanticide,

prominent medical journal, listed examples of when a life-saving abortion would be appropriate: in the case of a patient who was "mentally unfit [and] might become deranged," women with a "narrow brim or outlet" for whom a "Cesar[e]an section is the only relief," women at risk of hemorrhage or eclampsia, and "those suffering from dangerous diseases."[172] As the historian Leslie Reagan has shown, for example, one of the leading indications for life-saving abortions in the century after criminalization was excessive vomiting—a condition that could be life-threatening, to be sure, but one that gave physicians latitude to intervene.[173]

Physicians writing in major medical treatises and professional journals discussed life exceptions as authorizing them to respond to conditions threatening health: as one medical journal explained in 1871, "the fœtus may be destroyed to save the life of the mother or to prevent serious harm from befalling her person."[174] A well-known 1893 legal-medical treatise likewise explained that if a continuing pregnancy "is going to destroy life or intellect, or to permanently ruin the health of the patient, abortion should be brought on."[175] Though it was "always best to fortify one's opinion by consultation with a reputable colleague," another physician explained in the *Lancet* in 1902, if a physician "believes the life of the mother requires the sacrifice of the life of the fetus, he can operate without fear."[176] Writing in 1914 in the *American Journal of Obstetrics*, a leading journal, Dr. William Nicholson described the "wide latitude" physicians were granted under then-prevailing ethical rules when determining whether abortion was justified to protect a woman against a "danger of losing her life or health."[177]

There were shifts over time. After allowing greater access to abortion during the Great Depression of the 1930s,[178] many jurisdictions seemed to have increased prosecutions in the 1940s, targeting not only negligent physicians but also skilled

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11 Atlanta Med. & Surgical J. 516, 516 (1894) (describing as justifications pelvic deformation, "obstinate vomiting," "cases of pregnancy complicated by insanity," "certain diseases of the uterus," "placenta previa," and vaginal scarring).

172 Criminal Abortions, 34 J. Lancet 81, 81–82 (1914). Some physicians took a narrower view, see Reagan, *supra* note 64, at 64-65, which describes the comparably narrow view articulated by the American Medical Association, but discretion to disagree was woven into the system.

173 Reagan, *supra* note 64, at 63 ("Excessive vomiting was the most important indication for abortion, and one which gave women and their doctors substantial room to manuever."); Luker, *supra* note 170, at 36–38; see also Society Reports: American Medical Association, 58 Med. & Surgical Rep. 634, 634 (1888) (discussing abortion as a response to "the persistent vomiting of pregnancy").

174 Dennis, *supra* note 171, at 118.

175 Thomas Gaillard, Abortion and Its Treatment, From the Standpoint of Practical Experience 99 (New York, D. Appleton & Co. 1893).

176 Bacon, *supra* note 165, at 155.

177 *See* Nicholson, *supra* note 166, at 1004–05.

178 *See* Reagan, *supra* note 64, at 130–52; Luker, *supra* note 170, at 52–65.

providers.[179] Hospitals seeking to defuse the threat of prosecution and stabilize practice created therapeutic abortion committees that deliberated about the permissibility of abortion in individual cases.[180] But these committees failed to satisfy the members of a growing movement for abortion's decriminalization.[181] States began to enact laws codifying a range of indications for therapeutic abortion,[182] one of which was challenged in *Roe*'s companion case, *Doe v. Bolton*.[183] *Roe* itself, observing the persistence of a life exception in abortion laws, held that a pregnant woman had a right to access health care needed to protect life and health extending throughout pregnancy.[184]

As we have shown, states faced limits when prosecuting physicians who acted in good faith to protect life or health. These limits were in part derived from exceptions that were commonly included in bans, but they also derived from customary understandings that guided the judgments of doctors, prosecutors, and judges reported above. The boundaries of these understandings may have been imprecise, leading to negotiations in particular cases, but these were nonetheless thick understandings that allowed law and medicine to coordinate over long stretches of time. Judges, in reading a good-faith standard into the statutes, were creating a coordination rule that afforded the medical community significant discretion to practice in accordance with professional norms. There was friction and fluidity across jurisdictions and decades, but all things considered, these arrangements gave the profession the authority to practice medicine that well-entrenched custom provides.

This history suggests that the punitive laws enforced today in Texas and Idaho do not reflect the nation's traditions—and that *the very laws cited by* Dobbs *as evidence of a history of criminalization in fact protected critical forms of health care*, not only through express exemptions but through the customary understandings that guided their enforcement.[185] We turn next to the text and history of the Comstock Act, which contemporary conservatives hold out as a no-exceptions national ban on mailing abortion-related material. We show that even at the height of an extreme interpretation

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[179] *See* Reagan, *supra* note 64, at 160–73 (arguing that "[t]he repression of abortion in the 1940s and 1950s took new forms"); Alicia Gutierrez-Romine, From the Back Alley to the Border: Criminal Abortion in California, 1920-1969, at 138, 139–60 (2020) (describing how "law enforcement's handling of abortion took a startlingly repressive turn").

[180] Rickie Solinger, "A Complete Disaster:" Abortion and the Politics of Hospital Abortion Committees, 1950-1970, 19 Feminist Stud. 241, 242–53 (1993) (exploring the policy questions steering therapeutic abortion committees).

[181] On the reform movement, see David J. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of *Roe v. Wade* 210–43 (U.C. Press 1998) (1994); Before Roe, *supra* note 129, at 24–42.

[182] On the spread of therapeutic exceptions as part of a model developed by the American Law Institute, see Before Roe, *supra* note 129, at 24; Garrow, *supra* note 181, at 210–43.

[183] 410 U.S. 179, 182–83 (1973) (striking down as unconstitutional a statute "patterned upon the American Law Institute's Model Penal Code").

[184] *See* Roe v. Wade, 410 U.S. 113, 164–65 (1973).

[185] *See infra* Section III.A.

of Comstock's obscenity provision, judges and even Comstock himself assumed protection for certain forms of health care.

B. Comstock and the Preservation of Health

Dobbs canvassed the state abortion bans we have just considered,[186] yet devoted little attention to the case law enforcing life exceptions in those laws.[187] Similarly, the *Dobbs* opinion made no mention of the Comstock Act, which Justice Alito called a "prominent provision" in oral argument in *Alliance*.[188] "It's not some obscure subsection of a complicated obscure law," Alito remarked. "Everybody in this field knew about it."[189] In spotlighting the Comstock Act during oral argument in the *Alliance* case, Justice Alito was responding to briefing that (wrongly) depicted the postal obscenity statute as a categorical ban on mailing abortion-related materials.[190] It was not.

In this Section, we show how the text and enforcement history of the Comstock Act exempted important forms of health care. Our account both summarizes and supplements research in a forthcoming article in the *Yale Law Journal*.[191]

Congress passed the Comstock Act in 1873 to curb obscenity—stimulants to illicit sex, including sex without procreation in marriage—not to criminalize health care.[192] The law broke new ground in regulating contraception and in defining birth control and abortion as obscene, yet as it did so, we show, the law excepted health care from its novel definition of obscenity.[193] The statute's text and case law always protected doctors' discretion to care for their patients—even as the kinds of practices prohibited as obscenity and protected as health care shifted over time.[194]

The Comstock Act had three provisions concerning contraception and abortion. The first provision of the Comstock Act, which governed Washington D.C. and other territories under federal jurisdiction, criminalized the sale, possession,

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[186] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2249–56 (offering a lengthy historical account to "set the record straight").

[187] *See id.* at 2260 (observing "if the 'long sweep of history' imposes any restraint on the recognition of unenumerated rights, then Roe was surely wrong, since abortion was never allowed (except to save the life of the mother) in a majority of States for over 100 years before that decision was handed down").

[188] Transcript of Oral Argument at 27, FDA v. All. For Hippocratic Med., 144 S. Ct. 1540 (2024) (Nos. 23-235, 23-236).

[189] *Id.*

[190] This claim was part of the briefing in the Supreme Court in *FDA v. Alliance for Hippocratic Medicine*, in which ADF argued for the Alliance that the Comstock Act ban on mailing applied to all abortion, whether lawful or unlawful, and disparaged the many federal cases that say otherwise.

[191] *See supra* note 132 and accompanying text.

[192] Siegel & Ziegler, Comstockery, *supra* note 132, at 31–39.

[193] *Id.* (tracing Comstock enforcement case law treating certain patient-physician interactions as protected).

[194] *Id.* at 39–58 (tracing how resistance to Comstock changed understandings of "health care" exempted from criminalization).

publication, or giving away of "any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation, figure, or image on or of paper or other material, or any cast, instrument or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion."[195] A second provision prohibiting writings and articles in the U.S. mails stated:

> That no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal-card upon which indecent or scurrilous epithets may be written or printed, shall be carried in the mail.[196]

A third provision prohibited the importation of "any of the hereinbefore-mentioned articles or things."[197]

We read the provision on items "for causing unlawful abortion" and second section on writings or articles "designed or intended for . . . procuring of abortion"[198] as regulating terminations done with unlawful intent. Recall that in the era, "abortion" was understood to have the same meaning as "miscarriage."[199] To cause a miscarriage was not understood to be criminal unless done with unlawful intent.[200] As *Black's Law Dictionary* later explained, abortion was a "crime in law" only if "brought about with a

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[195] Act of Mar. 3, 1873, ch. 258, sec. 1, 17 Stat. 598. This provision was eventually repealed by Congress in 1948. Act of June 25, 1948, ch. 645, sec. 21, 62 Stat. 683, 864 (1948) (repeal of 18 U.S.C. § 512 (1946)).
[196] Act of Mar. 3, 1873, ch. 258, sec. 2, 17 Stat. 598.
[197] Act of Mar. 3, 1873, ch. 258, sec. 3, 17 Stat. 598. For enactment history of the Comstock Act, including discussion of the exemption of health care, see Siegel & Ziegler, Comstockery, *supra* note 132, at 20–27. For an account focusing on the health exception of the Comstock Act, see Lauren MacIvor Thompson, Abortion, Contraception, and the Comstock Law's Original Medical Exception, 1873-1936, 23 J. Gilded Age & Prog. Era (forthcoming 2024).
[198] In cases like United States v. One Package, 86 F.2d 737 (2d Cir. 1936), courts offered a detailed account of the differences between Sections One and Two of the Comstock Act.
[199] *See supra* notes 144–146 and accompanying text.
[200] *See supra* notes 144–146 and accompanying text.

malicious design, or for an unlawful purpose."[201] The language of Section Two of the Comstock Act thus had two scienter requirements: the sender had to "knowingly deposit" such items—and had to do so with the understanding that they would be used for unlawful terminations.[202]

Early interpretations of the Comstock Act reinforced this understanding of the statute's exemption for life- and health-preserving care.[203] Judges embracing the sexual-purity interpretation of the obscenity statute assumed that the Comstock Act could not be enforced against physicians and patients communicating with one another about questions related to life and health.[204] Courts stressed that the Comstock Act would not apply to "a communication from a doctor to his patient" or "a work designed for the use of medical practitioners only."[205] Other judges reasoned that "proper and necessary communication between physician and patient touching any disease may properly be deposited in the mail"[206] or "standard medical works" and direct physician-patient communications about "physical ailments, habits, and practices."[207] Even Anthony Comstock, in a 1915 interview with *Harper's* magazine, explained that the Comstock Act targeted "quacks," not physicians seeking to protect the life or health of their patients.[208]

By the early twentieth century, demand for condoms seemed to have expanded health-based access beyond the confines of the patient-physician relationship.[209] The spread of over-the-counter access to birth control came in response to anxieties about venereal disease and the growing understanding that men could express themselves sexually without first consulting a physician.[210] The New York Court of Appeals expansively interpreted a health exception in the state's obscenity statute that allowed physicians to prescribe condoms for health reasons also to allow doctors to prescribe contraception for married women for health reasons: "This exception . . . is broad enough to protect the physician who in good faith gives such help or advice to a married person to cure or prevent disease."[211] In the early twentieth century "health"

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[201] Black, *supra* note 146, at 8.
[202] Siegel & Ziegler, Comstockery, *supra* note 132, at 7, 9, 25, 84.
[203] *See id.*
[204] *See id.*
[205] Burton v. United States, 142 F. 57, 63 (8th Cir. 1906).
[206] United States v. Smith, 45 F. 476, 478 (E.D. Wis. 1891).
[207] United States v. Clarke, 38 F. 732, 735 (E.D. Mo. 1889).
[208] Mary Alden Hopkins, Birth Control and Public Morals: An Interview with Anthony Comstock, Harper's Weekly, May 22, 1915, at 489.
[209] Peter Andreas, Smuggler Nation: How Illicit Trade Made America 202 (2013); see also Andrea Tone, Devices and Desires: A History of Contraceptives in America 107–08 (2001) (reporting that men "routinely ignored" laws making prescriptions available only through a doctor's prescription).
[210] See Siegel & Ziegler, Comstockery, *supra* note 132, at 56–58.
[211] People v. Sanger, 118 N.E. 637, 637–38 (N.Y. 1918) (citing N.Y. Penal Law § 1145). Margaret Sanger had violated New York law in providing women access to contraception, and was prosecuted for her act in conscientious resistance. For a history situating her case in a history of the movement for voluntary motherhood, see Siegel & Ziegler, Comstockery, *supra* note 132, at 41–52, 63–67.

and "hygiene" became euphemisms for over-the-counter access to birth control and even abortifacient drugs for women.[212]

By the 1930s, longstanding popular resistance to extreme enforcement of the Comstock statute led to judicial decisions expanding the understanding of protected health care beyond the doctor-patient relationship.[213] These decisions explained that there were legitimate purposes for mailing items and communications related to abortion or contraception—not only among medical professionals but also within the broader community.[214]

Even at the height of the criminalization of abortion and contraception—and the condemnation of nonprocreative sex in marriage—courts and lawmakers assumed that health care could not be prosecuted under laws regulating obscenity and abortion. There is evidence that a tradition of exempting healthcare from criminal regulation existed in other contexts. We briefly consider another example of this tradition next.

C. Healthcare Access Beyond Reproductive Care

Laws regulating the sale of alcohol also protected health care against criminalization by exempting alcohol used for medical purposes.[215] In the nineteenth century, as states began regulating intoxicating liquors, many included protection for physicians prescribing alcohol for medicinal purposes (earlier laws prohibiting the sale of alcohol on Sundays often contained similar exceptions).[216] Even though the American Medical Association concluded in 1917 that use of medicinal alcohol had "no scientific basis" and should be discouraged,[217] Section Seven of Title Two of the Volstead Act exempted physicians who "in good faith" believed that "the use of such liquor as a medicine by such person is necessary and will afford relief to him from

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[212] David M. Kennedy, Birth Control in America: The Career of Margaret Sanger 212 (1970) (explaining that "[u]nder cover of that and similar euphemisms such as 'feminine hygiene,' a booming business in contraceptives developed rapidly"); Andrea Tone, Contraceptive Consumers: Gender and the Political Economy of Birth Control in the 1930s, 29 J. Soc. Hist. 485, 495 (1996) (describing the use of "feminine hygiene" as a euphemism for contraceptives); Sarah E. Patterson, Being Careful: Progressive Era Women and the Movements for Better Reproductive Health Care 145–46 (2020) (Ph.D. dissertation, State University of New York at Albany) (ProQuest).

[213] *See* Siegel & Ziegler, Comstockery, *supra* note 132, at 53–59.

[214] *Id.*

[215] *See infra* notes 217–222 and accompanying text.

[216] *See, e.g.*, Commonwealth v. Duncan, 11 Ky. L. Rptr. 402, 402 (1889) (discussing a prohibitory liquor law exempting physicians who prescribed alcohol to patients in good faith); State v. Wool, 86 N.C. 708, 708–09 (1882) (discussing a North Carolina statute barring the sale of alcohol on Sunday "except on the prescription of a physician and for medical purposes"); Brutton v. State, 4 Ind. 602, 603 (1853) (requiring prosecution for the sale of alcohol to disprove that alcohol was not for "sacramental, mechanical, chemical, medicinal, or culinary purposes"); Owens v. People, 56 Ill. App. 569, 570 (App. 2d 1895) (holding that a license-holding pharmacist could not be prosecuted if he acted in good faith in prescribing alcohol for medicinal purposes).

[217] Jacob M. Appel, "Physicians Are Not Bootleggers:" The Short, Peculiar Life of the Medicinal Alcohol Movement, 82 Bull. Hist. Med. 355, 366 (2008); Bartlett C. Jones, A Prohibition Problem: Liquor as Medicine 1920–1933, 18 J. Hist. Med. & Allied Scis. 353, 357 & n.22 (1963).

some known ailment."[218] Exemptions persisted in the face of evidence that customers purchasing "medicinal" liquor were often perfectly healthy and simply uninterested in abiding by the rules of Prohibition.[219] The press showed support for doctors too, joining the *New York Times* in castigating Congress for imposing limits on what some viewed as access to medication and defending "the right of the physician to select his remedies."[220]

The medicinal liquor movement suffered some setbacks when advocates began arguing that an existing tradition of exemption did not go far enough and demanded recognition of constitutional rights for physicians to prescribe medicinal alcohol as they saw fit. In *James Everard's Breweries v. Day*, the Supreme Court rejected a challenge to the constitutionality of the 1921 Supplementary Prohibition Act, which did not permit physicians to prescribe beer and other malt beverages.[221] In *Lambert v. Yellowley*, by a vote of 5-4, the Court likewise rejected a challenge to a law limiting the volume of liquor a physician could prescribe.[222]

Nevertheless, even in *Lambert* and *Everard's*, the Court stressed that the medical community had not reached a consensus about whether there were any health benefits for the remedies that the plaintiffs invoked—or that some of those who invoked the exceptions had no valid health interest at all. As had been the case in the context of abortion, courts and legislators acknowledged the importance of protecting health while seeking to police what they saw as the bad-faith misuse of health justifications

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[218] National Prohibition Act, Pub. L. No. 66, ch. 85, tit. 2, § 7, 41 Stat. 305, 311 (1919), *invalidated by* U.S. Const. Amend. XXI, § 1.

[219] On the abuse of medicinal alcohol exceptions, see Jones, *supra* note 217, at 353 (describing the discrediting of alcohol as a medical remedy). For examples of application of the medicinal alcohol exception under the Volstead Act, see Baucum v. Jackson, 35 F.2d 248, 250 (W.D. La. 1929) (exempting the sale of medicinal alcohol from federal prosecution); Senger Drug Co. v. Mellon, 20 F.2d 1000, 1001 (E.D. Ill. 1927) (same); and Sherman v. United States, 10 F.2d 17, 18–19 (6th Cir. 1926) (same).

[220] Medical Liberty Chained, N.Y. Times, Aug. 10, 1921, at 8; see also Making Prohibition Obnoxious, N.Y. Trib., June 30, 1921, at 12 (ridiculing "Dr. Congress" for regulating medicinal alcohol); Prohibition Anarchy, St. Louis Post-Dispatch, June 27, 1921, at 22 (criticizing Congress for violating the "fundamental rights" of physicians "to check a few lawbreakers").

[221] 265 U.S. 545, 561 (1924) ("The opportunity to manufacture, sell and prescribe intoxicating malt liquors for 'medicinal purposes,' opens many doors to clandestine traffic in them as beverages under the guise of medicines; facilitates many frauds, subterfuges and artifices; [and] aids evasion . . . ."). Prior to the passage of the 1921 Act, Attorney General Mitchell Palmer had lifted the limits on prescribing beer, reasoning that the Volstead Act left "the question of the quantity of liquor that may be used to advantage, as a medicine" not to the Government's control, but "to the professional judgment of the physician." Appel, *supra* note 217, at 360.

[222] 272 U.S. 581, 597 (1926) ("High medical authority being in conflict as to the medicinal value of spirituous and vinous liquors taken as a beverage, it would, indeed, be strange if Congress lacked the power to determine that the necessities of the liquor problem require a limitation of permissible prescriptions . . . .").

for other conduct.[223] The prevalence of medicinal exceptions—and the courts' assumption that prosecution would be inappropriate when a physician was legitimately concerned with patient health—established protection for physician discretion to protect a patient's health care needs.[224] The prevalence of medicinal alcohol reinforced that physicians still enjoyed significant discretion: *by the end of Prohibition, ten million prescriptions for medicinal whiskey were being filled each year.*[225]

It is striking to see this exemption in medical practice reiterated across regulatory regimes in different ways over time. The law we have examined grew out of a dense network of customary understandings and practices that limited the criminal law in deference to the professional prerogatives of doctors and the welfare of the patients they treated.[226] These understandings and practices may not have been understood as rights but nonetheless played a significant role in constraining state action in an era before the incorporation of constitutional rights and the disestablishment of traditional forms of status inequality.

III. A RIGHT TO HEALTH-CARE ACCESS UNDER *DOBBS* AND *GLUCKSBERG*

We have sampled sources spanning the mid-nineteenth century to the mid-twentieth century documenting a tradition, in both federal and state law, of exempting critical forms of medical care from criminalization. Refusal to criminalize was more than inaction; it was the expression of a self-conscious commitment to restrict the criminal law. That tradition was expressed in both the drafting and the enforcement

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[223] See *supra* Section II.A. We observe distinctions, too, between the regulation of abortion and medicinal alcohol. While the medical profession became increasingly divided about whether alcohol had any medical benefit, as the Court noted in *Lambert* and *Everard's*, physicians, prosecutors, and judges agreed on the importance of life- and health-preserving abortions, even as they contested precisely when a termination was required. See *supra* Section II.A. This accords with recent case law on access to experimental medical treatments. See, e.g., Abigail All. for Better Access to Dev. Drugs v. von Eschenbach, 495 F.3d 695, 697, 713 (D.C. Cir. 2007) (holding that patients had no right to access potentially toxic drugs with no proven benefit).

[224] See *supra* notes 217–222 and accompanying text.

[225] Joshua Stout, Just What the Doctor Ordered: Medicinal Alcohol, Opioid Prescriptions, and the Accessibility of Folk Devils, 44 Deviant Behav. 321, 322 (2023).

The exemptions studied here, we believe, are not exhaustive. Both states and the federal government have authorized medical exemptions in a variety of other contexts, including the regulation of controlled substances and public health mandates governing vaccines.

[226] By contrast, Americans seeking access to experimental treatment using otherwise controlled substances have generally not persuaded the courts that government regulation has violated their rights. One critical distinction in these cases is the absence of consensus among physicians or the public that a treatment is life- or health-preserving. See, e.g., *Abigail All.*, 495 F.3d at 703–711 (D.C. Cir. 2007) (rejecting a claim that access to experimental drugs for the terminally ill is deeply rooted in our nation's history and traditions). The Supreme Court has also declined to find such an implicit exception in federal statutes governing access to experimental drug treatments. See United States v. Rutherford, 442 U.S. 544, 552 (1979) ("[W]e are persuaded by the legislative history and consistent administrative interpretation . . . that no implicit exemption for drugs used by the terminally ill is necessary to attain congressional objectives.").

of abortion bans—a customary understanding that allowed legislators, physicians, and prosecutors to coordinate in protecting doctors' prerogative to provide pregnant patients urgently needed health care.[227] *Roe* gave express constitutional protection to this understanding when it ruled that a pregnant woman had a right to access health care needed to protect life and health extending throughout pregnancy, even beyond viability.[228]

Has *Dobbs* ended—or preserved—an understanding that took root with the spread of abortion bans a century and a half ago? In what follows, we make the case that *Dobbs preserved* that traditional understanding.

Addressing the question as to whether the Constitution protected "elective abortion,"[229] *Dobbs* reversed *Roe*. The Court held that when "state abortion regulations undergo constitutional challenge," "rational-basis review is the appropriate standard for such challenges," reasoning that "procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history."[230] In cases like *Moyle*, states reason as if *Dobbs* provides states authority that *Roe* denied them, to regulate abortion however they wish—enacting abortion bans even if the bans obstruct medical care urgently needed to save a pregnant woman's life or health.[231]

But *Dobbs*, we argue, does not give states the unfettered discretion that states like Texas and Idaho imagine. The *Dobbs* decision itself is framed in the very tradition we have documented in this Article. Consider again the language of the question presented in *Dobbs*, which concerned "elective" abortion, a term that recurs in the case.[232] Consider, as well, that the Court's statements about rational-basis review concern the "procuring of abortion." At common law, "procuring of abortion" was a crime only if undertaken for "a malicious design or for an unlawful purpose,"[233] a category that excluded procedures performed in good faith to preserve life or health.[234] *Dobbs*, then, is not always a rational-basis permission slip for states seeking to cut off access to life-and health-preserving care. Indeed, when the government enforces abortion bans in ways that depart from history and tradition and deny physicians

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[227] *See supra* Section II.A.

[228] Roe v. Wade, 410 U.S. 113, 136–43 (1973) (tracing criminalization of abortion in England and United States with attention to protection extended to physician efforts in good faith to save the life and health of the mother); *id.* at 164–65 (ruling that after viability "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother").

[229] For the question presented in *Dobbs*, see *supra* note 1.

[230] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2239, 2243, 2283 (2022).

[231] For sources discussing that federalism claim, see *supra* note 88 and accompanying text.

[232] *Dobbs*, 142 S. Ct. at 2244, 2284.

[233] *See supra* notes 145–146 and accompanying text.

[234] *See* text accompanying *supra* notes 145–175.

discretion to provide urgently needed medical care, *Dobbs* provides authority for claims on the Constitution's due process liberty guarantee.[235]

This question has taken on increasing importance in federal court. Plaintiffs have challenged the constitutionality of Idaho's Defense of Life Act, contending, among other things, that the "Due Process Clause of the Fourteenth Amendment protects the right to seek treatment for serious medical needs without undue interference because the right is deeply rooted in the nation's history and tradition."[236] The plaintiffs point to an impressive body of historical evidence supporting this claim, including express and implied exceptions in contemporaneous state abortion bans, common law decisions, and the doctrinal relevance of both self-defense and necessity.[237]

Given that we have documented the history of physician discretion under the bans, we focus on whether this history satisfies the *Dobbs* framework. (As we have observed, there are many constitutional grounds on which a pregnant woman denied access to medically necessary care might argue, but we focus here on the logic of the *Glucksberg* history-and-tradition claim on which *Dobbs* rests.) Under *Dobbs*, is it sufficient to show that protection for a fundamental liberty interest is "deeply rooted in this Nation's history and tradition"[238]—or must the claimant also show that there is a history and tradition of *recognizing that liberty interest as a right*? *Dobbs* adverted to this factor, and at least one prominent originalist scholar has embraced it.[239]

As we demonstrate, *Dobbs* cannot fairly be read to show that the liberty guarantee protects only interests historically recognized as rights at the time of the Fourteenth Amendment's ratification. We show that *Glucksberg*, on which *Dobbs* heavily relied, does not require a showing that an interest was historically recognized as a right to qualify for protection under the Constitution's liberty guarantee.[240] Finally, we discuss recent cases in abortion-ban states in which courts claiming to follow *Dobbs* in interpreting state constitutions derive rights to access health care from history and tradition without requiring as evidence that the interest was historically recognized as a right.[241]

We close by considering an argument to the contrary. Professor Stephen Sachs has argued that *Dobbs* imposes such a condition on rights recognized under the

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[235] To establish an unenumerated right under the due process liberty guarantee, the Court held, "any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted)).

[236] Complaint at 5, Seyb v. Members of the Idaho Bd. of Med., No. 1:24-cv-00244 (D. Idaho May 15, 2024).

[237] Plaintiffs' Consolidated Response in Opposition to Defendants' Motion to Dismiss at 15–20, Seyb v. Members of the Idaho Bd. of Med., No. 1:24-cv-00244 (D. Idaho May 15, 2024).

[238] *Dobbs*, 142 S. Ct. at 2283 (quoting *Glucksberg*, 521 U.S. at 721 (internal quotation marks omitted)).

[239] *See infra* Section III.D (discussing the argument of Professor Stephen Sachs).

[240] *See infra* Section III.B.

[241] *See infra* Section III.C.

Fourteenth Amendment, and defends this reading of *Glucksberg*'s history and traditions test as consistent with the Privileges or Immunities Clause. After setting out these claims we close with our historical and constitutional objections.

A. Rights-Recognition Criteria: Should Longstanding Refusal to Criminalize Guide Interpretation of the Liberty Guarantees?

Dobbs rejected cases holding that the decision whether to carry a pregnancy to term is a liberty guaranteed by the Fourteenth Amendment, calling out Justice Kennedy's reasoning about dignity and autonomy in *Casey*: "Attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like."[242] In reversing *Roe*, *Dobbs* held that to establish an unenumerated right under the due-process liberty guarantee, "any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[243] *Dobbs* emphasized historical inquiry as critical, pointing out that "in *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of 'Anglo-American common law tradition,' and made clear that a fundamental right must be 'objectively, deeply rooted in this Nation's history and tradition.'"[244]

The Court turned to history and tradition to guide interpretation of the liberty guarantee: "Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the 'liberty' protected by the Due Process Clause because the term 'liberty' alone provides little guidance."[245] Historical inquiry, the Court reasoned, would constrain judicial review and prevent "judicial policymaking."[246] The Court justified overruling *Roe* on the grounds that *Roe* was at odds with historical practice, pointing to statutes banning abortion enacted before and after ratification of the Fourteenth Amendment.[247] "[I]f the 'long sweep of history' imposes any restraint on the recognition of unenumerated rights, then *Roe* was surely wrong, since abortion was never allowed (except to save the life of the mother) in a majority of States for over 100 years before that decision was handed down."[248]

But this very history presents problems for the Court. To begin with, *Dobbs* justified its decision to overrule a half-century of precedent by emphasizing that the nation had "an unbroken tradition of prohibiting abortion on pain of criminal punishment [that] persisted from the earliest days of the common law until 1973."[249]

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[242] *Dobbs*, 142 S. Ct. at 2236 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).
[243] *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted)).
[244] *Id.* at 2247 (quoting *Glucksberg*, 521 U.S. at 711, 720–21).
[245] *Id.*
[246] *Id.* at 2248.
[247] *Id.* at 2248–49, 2253.
[248] *Id.* at 2260.
[249] *Id.* at 2253–54.

Yet, as the Court itself acknowledged, at the founding and for generations after, the common law banned abortion *after quickening*, a pregnant woman's perception of fetal movement, at least midway through pregnancy.[250] Quickening, a common law antecedent of *Roe*'s viability standard, seemed to *allow* abortion. How was *Roe* at odds with the nation's history and traditions if at the founding and for generations after the common law allowed abortion till mid-pregnancy, as *Roe* did? This weakness in the Court's argument was prominent enough that it drew criticism from the nation's premier historians' associations when the decision was issued.[251]

To shore up its argument that the abortion right recognized in *Roe* was at odds with the nation's history and tradition, *Dobbs* not only produced different history[252] but also pointed out that, even if the common law allowed terminations before quickening, the law never recognized a woman's ability to make decisions about abortion as a right: "Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a

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[250] See *id.* at 2249 ("We begin with the common law, under which abortion was a crime at least after 'quickening'—i.e., the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.").

[251] See Joint OAH-AHA Statement on the Dobbs v. Jackson Decision 1, Org. Am. Historians (July 2022), https://www.oah.org/site/assets/files/8924/oah-aha_dobbs.pdf:

> Our brief shows plentiful evidence, however, of the long legal tradition, extending from the common law to the mid-1800s (and far longer in some American states, including Mississippi), of tolerating termination of pregnancy before occurrence of "quickening," the time when a woman first felt fetal movement. The majority of the court dismisses that reality because it was eventually—although quite gradually—superseded by criminalization. In so doing the court denies the strong presence in US "history and traditions" at least from the Revolution to the Civil War of women's ability to terminate pregnancy before the third to fourth month without intervention by the state.

[252] *Dobbs* attacked *Roe* for relying on "faulty historical analysis," consisting "largely [of] two articles by a pro-abortion advocate." *Dobbs*, 142 S. Ct. at 2249, 2254. It is no small irony that *Dobbs* relies on the work of antiabortion scholars in rejecting an overwhelming historical consensus about the role of quickening. *Id.* at 2254–55 n.38 (citing the work of prominent abortion opponents, including John Finnis, Robert Byrn, and Robert Destro); see also Robert L. Tsai & Mary Ziegler, Abortion Politics and the Rise of Movement Jurists, 57 U.C. Davis L. Rev. 2149, 2208–15 (2024) (tracing the role of antiabortion rhetoric in Dobbs); Reva B. Siegel, Memory Games: *Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance, 101 Tex. L. Rev. 1127, 1189 n.236 (2023) [hereinafter, Siegel, Memory Games] (showing that antiabortion scholars repeatedly cite an 1867 Ohio legislative report as evidence that Americans at the time of the Fourteenth Amendment's ratification viewed abortion as "child murder," but do so "without acknowledging that the Ohio report (1) documented the public's persisting belief in quickening and (2) grounded its attack on abortion in nativist replacement arguments and gender-role anxiety"); *id.* at 1187–91 (discussing the public's belief in quickening in the era abortion was banned).

legal *right*."[253] *Dobbs* emphasized that "no common-law case or authority . . . remotely suggests a positive *right* to procure an abortion at any stage of pregnancy."[254]

Did the Court include the quoted passages in *Dobbs* to strengthen the majority's historical support for overruling *Roe*—or to announce elements of a new standard requiring that all substantive-due-process rights have a history and tradition of a recognition *as a right*? Going forward, is historical recognition as a right an essential criterion for rights recognition under the Constitution's liberty guarantees?

To restate this question with a bit more bite: *Dobbs* itself acknowledged that statutes criminalizing abortion exempted physician efforts to save a pregnant woman's life.[255] May states now criminalize such conduct, given that states did not protect access as a right?

Dobbs does not directly answer this question, but the Court's reasoning strongly suggests that the majority did *not* make historical rights recognition of this kind into a precondition for constitutional protection today. Concern of this kind led the *Dobbs* dissenters to worry that *Dobbs* undermined other rights.[256] The right to use contraception recognized in *Griswold v. Connecticut*[257] illustrates their concern. In 1868, for example, there was certainly a longstanding tradition of contraceptive access and very little evidence of prosecutions against those who sold or used contraceptive methods.[258] There was even a movement for free love—but its leaders did not mobilize around rights to access particular birth control methods, nor did antebellum law characterize contraceptive access as a right.[259] Has *Dobbs* committed to a principle that would overturn *Griswold* on the eve of its sixtieth anniversary?

Dobbs expressly rejected such inferences. *Dobbs* insisted that its decision overruling *Roe* did nothing to undermine rights of contraceptive access, sexual intimacy, or same-sex marriage.[260] Justice Alito's opinion suggested that "rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe*

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[253] *Dobbs*, 142 S. Ct. at 2250 (citing Washington v. Glucksberg, 521 U.S. 702, 713 (1997), and noting *Glucksberg*'s observation that "removal of 'common law's harsh sanctions did not represent an acceptance of suicide'").

[254] *Id.* at 2251. As the Court summarized:

> Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe*, no federal or state court had recognized such a right. Nor had any scholarly treatise.

Id. at 2235.

[255] *See supra* notes 253–254 and accompanying text.

[256] *Dobbs*, 142 S. Ct. at 2327–31 (Breyer, Sotomayor & Kagan, JJ., dissenting).

[257] 381 U.S. 479, 479 (1965).

[258] *See* Siegel & Ziegler, Comstockery, *supra* note 132, at 14–38; Michael Grossberg, Governing the Hearth: Law and Family in Nineteenth-Century America 175 (1985).

[259] Siegel & Ziegler, Comstockery, *supra* note 132, at 14–38.

[260] *Dobbs*, 142 S. Ct. at 2280 (asserting that "we have stated unequivocally that '[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion'") (citations omitted).

and *Casey* termed 'potential life.'"[261] Writing in concurrence in *Dobbs*, Justice Thomas called on the Court to overturn *Griswold v. Connecticut*, *Lawrence v. Texas*, and *Obergefell v. Hodges*, but other members of the *Dobbs* majority declined to join his opinion.[262]

Dobbs thus produces confusion: some passages suggested that the Court was compelled to reverse *Roe* because abortion was not recognized *as a right* at common law—and others insisted that the opinion does not "call[] into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*."[263] Here, the Court intimated that its decision was grounded in a moral judgment about abortion (suggesting that the decision "uniquely involves what *Roe* and *Casey* termed 'potential life'")[264]—and not the authority of history and tradition—or that if its judgment was in fact guided by history and tradition, then the passages of the opinion discussing historical rights recognition did not set forth general principles guiding application of the Constitution's liberty guarantees.

B. History-and-Traditions Analysis Under Glucksberg

Dobbs repeatedly pointed to *Glucksberg* as authority for its reading of the Fourteenth Amendment's liberty guarantee. *Glucksberg*, the *Dobbs* Court suggested, requires "a careful analysis of the history of the right at issue."[265] *Dobbs* seemed to cite *Glucksberg* for the proposition that the Court should protect only those interests recognized as rights in our history and tradition.[266] Superficially, then, *Dobbs*'s reliance on *Glucksberg* reinforced a reading of *Glucksberg* as requiring a showing of an antecedent historic right.

But this is a very recent and quite substantial reconstruction of *Glucksberg*. The text of the *Glucksberg* decision features the abortion right among the liberties the Constitution protects, repeatedly citing *Roe* and *Casey*—indeed, citing *Casey* dozens of times.[267] *Glucksberg* opens by announcing: "We begin, as we do in all due process cases,

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[261] *Id.* (quoting Roe v. Wade, 410 U.S. 113, 150 (1973)); *see id.* at 2261 ("The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life. . . . The exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a 'potential life,' but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in *Roe* and *Casey*, the implication is clear: The Constitution does not permit the States to regard the destruction of a 'potential life' as a matter of any significance.").

[262] *Id.* at 2301, 2303–04 (Thomas, J., concurring) (calling for the overruling of *Griswold*, *Lawrence*, and *Obergefell* and stressing that the "harm caused by this Court's forays into substantive due process remains immeasurable").

[263] *Id.* at 2251, 2280 (majority opinion).

[264] *Id.* at 2280 (quoting *Roe*, 410 U.S. at 150).

[265] *Dobbs*, 142 S. Ct. at 2246.

[266] *See supra* notes 250–254 and accompanying text.

[267] See Washington v. Glucksberg, 521 U.S. 702, 726–29 (1997); *see also id.* at 727 (explaining *Casey* in a line of cases extending constitutional rights to "those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment").

by examining our Nation's history, legal traditions, and practices," and then citing *Casey* *first* in support of this proposition.[268]

Nor does *Glucksberg* extend constitutional protection only to those liberties long recognized as rights. *Glucksberg* repeatedly speaks of fundamental "liberty interests" as well as "fundamental rights,"[269] and illustrates its approach to history and tradition by citing cases concerning rights recognized in the late twentieth century, most prominently, *Roe*, *Casey*, *Griswold v. Connecticut*, and *Loving v. Virginia*.[270] *Glucksberg* relies particularly on *Moore v. City of East Cleveland*,[271] which discussed a venerable *custom* of cohabitation among non-nuclear blood relatives without asserting that such cohabitation was regarded as a right.[272]

Glucksberg was written to reaffirm *Roe* and *Casey*, with support expressed in the text of the published decision and evidence of this purpose in the record of the Court's deliberations. The drafts that Chief Justice Rehnquist wrote to forge and hold a five-vote majority show that *Glucksberg*'s support for *Casey* and other substantive-due-process opinions was a key feature of the opinion. [273] The Supreme Court never

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[268] *See id.* at 710.

[269] *Id.* at 709, 719–21.

[270] *Id.* at 720–21, 727 n.19.

[271] *Id.* at 710 (citing Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) for the proposition that "careful 'respect for the teachings of history' could constrain substantive due process jurisprudence"); *id.* (citing *Moore* for the importance of "examining our Nation's history, legal traditions, and practices" in determining the scope of substantive due process).

[272] *Moore*, 431 U.S. at 504–05 (plurality opinion) (stressing evidence of longstanding custom and reasoning that "[o]ver the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it").

[273] To secure the votes of some of *Casey*'s coauthors, Chief Justice Rehnquist had to make clear, as the opinion does in the above quoted passage, see *supra* text accompanying note 271, that *Casey* faithfully employed the history-and-tradition test applied in *Glucksberg* itself. See Memorandum from C.J. Rehnquist to the Conf. 1 (June 11, 1997) (on file with the John Paul Stevens Papers, Library of Congress) (explaining that *Casey* applied rather than "supplant[ed] the traditional analysis").

For the same reasons, the five Justices in the majority negotiated over the presentation of *Glucksberg*'s test and its relationship to earlier substantive-due-process case law. In 1989, only Chief Justice Rehnquist joined Justice Scalia in footnote 6 of *Michael H. v. Gerald D.*, asserting that any substantive-due-process analysis should apply at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion). Rehnquist included a citation to *Michael H.* in an early draft of the majority opinion in *Glucksberg* in support of the idea that "[o]ur Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking . . . that direct and restrain our exposition of the Due Process Clause." 5th Draft of *Washington v. Glucksberg* 16 (June 17, 1997) (on file with the John Paul Stevens Papers, Library of Congress). But, as Marc Spindelman has pointed out, Justice O'Connor, one of the authors of the *Casey* joint opinion, requested that he remove the mention of *Michael H.* before joining the opinion. Memorandum from J. O'Connor to C.J. Rehnquist 1 (June 11, 1997) (on file with the John Paul Stevens Papers, Library of Congress); see Marc Spindelman, Washington v. Glucksberg's *Original Meaning*, 72 Clev. St. L. Rev. 981, 1019 n.191 (2024); Spindelman, *supra*, at 1018–19 (describing O'Connor's efforts to protect *Casey* in the drafting of *Glucksberg*).

understood *Glucksberg* as requiring *Casey*'s overruling until the shifts in the Court's membership that produced the *Dobbs* decision itself.[274] Does the Court's new reading of *Glucksberg* as requiring reversal of the abortion right mean that *Glucksberg now* stands for the proposition that the Constitution's liberty guarantee only protects those liberties historically recognized as rights? We do not think so. The *Glucksberg* decision from which *Dobbs* draws authority to overrule *Roe* and *Casey* discussed both "fundamental rights" *and* "fundamental liberty interests,"[275] and required "a 'careful

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Chief Justice Rehnquist accommodated this request. 6th Draft of *Washington v. Glucksberg* 14–17 (June 24, 1997) (on file with the John Paul Stevens Papers, Library of Congress); *Glucksberg*, 521 U.S. at 721 (explaining that "[o]ur Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decision-making'" (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992))).

As one of us has elsewhere explained, in asserting that *Dobb*s requires the overruling of *Casey*, the *Dobbs* Court is not reasoning from the *Glucksberg* decision handed down in 1997, whose majority included Justices Kennedy and O'Connor, coauthors of the joint opinion that had just reaffirmed the abortion right in *Casey*. Rather, the *Dobbs* Court appears to be reasoning from an aspirational reconstruction of the opinion that Justice Scalia advanced in several *solo-authored* opinions in which he presented *Glucksberg* as hostile to abortion rights and gay rights. See Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (arguing that *Roe* and *Casey* had been "eroded" by *Glucksberg*); McDonald v. City of Chicago, 561 U.S. 742, 797 (2010) (Scalia, J., concurring); see also Reva B. Siegel, The Levels-of-Generality Game: "History and Tradition" in the Roberts Court, 47 Harv. J.L. Pub. Pol'y (forthcoming 2025) (manuscript at 14–21) [hereinafter Siegel, The "Levels of Generality" Game], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4808688 [https://perma.cc/649N-X9SJ] (explaining how the *Dobbs* Court "dialed down the level of generality" when analyzing how abortion rights were understood in 1868); *infra* note 274 and accompanying text (reconstructing the fight over *Michael H.*, 491 U.S. at 127 n.6).

[274] Conservatives on the Court sought to narrow the standard for substantive due process to foreclose sexual and reproductive rights claims but for decades were outvoted. In 1989 Justice Scalia and Chief Justice Rehnquist tried to change the governing standard for substantive-due-process rights in a footnote of *Michael H. v. Gerald D.*, which they were the only Justices to join during the same Term that they sought to overrule *Roe* in Webster v. Reproductive Health Servs., 492 U.S. 490 (1989). See *Michael H.*, 491 U.S. at 127 n.6 (plurality opinion). But Scalia and Rehnquist failed—and failed to secure a majority for this view so long as Justice O'Connor and Justice Kennedy were on the Court.

In 1989, Justices O'Connor and Kennedy refused to join *Michael H.* note 6. *Id.*; see also *Glucksberg*, 521 U.S. at 736 (O'Connor, J., concurring) (characterizing the *Glucksberg* plurality as "conclud[ing] that our Nation's history, legal traditions, and practices do not support the existence" of a right to assisted suicide). In 1992, Kennedy and O'Connor (joined by Justice Souter) authored a joint opinion in *Casey* that rejected the views expressed in the *Michael H.* footnote. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) ("It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law." (citing Michael H. v. Gerald D., 491 U.S. 110, 127–28, n.6 (1989)). In 1997, O'Connor and Kennedy insisted on removing references to *Michael H.* in *Glucksberg*. See *supra* note 273 and accompanying text. And in 2015, Justice Kennedy limited *Glucksberg*'s application to substantive-due-process rights. See Obergefell v. Hodges, 576 U.S. 644, 664 (2015) (explaining with respect to substantive due process that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries").

[275] *Glucksberg*, 521 U.S. at 720–24.

description' of *the asserted fundamental liberty interest*."[276] *Dobbs* obscures this by referring to *Glucksberg*'s careful-description requirement as pertaining to a "right" rather than directly quoting the "fundamental liberty interest"[277] language in *Glucksberg* itself. In *Dobbs*, the Court employed this strategy to justify denying constitutional protection to a disfavored right. But the Court has not declared a general commitment to limiting protections of the liberty guarantee in this way. Indeed, in *Dobbs*, the Court repeatedly affirmed that it had not overruled the many other rights such a standard would threaten.[278]

In short, the Court has to date adopted no general principle that a right must be historically recognized as a right to secure protection under the liberty guarantee, either under *Dobbs* or *Glucksberg*. Americans can therefore assert liberty claims under *Dobbs* and *Glucksberg* challenging criminal laws that obstruct the customary freedom of doctors to provide patients urgently needed health care.

C. Conservative States Following Dobbs*'s History-and-Tradition Analysis*

As we have shown, even if *Dobbs* emphasized that abortion was not historically recognized as a right, much else in *Dobbs* and *Glucksberg* suggests that a history of rights recognition is not required for recognition of a substantive-due-process right today.[279] Is there other authority demonstrating how to establish liberty rights through history-and-tradition analysis under *Dobbs*?

Courts applying history-and-tradition analysis in states that have banned abortion offer guidance. However one views the law in these jurisdictions, these cases offer powerful examples of how judges in abortion-banning states have made sense of history-and-tradition analysis and of *Dobbs* itself—not by requiring recognition of a historic right but by identifying dense and binding customs, many of them written into state statutes. We observe that jurists evaluating rights claims in conservative abortion-banning states are unlikely to dilute history-and-tradition standards.[280]

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[276] *Id.* at 721 (emphasis added).

[277] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022) ("[I]n conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue.").

[278] *See supra* notes 265 and accompanying text.

[279] *See supra* Sections III.A–B.

[280] That said, reproductive-rights litigators have advanced history-and-tradition claims before state courts. For an overview of these campaigns, see Mary Ziegler, Reversing the Reversal of *Roe*: State Constitutional Incrementalism, 100 N.Y.U. L. Rev. (forthcoming 2024). Some states have been more overtly critical of *Dobbs*'s approach to history and tradition. Allegheny Reprod. Health Ctr. v. Pa. Dep't of Health & Hum. Servs., 309 A.3d 808, 906 (Pa. 2024) (rejecting a *Dobbs*-ian framework and applying a state-based "inherent rights" analysis).

We note that not all state supreme courts see a history of exempting life- or health-preserving care as evidence of state constitutional protection. See Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1194 (Idaho 2023), which held that "[t]he legislature's decision to redefine an exception to the criminalization of abortion does not necessarily mean that the framers of our Constitution intended to enshrine the excepted conduct as a fundamental right."

Consider the Oklahoma Supreme Court's spring 2023 decision in *Oklahoma Call for Reproductive Justice v. Drummond I*.[281] The court explained that if it "adopted the *Dobbs* analysis," it "would have to find a right to terminate a pregnancy was deeply rooted in Oklahoma's history and tradition."[282] The court stressed that *Dobbs* "relied upon various state statutes that criminalized abortion to help determine whether abortion rights were deeply rooted in this nation."[283] The court acknowledged that Oklahoma had criminalized most abortions since shortly after statehood.[284] But while "*Dobbs* focused on the criminal element of such statutes," the court insisted, "that is only half the story in Oklahoma."[285]

Highlighting that the law has "always acknowledged a limited exception," the court then concluded that "[t]he law in Oklahoma has long recognized a woman's right to obtain an abortion in order to preserve her life."[286] The court inferred a state right to preserve life not by asking whether contemporaries would have recognized a right to abortion of any kind but by looking at a tradition of exempting certain procedures from criminal prosecution.[287] "Our history and tradition," the court explained, "have therefore recognized a right to an abortion when it was necessary to preserve the life of the pregnant woman."[288]

At the same time, breaking from the practice of most jurisdictions before *Roe*, the Oklahoma Supreme Court—like the Texas Supreme Court in the case of Kate Cox[289]—suggested that physicians would be protected only if their decisions about protecting life were objectively reasonable.[290] As a result, most abortions in the state remain criminalized, and intense chill persists.[291] Patients are forced to travel out of state—at least 2300 did so in 2022 alone[292]—or order pills online (Oklahoma remains one of the states that receives the largest number of pills from shield states).[293] *Drummond I* shows how state courts do not require recognition of an antecedent right, even as it reminds us that recognizing a right to life-saving health care may not be transformative if it doesn't explain (as exemptions once did) how such a right protects physician discretion.

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281 526 P.3d 1123, 1129 (Okla. 2023).
282 *Id.*
283 *Id.*
284 *Id.*
285 *Id.* at 1130.
286 *Id.*
287 *Id.*
288 *Id.*
289 In re State, 682 S.W.3d 890, 894 (Tex. 2023).
290 *Drummond I*, 526 P.3d at 1130. For discussion of Cox's case, see *supra* notes 52–55 and accompanying text.
291 *See infra* notes 292–293 and accompanying text.
292 Ari Feife, As More Women Leave Oklahoma to End Pregnancies or Order Pills Online, Lawmakers Seek Tougher Laws, Frontier (Feb. 23, 2024), https://www.readfrontier.org/stories/as-more-women-leave-oklahoma-to-end-pregnancies-or-order-pills-online-lawmakers-seek-tougher-laws.
293 *Id.*

Courts in other states have employed history-and-tradition analysis to protect a state constitutional right to access critically needed medical care under abortion bans.[294] In *Members of Medical Licensing Board v. Planned Parenthood Great Northwest*, the Indiana Supreme Court rejected recognition of a broad right to abortion while stressing that a right to access abortions in cases of threats to life or health was so "firmly rooted in Indiana's history and traditions" that it was "a relatively uncontroversial legal proposition that the General Assembly cannot prohibit an abortion procedure that is necessary to protect a woman's life or to protect her from a serious health risk."[295] As evidence of this tradition, the court cited both Indiana's longstanding life exception and similar provisions recognized by *Dobbs*, which the court argued, had emphasized that "[a]bortion statutes traditionally and currently provide for an exception when an abortion is necessary to protect the life of the mother."[296] As in other jurisdictions, the details of such a right remain unclear: The court did not address whether a physician protecting patients could act in good faith since the justices insisted that the case did "not present an opportunity to establish the precise contours of a constitutionally required life or health exception."[297] Partly for this reason, Indiana, like Oklahoma, has seen obstetric medical practice chilled even in cases in which an abortion exception might apply,[298] and a new group of plaintiffs has filed suit, insisting on a broader interpretation of the life-and-health exceptions in the state's ban.[299]

North Dakota, like the Oklahoma and Indiana Supreme Courts, agrees that its state constitution protects access to life-preserving care without requiring that such access had long been recognized as a right.[300] Without explicitly claiming to interpret

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[294] In Blackmon v. Tennessee, the Tennessee Chancery Court held that plaintiff-patients' right to life is fundamental under Article I, section 8 of the Tennessee Constitution. Memorandum & Ord. on Plaintiffs' Motion for Temp. Injunction at 18–19, Blackmon v. Tennessee (Tenn. Ch. 2024) (No. 23-11916-IV(I)). The court reasoned that the plaintiffs had established that their health and lives had been threatened on several occasions, even though in some instances the Medical Necessity Exception should have applied. The court explained that the right to life applicable to plaintiffs' denial of care was "'deeply rooted in this Nation's history and tradition' insofar as it reflected 'the basic values that underlie our society.'" *Id.* (first quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)); and then citing Estate of Alley v. State, 648 S.W.3d 201, 225 (Tenn. Crim. App. 2021)).

[295] 211 N.E.3d 957, 976 (Ind. 2023).

[296] *Id.* at 976–78 (quoting Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2305 n.2 (2022) (Kavanaugh, J., concurring)).

[297] *Id.*

[298] Abigail Ruhman, Indiana's Abortion Ban Has Few Exceptions. But Navigating Them Can Be Difficult for Providers, WFYI (Jan. 12, 2024), https://www.wfyi.org/news/articles/indianas-abortion-ban-has-few-exceptions-but-navigating-them-can-be-difficult-for-providers (citing providers reporting a reluctance to intervene because of "concerns about the potential legal risk of determining what qualifies under the exception").

[299] Brendan Pierson, Indiana Needs Clearer Medical Exception to Abortion Ban, Doctor Tells Judge, Reuters (May 29, 2024, 5:11 PM), https://www.reuters.com/world/us/indiana-needs-clearer-medical-exception-abortion-ban-doctor-tells-judge-2024-05-29.

[300] Wrigley v. Romanick, 988 N.W.2d 231, 241 (N.D. 2023).

Dobbs, the court in *Wrigley v. Romanick* adopted a similar approach to identifying unenumerated rights to the court in *Drummond*, asking whether North Dakota had "a long history of permitting women to obtain abortions to preserve their life or health."[301] Like the Oklahoma Supreme Court, the North Dakota Supreme Court reasoned about the existence of a *right* to abortion in cases of threats to life or health by looking at a longstanding exemption from prosecution.[302] North Dakota, the court explained, had even before statehood "criminalized abortions but . . . explicitly provided an abortion w[as] not . . . a criminal act if the treatment was done to preserve the life of the woman."[303] By its terms, the state's exception applied only to threats to life.[304] But the court noted that not long after statehood, relevant medical journals affirmed that "an abortion could be performed to preserve the life or health of the woman."[305]

The state responded that the idea of a *right* to abortion did "not have long-standing roots in American culture."[306] The court rejected the state's claim by emphasizing that the state had "a longstanding history of *allowing* pregnant women to receive an abortion to preserve her life or health."[307] The court said little about whether a physician had to act in good faith to protect life or health or whether a doctor instead had to have objective proof of a health imperative, reasoning instead that North Dakota's law impinged "unnecessarily on a woman's fundamental right to seek an abortion to preserve her life or health."[308]

But the scope of the right recognized in *Romanick* remains in dispute.[309] After the *Romanick* Court enjoined enforcement of the original state ban on state constitutional grounds, the state legislature passed a strikingly similar prohibition in 2023,[310] and litigation about its constitutionality under *Romanick* continues in the state courts, with a district court enjoining enforcement of the law in the fall of 2024.[311]

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[301] *Id.* at 240.

[302] Compare Okla. Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1129–30 (Okla. 2023) (explaining that the "law in Oklahoma has long recognized a women's right to obtain an abortion in order to preserve her life"), with *Romanick*, 988 N.W.2d at 240–41 (explaining that the "North Dakota Constitution explicitly provides all citizens . . . the right of enjoying and defending life and pursuing and including safety," which "implicitly include[s] the right to obtain abortions to preserve the woman's life or health").

[303] *Romanick*, 988 N.W.2d at 241.

[304] *Id.* (describing an exception for procedures necessary "to preserve . . . life").

[305] *Id.*

[306] *Id.*

[307] *Id.* (emphasis added).

[308] *Id.* at 242–43.

[309] *See infra* notes 310–311 and accompanying text.

[310] N.D. Cent. Code § 12.1-19.1-02 (2023).

[311] Access Indep. Health Servs., Inc. v. Wrigley, No. 08-2022-CV-01608 (N.D. Dist. Ct. Jan. 22, 2024) (denying defendant's motion to strike and denying motion for preliminary injunction). Recent lower court decisions in both North Dakota and Georgia again show some concern for access to health- and

D. The Normative Case against Imposing a Historical Rights-Recognition Standard to Restrict the Constitution's Liberty Guarantees

The longstanding and widespread custom of exempting health care from criminalization can support a claim for rights under constitutional liberty guarantees. Our reading of the case law shows that *Dobbs*, *Glucksberg*, and the conservative state courts applying history-and-tradition analysis to state abortion bans do not require courts to find evidence that a liberty interest was historically recognized as a right for courts to recognize that right under the due-process liberty guarantee today.[312]

We defend this reading of the case law against an opposing account advanced by Professor Stephen Sachs, who has argued that historical rights-recognition *is* a core element of *Dobbs*'s history-and-tradition analysis,[313] a claim he advances on originalist grounds. Professor Sachs maintains that the Roberts Court was impelled by party presentation—and by fidelity to its own caselaw—to overturn *Roe*, because *Glucksberg* established a history-and-tradition test that required *Casey*'s overruling.[314]

But Sachs advances these claims about the case law not on doctrinal grounds, but as proxies for his own distinctive conception of originalism.[315] Sachs has declared himself an original-law originalist who recognizes as our law "the law of the United States as it stood at the Founding, and as it's been lawfully changed to the present

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life-preserving care. See SisterSong v. State of Georgia, No. 2022CV367796, slip op. at 18–19 (Ga. Sup. Ct. Sept. 30, 2024), which enjoined enforcement of the state's six-week abortion ban and reasoned that "[a] law that saves a mother from a potentially fatal pregnancy when the risk is purely physical but which fates her to death or serious injury or disability if the risk is 'mental or emotional' is patently unconstitutional and violative of the equal protection rights of pregnant women suffering from acute mental health issues," and Access Independent Health Services v. Wrigley, Case No. 08-2022-CV-01608, slip op. at 9 (N.D. Dist. Ct. Sep. 12, 2024), which held that the state's ban did not afford physicians adequate notice because under the law, "a North Dakota physician may provide an abortion with the subjective intent to prevent death or a serious health risk, yet still be held criminally liable." The Georgia Supreme Court has since stayed the ruling.

We observe that the court in *Wrigley* voiced broader concerns about history-and-tradition analysis that we have voiced in other work. *See id.* at 14–15 ("[I]f we can learn anything from examining the history and prior traditions surrounding women's rights, women's health, and abortion in North Dakota, the Court hopes that we would learn this: that there was a time when we got it wrong and when women did not have a voice.").

[312] Justice Barrett authored the majority opinion in *Department of State v. Muñoz*, applying *Glucksberg* to the practice of exempting noncitizen spouses under the nation's immigration laws, and concluded that the pattern of exceptions was not sufficiently consistent to count as a deeply rooted tradition. 144 S. Ct. 1812, 1821–23 (2024).

[313] *See* Sachs, Dobbs, *supra* note 21, at 9–16.

[314] *See id.* at 8–9 & n.46. Sachs briefly notes in a footnote that "*Glucksberg* acknowledged a right to abortion in then-governing precedent, . . . [b]ut that doesn't entail that *Casey* actually *passed* the *Glucksberg* test," drawing an analogy to debates over the reading of Grutter v. Bollinger, 539 U.S. 306 (2003). *Id.* at 8 n.46. For our systematic rejoinder of this claim, see *supra* Section III.B. There were not five justices on the Supreme Court who read *Glucksberg* in this way until the appointments of justices selected to overrule *Roe*. See *supra* note 274 and accompanying text.

[315] *See infra* notes 316–321 and accompanying text.

day."[316] "The basic, most essential claim of originalism is that the Founders' law has not been superseded," he writes, "that the 'original' law, whatever it was, is still law for us today. We may have changed it over time, but only because the law itself provided for means of change."[317] Sachs acknowledges that our legal system *has* accepted numerous changes in the law that appear to be unauthorized by this rule of recognition—for example, the ratification of Reconstruction Amendments as war-time measures[318]—and yet he does not view these social facts about legality as an integral feature of our constitutional order's rule of recognition. "Our law requires us, at one and the same time, to overlook past violations and to commit to being rule-governed in the future; to go, and sin no more," Sachs asserts, to recognize "from now on, only the future changes that are authorized by our rules of change."[319]

1. The Original-Law Originalist Case for *Dobbs*

Leading originalists have criticized *Dobbs* because it rests on *Glucksberg*, that is, on substantive due process doctrine, rather than on original public meaning.[320] Sachs, by contrast, defends the *Dobbs* decision as "originalism compliant" by the criteria of his own originalist theory, that is, as "show[ing] the importance of looking to our *original law*—to all of it . . . and not just to wooden caricatures of original public

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316 Sachs, Dobbs, *supra* note 21, at 3 n.11 (citing Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J.L. & Pub. Pol'y 817, 838 (2015)) [hereinafter Sachs, Originalism as a Theory of Legal Change]); William Baude & Stephen E. Sachs, Grounding Originalism, 113 Nw. U. L. Rev. 1455, 1457 (2019) (same); Sachs, Dobbs, *supra* note 21, at 1 ("*Dobbs* shows the importance of looking to our *original law*—to all of it, including lawful doctrines of procedure and practice, and not just to wooden caricatures of original public meaning.").

317 Sachs, Originalism as a Theory of Legal Change, *supra* note 316, at 838–39.

318 *See, e.g.*, Bruce Ackerman, We the People: Transformations 99–119 (1998) (detailing the limits of Reconstruction); Thomas B. Colby, Originalism and the Ratification of the Fourteenth Amendment, 107 Nw. U. L. Rev. 1627, 1627 (2013) ("The Fourteenth Amendment . . . would never have made it through Congress had all of the elected Senators and Representatives been permitted to vote. And it was ratified not by the collective assent of the American people, but rather at gunpoint. . . . The Amendment . . . added to the Constitution despite its open failure to obtain the support of the necessary supermajority of the American people.").

319 Sachs, Originalism as a Theory of Legal Change, *supra* note 316, at 844.

320 *See, e.g.*, Randy E. Barnett & Lawrence B. Solum, Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition, 118 Nw. U. L. Rev. 433, 456 (2023) (explaining that in Dobbs, "Justice Alito's use of history and tradition seems decidedly nonoriginalist in two distinct respects," making "no claim at all about the original meaning of the text of the Fourteenth Amendment" and drawing on doctrine to assert a "nonoriginalist historical claim about a tradition of protecting a particular unenumerated right"); Sherif Girgis, Living Traditionalism, 98 N.Y.U. L. Rev. 1477, 1479 (2023) (locating *Dobbs* in the Court's turn toward a method of "living traditionalism," which is "'traditionalist' because it looks to political traditions, and 'living' because the traditions postdate ratification").

meaning."[321] Sachs argues *Dobbs*'s approach to *Glucksberg* and the reach of substantive due process aligns with his originalist account of the Privileges or Immunities Clause—advanced in other scholarship by Sachs and his co-authors Professors Will Baude and Jud Campbell—as securing for all only those "rights [that] were present already, defined by general law," a body of "unwritten law" defined by "reliance on custom and tradition."[322]

In their article reconstructing beliefs about general law that informed ratification of the Fourteenth Amendment, Baude, Campbell, and Sachs show that conceptions of general law shaped understandings of the Privileges or Immunities Clause and were embraced by the dissenters in *Slaughter-House Cases*.[323] But just as importantly, Baude, Campbell, and Sachs acknowledge that the Supreme Court *rejected* this view in *Slaughter-House* and later, in *Erie Railroad Co. v. Tompkins*.[324] For this reason, the three scholars recognize that present authority of the general-law interpretation is indeterminate,[325] and reserve judgment about their history's contemporary implications.[326] While admitting that a general-law interpretation might be "legally dead," the three also consider the possibility that general law exerts the kind of authority a court cannot kill, and thus provides a resource that "might help us both to ground and to redefine substantive due process doctrine."[327]

Sachs, by contrast, is eager to resuscitate general law as an instrument of legal change. In a solo-authored article drafted before publication of the co-authored piece, he argues that general law provides an originalist justification for the dramatic changes that *Dobbs* has introduced into substantive due process doctrine.[328] The shift in tone from one article to the next is notable. Baude, Campbell, and Sachs foreground the uncertainties in translating from past to present, emphasizing "[h]ow (and whether) to pursue a general-law approach" in a world where general law is not recognized "poses significant dilemmas."[329] Sachs, by contrast, employs the general-law approach to

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[321] *See* Sachs, Dobbs, *supra* note 21, at 1 ("This essay argues that *Dobbs* is indeed an originalist opinion: if not distinctively originalist, then originalism-compliant, the sort of opinion an originalist judge could and should have written. *Dobbs* shows the importance of looking to our original law—to all of it, including lawful doctrines of procedure and practice, and not just to wooden caricatures of original public meaning.")

[322] Baude, Campbell & Sachs, *supra* note 6, at 1191–93.

[323] *See id.* at 1207 ("On the general-law view, Sections One and Five of the Fourteenth Amendment were principally forum-shifting provisions, substituting federal-level rights enforcement for deficient state-level rights enforcement."); *id.* at 1232–34 (showing how this view shaped the *Slaughter-House* dissent).

[324] 304 U.S. 64, 78–79 (1938).

[325] *See* Baude, Campbell & Sachs, *supra* note 6, at 1250–52.

[326] *Id.* at 1251 (acknowledging that the contemporary application of general law would pose "significant dilemmas").

[327] *Id.* at 1251–2.

[328] *See infra* notes 330, 335–338 and accompanying text.

[329] Baude, Campbell & Sachs, *supra* note 6, at 1251.

explain *Dobbs*,[330] and thus to "ground and to *redefine* substantive due process [law]"[331] without addressing the many issues that resuscitating general law in this case—but not in others—would create. On Sachs's understanding, *Dobbs* reached the correct result insofar as it applied a history-and-tradition standard that was the "intellectual descendant" of general law.[332] He speaks as if there are few difficulties in employing a general-law approach that he and his-co-authors recognize has not been applied for a century and a half to guide the resolution of contemporary constitutional conflicts.

Sachs reads *Dobbs* as properly restricting the reach of the liberty guarantee to rights that the Fourteenth Amendment's ratifiers would have recognized as secured by its Privileges or Immunities Clause in 1868.[333] Under this standard, Sachs reasons, it does not matter that, as historians emphasized, the common law in fact allowed abortion until quickening (the perception of fetal movement midway through pregnancy, a standard not unlike viability).[334] Sachs scorns historians' criticism of the *Dobbs* decision, concluding:

> What the *advocates* of an unenumerated right have to show is that *state restrictions of the right were prohibited, not just absent*. That is, they'd have to show the constitutional right to be deeply rooted in the nation's history and tradition—or, more accurately, to be a privilege of citizenship, inalienable or protected by fundamental positive law (written or customary), and existing "at all times" since the Founding.[335]

For an originalist to determine whether *Dobbs* was correct in overturning *Roe*, Sachs suggests, "we'd want to know whether the law regarded" a right to decide whether to carry a pregnancy to term was "a privilege of American citizenship" or "among the inalienable rights of American citizens" at the time of the Fourteenth Amendment's

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330 Sachs, Dobbs, *supra* note 21, at 10–14.

331 *See* Baude, Campbell & Sachs, *supra* note 6, at 1252 (emphasis added).

332 Sachs, Dobbs, *supra* note 21, at 10.

333 *Id.* at 10–13.

334 Brief for the American Historical Association and the Organization of American Historians as Amici Curiae Supporting Respondents, at 30, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022) (No. 13-1392) (arguing that "American history and traditions from the founding to the post-Civil War years included a woman's ability to make decisions regarding abortion, as far as allowed by the common law").

335 Sachs, Dobbs, *supra* note 21, at 12–13, 15 (emphasis added). This leap to apply general law requires more explanation than Sachs has provided. Professors Sachs, Baude, and Campbell conclude their account of general law by emphasizing how this understanding is part of a lifeworld that no longer structures our law and would require multiple revolutions to rehabilitate. See Baude, Campbell & Sachs, *supra* note 6, at 1252. Sachs's solo-authored account of general law scarcely acknowledges this problem and seems to suggest that selective return to a legally lost past is not only feasible, but morally incumbent upon the American legal system in defining constitutional protections for abortion. See Sachs, Dobbs, *supra* note 21, at 10–14.

ratification.[336] "[W]hat matters isn't just whether states [banned the practice]," Sachs concludes, "but whether the American legal system thought they could."[337]

Speaking as an original-law originalist, Sachs declares the Court was right to reverse *Roe* on *Glucksberg*-like grounds that ignored the common law doctrine of quickening. Even if abortion was lawful for long stretches of American history, Sachs reasons, the Court was right to conclude that the abortion right was contrary to history and tradition: "If chewing gum wasn't prohibited in most states prior to 1868, that doesn't show that a right to chew gum was deeply rooted in this Nation's history and tradition, much less that chewing gum was a fundamental right of citizenship at general law," Sachs concludes. "It just shows that most states chose not to prohibit it at the time."[338] To Sachs this restriction on constitutional rights is a virtue: "Understanding the Fourteenth Amendment as securing old rights, rather than as letting judges craft new ones, leaves more rather than fewer choices for today's voters. In any case, it may be the law we've made, both in the 1860s and today."[339]

On Sachs's account, it seems, historical evidence of a durable customary understanding protecting the pregnant patient's access to urgently needed health care should *not* guide interpretation of the liberty guarantee, even if that custom was itself the expression of a self-conscious commitment to limit state action criminalizing Americans' access to critical forms of health care. It would seem to follow that states banning abortion can criminalize a pregnant patient's access to urgently needed health care, even if she dies, if she didn't have the "right" to such care at the time the Fourteenth Amendment was ratified.

2. Problems with Sachs's Originalist Defense of *Dobbs*

There are several problems with this originalist reconstruction of *Dobbs*.

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[336] *Id.* at 13.

[337] *Id.* (emphasis omitted). Sachs disparages the significance of common law quickening doctrines extending from the Founding to Reconstruction through something like an original-intent or original-expected-applications standard, asking his audience to determine women's rights by asking how "the American legal system thought" about whether women had rights one hundred and fifty years ago. See *infra* note 338 and accompanying text. The resurgence of what appears to be an inquiry into original intent or expected application seems noteworthy. Cf. Keith E. Whittington, The New Originalism, 2 Geo. J.L. & Pub. Pol'y 599, 601–12 (2004) (arguing that new originalism focused on "the public meaning of the text that was adopted" and replaced an "old originalism" that put emphasis "on the subjective intentions of the founders"); Thomas B. Colby, The Sacrifice of the New Originalism, 99 Geo. L.J. 713, 720–31 (2011) (describing original-expected-application originalism as requiring the result that "the Framers would have expected a judge to endorse" and explaining that this approach had been criticized as "unworkable" and "theoretically indefensible in light of the New Originalism").

[338] Sachs, Dobbs, *supra* note 21, at 12–13 ("In identifying these privileges, what matters isn't just whether states did ban chewing gum or daytime burglaries, but whether the American legal system thought they could.").

[339] *Id.* at 1.

"Sin No More": The Normative Aspects of a Positive Argument: Sachs presents original-law originalism as a positivist theory that derives its rule of recognition from the historical facts of social practice.[340] Simply put, Sachs offers no normative argument for following the Founders' law other than what he observes: that Americans do follow the Founders law, lawfully changed.[341] Sachs recognizes that at epochal moments, Americans have accepted changes that the Founders' law didn't authorize,[342] but he minimizes the significance of these features of American law because "we don't really regard them as remaking our law"—and "our dominant legal explanations of these events, consistent with the explanations given at the time, are based on continuity rather than disruption."[343]

But given these ruptures, how can original-law originalism, which Sachs makes clear is a *positivist* theory, derive its rule of recognition from the *historical facts of social practice*? In other words, if American law did not always follow the Founders' law lawfully changed, in what sense is the theory positivist? We know, for example, that during Reconstruction and again during the fight over segregation, Southerners advanced detailed legal arguments asserting that the Civil War Amendments—and particularly, the Fourteenth Amendment—had not been ratified in accordance with Article V.[344] Yet Sachs does not cite or describe their claims.[345] Here, Sachs reasons at

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[340] Sachs, Originalism As a Theory of Legal Change, *supra* note 316, at 855 ("To find out the Founders' law, we have to apply our positivist toolbox to facts about the past. . . . This means that the rules of change—and the sorts of lawful changes that have been made—depend on history, not constitutional theory, and could upend some conventional views of originalism.").

[341] *Id.* at 837 (insisting that originalist claims are "standard features of our legal practice").

[342] *Id.* at 868–71 (discussing Ackerman's account of ruptures at the founding, during Reconstruction, in the New Deal, and in the Civil Rights Era).

[343] *Id.* at 869.

[344] In the immediate aftermath of the amendment's ratification, Democrats across the South refused to accept the amendment's validity. See Thomas B. Colby, *supra* note 318, at 1661 & n.209 (2013). A century later, these objections exploded again when Southern legal commentators responded to *Brown v. Board of Education* with arguments that the Fourteenth Amendment had never been properly ratified. For just a few examples, see Walter J. Suthon, Jr., The Dubious Origins of the Fourteenth Amendment, 28 Tul. L. Rev. 22 (1953); Pinckney G. McElwee, The 14th Amendment to the Constitution of the United States and the Threat It Poses to Our Democratic Government, 11 S.C. L.Q. 484 (1959). Prominent Southern commentators, including James Kilpatrick, popularized these claims well beyond the academy—at least into the 1990s. See James Jackson Kilpatrick, The Sovereign States: Notes of a Citizen of Virginia 258–261 (1957) [hereinafter Kilpatrick, The Sovereign States] (challenging the Fourteenth Amendment's ratification); James Kilpatrick, The Southern Case for School Segregation 140 (1962) (detailing the "tainted parenthood" of the Fourteenth Amendment); Forest McDonald, Was the Fourteenth Amendment Constitutionally Adopted? 1 Ga. St. Leg. Hist. 1, 18 (1991) (offering elaborate legal arguments to show that "the Fourteenth Amendment was never constitutionally ratified"). These claims also captured the support of David Lawrence, the Northern-born, Princeton-educated editor of *U.S. News World Report*. David Lawrence, "There Is No Fourteenth Amendment! Historical Records Prove It," Shreveport Times, Oct. 6, 1957, at 3-B; David Lawrence, Fourteenth Amendment Adopted by Force, The Item (Sumter, SC), Apr. 22, 1970, at 18.

[345] He does acknowledge the work of a several other scholars on this point, primarily Bruce Ackerman. See Sachs, Originalism As a Theory of Legal Change, *supra* note 316, at 868 & n.199.

a very high level of generality without addressing the South's legal arguments. His claims of "continuity" instead refer to the beliefs expressed by governing elites. He concludes that the Fourteenth Amendment is our law because people in power reasoned that way.

Elsewhere, however, Sachs reasons at a *much* lower level of generality. Even if Americans have strayed from the Founders' law, Sachs urges, going forward they should not. "Our law requires us, at one and the same time, to overlook past violations and to commit to being rule-governed in the future; to go, and sin no more."[346] But why is this so? He explains: "to adhere to our current law, from the internal perspective of a faithful participant, means accepting the past changes that it accepts, wherever they came from. But it also means recognizing, *from now on*, only the future changes that are authorized by our rules of change."[347]

If the constitutional order has in fact departed from Founders' law in different epochs, and the positivist's rule of recognition is rooted in social practice, why conceptualize social practice recognizing constitutional change of these kinds as "sin" requiring repentance? Further, what unstated norms trigger the impulse to repent, and when?

We can restate these questions with respect to *Dobbs*. Sachs explains that *Dobbs* overturned *Roe* as required by an originalist understanding of *Glucksberg*, that is, as required by a general-law understanding of privileges or immunities developed with Professors Will Baude and Jud Campbell.[348] Sachs asserts that *Dobbs* was correct to follow an understanding of privileges or immunities espoused by the *dissenters* in *Slaughterhouse*—a view no more accepted in the American constitutional order than the South's challenge to the legality of the Fourteenth Amendment itself.[349]

What does it mean for Sachs selectively to revive general law to justify overturning *Roe*—without addressing the implications for the (vast) body of rights the Court has recognized under the Due Process Clause?[350]

General law as Sachs describes it has no more authority in the American constitutional order today than James Kilpatrick's challenge to the ratification of the

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[346] *Id.* at 844.

[347] *Id.*

[348] Sachs, Dobbs, *supra* note 21, at 10–11 (emphasizing that *Gluckberg* was an "intellectual descendant" of general law and noting that if the Court had "not taken a wrong step in the *Slaughter-House Cases*, . . . it could have protected these traditional privileges and immunities in their own names"). Baude, Campbell, and Sachs emphasize that "the general-law approach helps us understand how the Privileges and Immunities Clause was originally designed to work." Baude, Campbell & Sachs, *supra* note 6, at 1252.

[349] Sachs, Dobbs, *supra* note 21, at 2 (insisting that *Dobbs* was "correct as a matter of originalist substance"). As recently as 2012, the Court refused to rest incorporation on the Privileges or Immunities Clause in McDonald v. City of Chicago, 561 U.S. 742, 758 (2012).

[350] *See supra* Section III.B.

Fourteenth Amendment.[351] Perhaps there is some normative ground on which we are invited to embrace this lost Fourteenth Amendment as more authentic or authoritative than the one the Court has elaborated in the last 150 years. But if so, those grounds require articulation, as do the implications for law beyond the abortion right.

General Law & Custom: Professor Sachs seems confident that a general-law approach buttresses the Court's reasoning in *Dobbs*, but his claims about general law introduce important questions.

To begin with, there might be circumstances in which general law could *support* abortion access, especially in cases of threats to life or health. *Corfield v. Coryell* recognizes rights to "the enjoyment of life" and the pursuit of "safety."[352] A citizen has a general-law right to self-preservation that entitles her to freedom from laws criminalizing life- and health-preserving medical care.

Second, Sachs's argument for general law provides support for abortion access in cases of urgent medical need for the distinct and separate reason that general law follows custom.[353] Sachs's chewing-gum hypothetical simplifies complexities in the general-law argument. Even if customary exemptions for terminations urgently needed as health care were not called "rights," the persistence of this understanding in law and medical practice over time and across jurisdictions suggests that the exemptions had intelligible and constraining force. Might these customary limits on state action nevertheless be a part of the general law that Sachs and his coauthors describe? As we have seen, they limited criminal prosecutions.

An ordinary reader would infer from Sachs's defense of *Dobbs* that courts should *not* look to customary understandings limiting criminalization of healthcare in the past as courts define the constitutional rights of pregnant patients to access health

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[351] Kilpatrick, The Sovereign States, *supra* note 344, at 258 (arguing that it was only by virtue of a "palpably unconstitutional series of acts that the Fourteenth Amendment was ratified at all"); *id.* at 258-261 (detailing constitutional objections to the Amendment's ratification).

[352] 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230). For Sachs's discussion of *Coryell*, see Sachs, Dobbs, *supra* note 21, at 10 (pointing to *Coryell* as identifying rights that were "fundamental rights of American citizenship").

[353] The jointly authored paper suggests that customary understandings might play a larger role in demarcating the reach of constitutionally protected rights. It asserts that the Fourteenth Amendment protected rights recognized by general law but "did not resolve debates about the boundaries of general law," which remained characterized by "imprecision, wooliness, and customary background principles." Baude, Campbell & Sachs, *supra* note 6, at 1193, 1206 (emphasis omitted).

Baude, Campbell & Sachs recognize that general law was in part based on "legally recognized custom and practice." *Id.* at 1248. They acknowledge that "judges faced disagreement and ambiguity regarding the scope of general law and the powers of courts to apply general fundamental rights." *Id.* at 1206. *Who* needed to regard a practice as a right for general law to protect it, in the case of a widespread and longstanding customary practice—and how widespread a consensus was required? Were general-law rights, however defined, fluid, or were they in fact a "closed set?" Baude, Campbell, and Sachs do not claim to offer definitive answers to these questions. For Sachs, however, the answer appears to be much more straightforward.

care today. But perhaps Professor Sachs would conclude that on a general-law account, courts *should* give weight to customary understandings that shaped legislation, prosecution, and medical practice across jurisdictions and over time as evidence of the nation's history and traditions.

If so, Professor Sachs would seem to have identified an originalist case for imposing substantive-due-process (or privilege-or-immunity) restrictions on abortion bans that criminalize access to urgently needed life- and health-protective medical care in Texas and Idaho.

Interpretive Choices about Entrenching Inequality: Sachs's preferred reading—which ties the Amendment to understandings of general law at the time of ratification—can be expected to bake into the Amendment's meaning biases of the American legal system in 1868, unless it is enforced at a very high level of generality.[354] Sachs seems aware of this as he shifts levels of generality in presenting his argument, framing his case with care to show it would not entrench *race* inequality.

Where race is concerned, Sachs reasons at a high level of generality: he reports that the Reconstruction Amendments ended slavery by extending to the emancipated slaves the "rights of Englishmen," "all" the rights white men possessed at the time of the Amendments' ratification.[355] He roots this (apparently colorblind) reading of the Amendment in the text of the Amendment's first section—citing its grant of citizenship to "All persons born or naturalized in the United States, and subject to the jurisdiction thereof"[356]—not the record of deliberations about emancipation before or after the Amendment's ratification. Sachs and his coauthors also suggest that general law is colorblind, stressing that "racial disabilities," unlike gender disabilities, "did not exist as a matter of general common law and had to be imposed by statute or local custom."[357] They focus on how the Amendment applied to the Black Codes, which regulated civil rights on the basis of race;[358] without mention of laws authorizing race

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354 For discussion of the ways in which changing levels of generality can be used to contest or defend inequality, see generally Siegel, History of History and Tradition, *supra* note 23, at 104–107, 145-46; Siegel, The "Levels of Generality" Game, *supra* note 273, at 2–4.

355 Sachs, Dobbs, *supra* note 21, at 11.

356 *See id.* at 11 & n.65 (citing U.S. Const. amend. XIV, § 1 and explaining that it included "as citizens '*All* persons born or naturalized in the United States, and subject to the jurisdiction thereof' (emphasis added)").

357 Baude, Campbell & Sachs, *supra* note 6, at 1242 (emphasis omitted) (suggesting there might be "a core conceptual difference between regulations that were baked into the general law, so to speak, and so were not really abridgments at all, and those which partly abrogated or superseded the general law, and so had to be subject to more searching review").

358 *See id.* at 1212–14.

discrimination in public accommodations and the franchise, which many contended involved social and political, rather than civil, rights.[359]

If Professor Sachs had asked how white Americans who drafted and ratified the Fourteenth Amendment expected the rights it conferred to change race relations, he would have uncovered debate about whether the Amendment prohibited race discrimination in political or social rights—the very distinctions that *Plessy* invoked in defending the constitutionality of Jim Crow.[360] But Professor Sachs never examines the Fourteenth Amendment's application to particular questions of racial status at this lower level of generality.

Professor Sachs reasons about gender and the Constitution in 1868 quite differently. At the Founding through the Fourteenth Amendment's ratification, the common law treated marriage as an openly hierarchical status relationship in which "the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband," as Blackstone famously expressed it.[361] Sachs and his coauthors are circumspect in explaining whether, in their view, these status-

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[359] Section Two of the Fourteenth Amendment sanctioned race-based restrictions of the franchise. U.S. Const. amend. XIV, § 2. And the Supreme Court distinguished racial segregation in public accommodations as a matter concerning social rights, outside the scope of the civil rights addressed by the 1866 Civil Rights Act in the Civil Rights Cases, 109 U.S. 3, 22–25 (1883); *see also infra* note 360 and accompanying text (discussing prevailing debates over civil, political, and social rights during Reconstruction).

[360] Plessy v. Ferguson, 163 U.S. 537, 544 (1896) ("The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality . . . ."); see also Alexander M. Bickel, The Original Understanding of the Segregation Decision, 69 Harv. L. Rev. 1, 58 (1955) ("[S]ection I of the fourteenth amendment, like section I of the Civil Rights Act of 1866, carried out the relatively narrow objectives of the Moderates, and hence, as originally understood was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation."); Michael J. Klarman, Response*: Brown,* Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 Va. L. Rev 1881, 1898 (1995) ("Section One was consistently defended in public debate—both in Congress and in the constituencies—as a guarantee of civil, not political or social, rights. . . . It is difficult to escape the conclusion that the scope of Section One was limited in deference to the prejudices of Northern voters."); Reva B. Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111, 1125–27 (1997); Ronald Turner, A Critique of Justice Antonin Scalia's Originalist Defense of *Brown v. Board of Education*, 62 UCLA L. Rev. Disc. 170, 176–84 (2014).

[361] William Blackstone, Commentaries on the Law of England 746 (William G. Hammond ed., S.F., Bancroft-Whitney 1890) [hereinafter Blackstone's Commentaries]; *see also infra* note 373 (quoting a Supreme Court Justice affirming this view in 1873). *See generally* Reva B. Siegel, The Nineteenth Amendment and the Democratization of the Family, 129 Yale L.J.F. 450, 456 (2020) ("Unequal distribution of the franchise at the Founding . . . empowered some members of the community—generally propertied white male heads of household—to control others. [S]tate law looked to the head of household to govern and represent his legal dependents, not only children, but adults affiliated through institutions including slavery, employment, and marriage.")

based views are part of general law, emphasizing that "women's various legal disabilities existed at common law," while distinguishing racial disabilities they claim were sourced outside general law, and then declaring they "take no position" on whether these gender, but not race, distinctions should govern the Fourteenth Amendment today.[362]

In his solo-authored article defending *Dobbs*, by contrast, Sachs seems to incorporate gender inequality into his constitutional analysis. He declares it would be reasonable for contemporary interpreters to construe the Constitution's liberty guarantee with attention to these common law gender status distinctions: "If the Amendment's authors didn't 'perceive women as equals, and did not recognize women's rights,' that might be a good historical *explanation* for why they failed to make more specific provision for them—and why the privileges-of-citizenship principle they *did* enact might have failed to include abortion, even as applied to modern facts."[363] Professor Sachs suggests that interpreters with originalist commitments can perpetuate inequality as fidelity to the Framers' understanding—a point Sachs makes with respect to gender and not race, even though appeal to the original understanding was common in defending racial segregation in the wake of *Brown*.[364]

Notably, Professor Sachs views the gender-status elements of the common law dating to the Founding[365] as an essential feature of general law that interpreters of the Fourteenth Amendment could give continuing significance today.[366] This is part of a larger picture of the Fourteenth Amendment as "backward-looking": as "protecting the citizenship rights of all Americans," but "only those rights which American citizenship already guaranteed," privilege-or-immunity rights enunciated in *Corfield* "to which citizens had been entitled 'at all times' since the Founding, '"rights of Englishman,' as Justice Bradley put it in his *Slaughter-House* dissent."[367] Professor Sachs emphasizes "new rights couldn't be added to the mix; the tradition was a bounded set rather than a growing thing."[368]

How is *this* the account of a positivist? It is *not* the Supreme Court's account of the Fourteenth Amendment—nor is it one that most historians would provide. In

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[362] Compare Sachs, Dobbs, *supra* note 21, at 17, with Baude, Campbell & Sachs, *supra* note 6, at 1242–43.

[363] See Sachs, Dobbs, *supra* note 21, at 16–17. To mitigate this, Sachs tells women they can vote and points to elections after *Dobbs* to suggest his framework offers women sufficient protection. *Id.* at 17 ("Of course, if we want to enact new rights, we still can, as the electoral process since *Dobbs* has repeatedly showed.").

[364] *See* Charles Tyler, Genealogy in Constitutional Law, 77 Vand. L. Rev. 1713, 1756–57 (2024) (discussing historical scholarship tracing the emergence of claims on original intent and original understanding in backlash to *Brown*).

[365] *See supra* note 361 and accompanying text (quoting Blackstone's Commentaries at 746).

[366] *See supra* note 363 and accompanying text.

[367] Sachs, Dobbs, supra note 21, at 11 (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 114, 122 (1873) (Bradley, J., dissenting)).

[368] *Id.*

the decades leading up to the Civil War, historians recount, Americans asserted claims for freedom and for suffrage, often focusing on the Privileges and Immunities Clause of Article IV,[369] then after the War on the Privileges or Immunities Clause of the Fourteenth Amendment.[370] But within a few years, the Supreme Court wrote the *Slaughter-House Cases*[371] to block these claims, opposing not only the New Orleans butchers, but others who might seek political emancipation through the Fourteenth Amendment's newly ratified text: The day after *Slaughterhouse*, the Court applied its *Slaughter-House* holding to deny suffragist Myra Bradwell her claim to practice law,[372] and soon thereafter in *Minor v. Happersett*,[373] the Court denied suffragists' claims that

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369 See, e.g., Randy E. Barnett & Evan D. Bernick, The Original Meaning of the 14th Amendment: Its Letter & Spirit 93–102 (2021) (showing the importance of privileges and immunities in early abolitionist constitutionalism); Kate Masur, Until Justice Be Done: America's First Civil Rights Movement, from the Revolution to Reconstruction (2021) (examining the claims of free Blacks on Privileges and Immunities Clause of Article IV in the decades before the Civil War).

370 See James W. Fox, Jr., The Constitution of Black Abolitionism: Reframing the Second Founding, 23 U. Pa. J. Const. L. 267, 270, 347 (2021) (including perspectives of the Black public sphere in original public meaning and observing that "[u]nlike the dominant view among white Republicans, who temporized on Black suffrage during the drafting of the Fourteenth Amendment, Black leaders had seen suffrage as an essential right of citizenship since at least the 1830s"); James W. Fox, Jr., Publics, Meanings & the Privileges of Citizenship, 30 Const. Comment. 567, 569, 597–604 (2015) (criticizing originalist arguments that determine the original public meaning of the Privileges or Immunities Clause in ways that exclude the suffrage arguments of disfranchised Americans Frederick Douglass and Victoria Woodhull in a review of Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship (2014)). For accounts of "the New Departure," women's efforts to vote under the newly ratified Fourteenth Amendment in the 1872 election, see Rosalyn Terborg-Penn, African American Women in the Struggle for the Vote, 1850–1920, at 36–41 (1998); Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947, 970–74 (2002) (discussing the constitutional basis of New Departure claims and the Supreme Court's response in several decisions of the 1870s).

371 83 U.S. (16 Wall.) 36 (1872).

372 Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1872) ("The opinion just delivered in the *Slaughter-House Cases* renders elaborate argument in the present case unnecessary, for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a state is one of those powers which are not transferred for its protection to the federal government").

In deciding *Bradwell*, the Court was well aware of woman suffrage claims, which began as early as the Fourteenth Amendment's ratification and were asserted in hearings in Congress. See Siegel, She the People, *supra* note 370, at 971–74. Bradwell was a prominent suffragist and so Senator Matthew Carpenter, who argued Bradwell's case, sought to distinguish her claims on the Privileges or Immunities Clause from those of the woman suffrage movement, anticipating the Court's hostile response. *See id.* at 974 n.74 (observing that "Carpenter . . . assured the Supreme Court that it could interpret the Privileges or Immunities Clause to protect a woman's right to practice her occupation without having to rule that it also protected a woman's right to vote").

373 88 U.S. (21 Wall.) 162, 165 (1874) ("The argument is, that as a woman . . . is a citizen of the United States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the State cannot by its laws or constitution abridge."). A

the right to vote was a privilege or immunity protected by the Fourteenth Amendment, emphasizing that "in no State were all citizens permitted to vote" and listing Founding-era restrictions on suffrage by slave status, race, gender, wealth, residency, and age.[374]

One hundred fifty years later, Professor Sachs revisits the Court's initial interpretation of the Privileges or Immunities Clause to defend *Dobbs*. To justify the Court's decision to overturn *Roe* and a half-century of women's rights, Professor Sachs appeals to the *Slaughter-House* dissenters' understanding of general law, yet would preserve the gender-exclusionary privileges-or-immunities rulings the Court handed down with its *Slaughter-House* decision. In other words, Professor Sachs invites us to make sense of *Dobbs* in light of Justice Bradley's views of privileges or immunities as expressed in both *Slaughter-House* and in *Bradwell*.[375]

Professor Sachs presents his defense of *Dobbs* as an expression of original-law originalism and of positivist principle, hence needing no normative justification. We have shown why we believe this core claim is unpersuasive. Putting to one side the questions we have raised about original-law originalism as a theory of change, the general-law standard Sachs invokes to justify *Dobbs* has too little in common with American practice to count as positivist. Nor is it doctrinally required by *Glucksberg*.[376] Like so many constitutional memory claims, "[a]n interpreter's appeal to *facts* about the nation's past in constitutional argument often expresses *values*," and "[w]hat appear in constitutional argument as positive, descriptive claims about the past are often normative claims about the Constitution's meaning."[377]

Some set of commitments do seem to animate Professor Sachs's interest in channeling substantive due process liberty claims into the Privileges or Immunities Clause, but the character of these commitments is not fully articulated. For example, it is not clear whether Professor Sachs would recognize that women have a right to

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concurrence in *Bradwell* famously justified denying women privileges or immunities of citizenship extended to men on the ground that at common law, "a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state." *Bradwell*, 83 U.S. (16 Wall.) at 141–42 (Bradley, J., concurring).

374 *Minor*, 88 U.S. (21 Wall.) at 172.

375 The day after Bradley dissented in *Slaughterhouse*, arguing that the New Orleans butchers had a privilege-or-immunity right to pursue their calling, he wrote a concurring opinion for the other Slaughter-House dissenters in the *Bradwell* case, explaining their view that women did not have such a federally protected right. See *Bradwell*, 83 U.S. at 140–41 (Bradley, J. concurring) (rejecting Bradwell's claim that "the practice of law . . . is one of the privileges and immunities of women as citizen and reasoning that the "Constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state . . . .").

376 *See supra* Section III.B.

377 Siegel, The "Levels of Generality" Game, *supra* note 273, at 1.

self-preservation under general law entitling them to access urgently needed medical care, under any of the standards we have delineated.

We do not believe that general-law standards should control liberty claims for access to urgently needed medical care under *Dobbs*. But if they did, we believe the law should recognize women's privilege or immunities rights to self-preservation no less than men's. We have derived these claims from evidence of our traditions above; but, should some insist upon the underlying gender biases of our traditions, we affirm here as we have elsewhere that Americans today are no more obliged to perpetuate these wrongs of our past than any others.

It is Americans in the present who decide whether to tie the Constitution's liberty guarantees to practices and beliefs that the nation has for generations repudiated—or to "democratiz[e] constitutional memory"[378] and respect our history and traditions on terms that affirm that our Constitution guarantees equal liberty for all.

CONCLUSION

In *Dobbs*, the Supreme Court addressed the constitutionality of "elective abortion"[379] and was silent about medically urgent terminations. We show, first, that contemporary abortion bans and state cases interpreting them impose standards that break with centuries of medical and legal practice,[380] and second, that under *Dobbs*, Americans can challenge abortion bans that obstruct their access to urgently needed medical care as violating the Due Process liberty guarantee.[381]

Of course, there are many constitutional guarantees to which litigants in state and federal courts can appeal when challenging abortion bans that obstruct access of pregnant patients to urgently needed medical care, including federal and state guarantees of equal protection, bodily integrity, and the right to life. We write to make clear that, even after *Dobbs*, Americans can still appeal to the Constitution's liberty guarantee—and do so reasoning within *Dobbs'*s history and tradition framework. New state abortion bans—with increasingly narrow exceptions—do not reflect a return to tradition but the new and unprecedented criminalization of pregnancy.

We have each criticized particular claims about history and tradition in *Dobbs*,[382] yet believe that history has much to teach about the constitutionality of laws

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[378] *See* Siegel & Ziegler, Comstockery, *supra* note 132, at 97.

[379] Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2244 (2022); *see also id.* at 2310 (Roberts, C.J., concurring).

[380] *See supra* Sections II.A–B.

[381] *See supra* Sections III.A–B.

[382] *See, e.g.*, Siegel, *supra* note 273, The "Levels of Generality" Game, at 3 (showing an "account of constitutional memory undermines the judicial-constraint justification for conservative historicism, as well as the levels-of-generality claims associated with it.") (footnote omitted); Reva B. Siegel, The History of History and Tradition, *supra* note 23, at 108 (arguing that "a backward-looking standard that

regulating abortion. The historical record reveals that Americans have restricted access to abortion for deeply inegalitarian reasons—to enforce sex roles and to preserve the racial character of the nation;[383] at the same time, it also shows that Americans have restricted access to abortion to safeguard life—to protect antenatal life and to protect the lives of pregnant women.[384] Just as clearly, history shows that law has *allowed* abortion to protect women's lives. As this Article documents, since the spread of abortion bans in the United States, there has been a continuous, widespread, and well-articulated legal, juridical, and medical tradition of deferring to doctors' discretion in terminating pregnancy in order to protect the life or health of patients.

What does excavating this history demonstrate? We do not advocate following tradition for tradition's sake—especially as a sole criterion for interpreting the Constitution's liberty guarantee. But when confronted with an historical record demonstrating a course of conduct as clear as the one we have documented, it is important to engage with the evidence and ask what values and commitments such a tradition might reflect. The evidence shows that even when law banned abortion, it allowed doctors to terminate pregnancy to protect the lives, health, and fertility of women bearing children. We have demonstrated that this tradition involved considerably more than legislative inaction: doctors, legislators, prosecutors, and judges coordinated in establishing limits on state action that were reiterated across jurisdictions and over time. Finally, we have shown that these customary norms can guide interpretation of the due process liberty guarantees under *Dobbs*, under *Glucksberg*, and in state cases following them, and defended our reading of precedent against contending interpretations as offering the best account of our constitutional tradition.

In the Victorian separate-spheres era, when the Court allowed states to deny women the right to vote and practice law, American law allowed doctors to terminate pregnancy to protect the life and health of their patients. Perhaps these limits on criminal prosecution were not then called "rights" because American law did not then imagine women bearing children as rights-holders. But the law authorized doctors to

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appears to fix the Constitution's meaning in the past in fact vindicates the interpreters' values"); Mary Ziegler, The History of Neutrality: *Dobbs* and the Social-Movement Politics of History and Tradition, 133 Yale L.J.F. 161, 190 (2023) (emphasizing that "framing a method as neutral," as the Court did in *Dobbs*, "may disguise the political origins . . . of an opinion").

383 For examples, see S. Journal, 57th Gen. Assemb., 2d Sess. app. at 233, 233–34 (Ohio 1867); Reva B. Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 297 (1992) (demonstrating "[i]n nearly all antiabortion tracts, doctors emphasized that abortion was most frequently practiced by married women, particularly those of the so-called 'native' middle class"); Ziegler, *supra* note 110, at 6–7, 8–9.

384 On the antiabortion movement's interest in fetal protection, see Siegel, *supra* note 383, at 297–393; Ziegler, *supra* note 110, at 6–7, 8–9. On the restriction of abortion to protect women from unsafe drugs and poisons, see James Mohr, Abortion in America: The Origins and Evolution of National Policy 26, 142–43 (1979) (describing how early abortion regulations were "as much poison control measures as anti-abortion measures"); Reagan, *supra* note 64, at 10.

intervene and protect pregnant women because it understood women bearing children were engaged in dangerous, arduous, and socially essential labor. This tradition persisted from the era of the first bans through *Roe* and *Casey*, which recognized a life and health exception throughout pregnancy—a life exception still recognized by prominent personhood proponents today.[385]

Today, states banning abortion, empowered by *Roe*'s reversal, threaten doctors with life in prison should they manage a miscarriage or provide a termination for a pregnant patient judged not close enough to death.[386] The public is increasingly aroused to witness shameful and shocking scenes: pregnant women left to bleed in parking lots or worse simply to die.[387] The Constitution guarantees women freedom from coercive state action of this kind, which finds no warrant in the nation's history and traditions—or even, in *Dobbs*. America's eyes are on the Court.

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[385] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (plurality opinion) (permitting the state the "power to restrict abortions after fetal viability" only "if the law contains exceptions for pregnancies which endanger the woman's life or health"); Roe v. Wade, 410 U.S. 113, 164–65 (1973) (requiring that even after viability, the state could not proscribe abortion "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother"). On the support for life exceptions among personhood proponents, see *supra* note 117 and accompanying text. For discussion of the complex relationship between personhood and life exceptions, see Ziegler, *supra* note 110, at 11, 17–18, 57–58, 70–71, 79–80.

[386] Lizzie Presser & Kavitha Surana, A Third Woman Died Under Texas' Abortion Ban. Doctors Are Avoiding D&Cs and Reaching for Riskier Miscarriage Treatments, ProPublica (Nov. 26, 2024, 6:00 AM), https://www.propublica.org/article/porsha-ngumezi-miscarriage-death-texas-abortion-ban (reporting on women who die because denied dilation and curettage, a regular procedure for first-trimester miscarriages and abortions, by hospital staff chilled by abortion bans, and reporting a third death in Texas where "any doctor who violates the strict law risks up to 99 years in prison").

[387] The stories of women like Kate Cox and Amanda Zurawski have captured national attention. See Kate Zernike, The Unlikely Women Fighting for Abortion Rights, N.Y. Times (May 27, 2024), https://www.nytimes.com/2024/05/27/us/abortion-women-tfmr.html; Charlotte Alter, How Kate Cox Became a Reluctant Face of the Abortion-Rights Movement, Time (Mar. 27, 2024, 12:06 PM), https://time.com/6960387/kate-cox-abortion-rights-interview; Jacqueline Howard & Tierney Sneed, Texas Woman Denied an Abortion Tells Senators She "Nearly Died on Their Watch," CNN (Apr. 26, 2024, 8:24 PM), https://www.cnn.com/2023/04/26/health/abortion-hearing-texas-senators-amanda-zurawski/index.html. Pew Research Center found in 2022 that sizable majorities of U.S. adults supported access in cases of threats to life or health—and that nearly half of those who thought that abortion should be illegal in all or most cases still supported access in cases of threats to life or health, together with the majority who believed that abortion should be legal in all or most cases. Pew Research Center, America's Abortion Quandary 9 (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary. Since *Dobbs*, support for abortion access has grown. Julie Wernau, Support for Abortion Access Is Near Record, WSJ-NORC Poll Finds, Wall St. J. (Nov. 20, 2023, 9:00 AM), https://www.wsj.com/politics/policy/support-for-abortion-access-is-near-record-wsj-norc-pollfinds-6021c712.