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ABORTION'S NEW CRIMINALIZATION—A HISTORY-AND-TRADITION RIGHT TO HEALTH-CARE ACCESS AFTER *DOBBS*

*Reva B. Siegel & Mary Ziegler**

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.*

Are there constitutional limits 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*

* Reva Siegel is Nicholas deB. Katzenbach Professor of Law at Yale Law School. Mary Ziegler is Martin Luther King Jr. Professor of Law at UC Davis School of Law. This draft benefitted from dialogue with readers including Kathy Abrams, Jack Balkin, Evan Bernick, Nancy Cott, Dov Fox, Cary Franklin, Sherif Girgis, Linda Greenhouse, Nicole Huberfeld, Robert Post, Laura Portuondo, Rachel Rebouché, Stephen Sachs, Jed Shugerman, Lawrence Solum, Aaron Tang, and Garrett West. We especially thank Jessie Hill for her suggestion to consider the histories of Prohibition and vaccination. We thank Lawrence B. Glickman for sharing David Lawrence's article on the Fourteenth Amendment's legitimacy. For excellent research assistance, we are grateful to Hannah Berkman, Gila Glattstein, Lily Jacobs, Caitlyn Jordan, Katie Kroft, Tamara Shamir, Marlen Renderos, and Indu Pandey.

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 often view history-and-tradition analysis of this kind as faithful to* Dobbs *and have begun to employ it under their own state constitutions.*

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 are history and tradition the sole ground on which Americans can assert the rights in question, yet they are a critical ground—a reminder that criminalizing urgently needed health care is not what Americans traditionally do, even to pregnant women.

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*, might 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 may be 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 abortion 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 in statutory exceptions, in medical judgments, and in judicial interpretations that often afforded

[1] 142 S. Ct. 2228, 2244 (2022); see also id. at 2310 (Roberts, C.J., concurring) (identifying the same question presented).

[2] See infra Sections II.A–B.

doctors discretion to protect health and life in accordance with professional norms and good faith.[3] We demonstrate that these thick customary understandings involved much more than legislative inaction[4]: they were 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,[6] when not all constraints on legislative power came in the form of judicial enforcement of fundamental rights,[7] and when rights were severely circumscribed by forms of status our Constitution no longer recognizes.[8]

As we show, far from returning to the past, the criminalization regime emerging after *Dobbs* is in critical ways far more punitive.[9] Criminalization has always disproportionately burdened the poor and marginalized, even as these burdens change shape.[10] 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,[11] while harsh criminal sanctions threaten access to health care for those carrying pregnancies to term,[12] 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.[13]

In fact, the criminal law regime emerging after *Dobbs* prevents doctors from addressing urgent health needs of pregnant patients in ways that bans

[3] See infra Sections II.A–B.

[4] See infra Sections II.A–B.

[5] See infra Sections II.A–B.

[6] See infra Sections II.A–B.

[7] 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 on state power, including police-power limitations and "more determinate limits, usually grounded in customary law").

[8] See infra notes 369, 373–75 and accompanying text.

[9] See infra Section I.A.

[10] See infra notes 68–71 and accompanying text.

[11] See Jolynn Dellinger & Stephanie K. Pell, The Criminalization of Abortion and Surveillance of Women in a Post-Dobbs World, Brookings Inst. (Apr. 18, 2024), https://www.brookings.edu/articles/the-criminalization-of-abortion-and-surveillance-of-women-in-a-post-dobbs-world/ [https://perma.cc/B3M2-RXND].

[12] See infra Section I.A.

[13] See, e.g., Khiara M. Bridges, Racial Disparities in Maternal Mortality, 95 N.Y.U. L. Rev. 1229, 1257–61 (2020) (surveying reasons for racial disparities in maternal mortality). For more on the disparate effects of *Dobbs*, see infra notes 70–71 and accompanying text.

before *Roe v. Wade* did not.[14] These harms are concentrated in the South and Midwest,[15] but may not remain there. Federal law could nationalize them, and conscience claims could bring them inside abortion-rights-protecting states.[16] States may continue to enforce laws with life exceptions far harsher than those in place before *Roe*.[17] And the Trump Administration has recently dropped the Biden Administration's lawsuit arguing that the Emergency Medical Treatment and Labor Act ("EMTALA") guarantees access to abortion in certain medical emergencies.[18] The Trump Administration (or litigants) may further seek to break from longstanding practice and judicial precedent by enforcing the Comstock Act as a de facto no-exceptions national abortion ban.[19] Facing such threats, pregnant patients and their lawyers are beginning to look to the federal and state constitutions to assert a right to access care in cases of threats to life or health.[20]

We demonstrate that under *Dobbs* and *Washington v. Glucksberg*,[21] the tradition we identify can guide interpretation of the Constitution's liberty

[14] See infra notes 60–63 and accompanying text.

[15] Allison 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 Mar. 6, 2025, 5:48 PM).

[16] On the potential impacts of expanding conscience provisions, see Reva Siegel & Mary Ziegler, Conservatives Are Getting Comfortable Talking Openly About a National Abortion 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 [https://perma.cc/74XU-QJHX]. For further discussion of the Court's apparent embrace of a broad understanding of conscience protections, see infra text accompanying notes 129–34.

[17] See infra Section III.C.

[18] Alice Miranda Ollstein, Trump Admin Moves to Drop Fight Over Emergency Abortions, Reversing Biden Admin Stance, Politico (Mar. 4, 2025, 7:29 PM), https://www.politico.com/news/2025/03/04/trump-emergency-abortions-00211399 [https://perma.cc/DT4K-F8AD]. This is only the first step the Trump Administration might take on the issue. See Laurie Sobel et al., How Pending Health-Related Lawsuits Could Be Impacted by the 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/ [https://perma.cc/F7A8-82RM] (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").

[19] See infra note 125 and accompanying text; Chantelle Lee, The Powers Trump's Nominees Will Have Over Abortion, Time (Jan. 22, 2025, 1:37 PM), https://time.com/7209202/donald-trump-cabinet-abortion/ [https://perma.cc/ZY4L-LVAQ].

[20] See infra Section III.C (discussing cases under state constitutions); infra notes 244–45 and accompanying text (discussing *Seyb v. Members of the Idaho Board of Medicine*, the first case post-*Dobbs* to bring a challenge under the federal Constitution).

[21] 521 U.S. 702 (1997).

guarantees to protect access to urgently needed health care against criminalization, even if access was not historically understood as a right.[22] We show that courts in states with abortion bans often 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.[23]

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.[24] 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 *Dobbs* and *Glucksberg* and, in the process, imposes constitutionally offensive status inequalities on the Constitution's liberty guarantees.[25]

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. A challenge to abortion bans written or enforced in such a way as to deny pregnant persons access to urgently needed medical care could appeal to liberty interests in bodily autonomy and family decision-making—understanding these traditionally protected forms of freedom at a higher level of generality—as *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* did.[26] Ambiguously worded exceptions in abortion bans that chill or obstruct access to urgently needed medical care can be challenged on grounds of vagueness.[27] Or state action of this kind can be

[22] See infra Sections III.A–B.

[23] See infra Section III.C.

[24] Stephen E. Sachs, *Dobbs* and the Originalists, 47 Harv. J.L. & Pub. Pol'y 539, 540–43 (2024) [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 [https://perma.cc/G4VV-2Q8E].

[25] See infra Section III.D.

[26] 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, 105, 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.").

[27] See, e.g., David S. Cohen & Greer Donley, From Medical Exceptions to Reproductive Freedom, 124 Mich. L. Rev. (forthcoming 2025) (manuscript at 26–35, 37–41), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5124948 [https://perma.cc/J3TH-AJTJ] (arguing that pregnancy-complication cases illustrate that exceptions are both impermissibly vague and

challenged as denying the right to life.[28] Claims might be based on the Privileges and Immunities Clause;[29] asserted as challenges to involuntary servitude under the Thirteenth Amendment;[30] or advanced as a challenge to stereotyping under equal protection.[31]

Even so, there are critically important goods served in analyzing state action obstructing urgently needed reproductive health care through a history-and-tradition lens. We learn that at a time when American women were not recognized as having many rights, doctors, lawmakers, prosecutors, and judges coordinated to limit abortion bans and permit physicians to protect the lives and health of pregnant patients. This widespread and enduring customary practice shows that access to

religiously discriminatory); Maxine Eichner, Mara Buchbinder, Abby Schultz, Cambray Smith & Amy Bryant, The Inevitable Vagueness of Medical Exceptions to Abortion Bans, 15 U.C. Irvine L. Rev. (forthcoming 2025) (manuscript at 14–22, 35–47, 52–53) (on file with authors) (highlighting uncertainties in applying medical exceptions to abortion bans due to ambiguities that render such laws unconstitutionally vague under the void for vagueness doctrine and proposing a "least-vague" exception to provide clear guidance).

[28] See B. Jessie Hill, Medical Authority and the Right to Life, 104 B.U. L. Rev. Online 67, 76–77 (2024) (challenging abortion bans "as incompatible with individuals' constitutional right to life"—and asserting that a broad understanding of life could inform the understanding of existing exceptions, in keeping with the more liberal interpretation typical in the nineteenth century).

[29] See infra notes 382–83 and accompanying text.

[30] 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, 166–80 (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").

[31] 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 (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); Reva B. Siegel, *Roe*'s Roots: The Women's Rights Claims That Engendered *Roe*, 90 B.U. L. Rev. 1875, 1889–91 (2010); Memorandum & Order on Plaintiffs' Motion for Temporary Injunction at 22–23, Blackmon v. State, No. 23-1196-IV(I) (Tenn. Ch. Oct. 17, 2024) (finding that pregnant plaintiffs challenging access to emergency medical care under the Medical Necessity Exception of the Tennessee abortion ban "have shown they are 'similarly situated' to non-pregnant women for purposes of their equal protection challenge" under the state's constitution).

urgently needed health care, including abortion, is deeply rooted in our nation's history and traditions, even on *Dobbs*'s own terms.

I. 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."[32] Claims in the October 2023 Term's abortion cases, *FDA v. Alliance for Hippocratic Medicine* and *Moyle v. United States*, reinforced the narrative of criminalization as a return to tradition.[33] As Robert Cover famously observed, "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."[34]

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 v. Wade*. We focus on the Texas Supreme Court's decision in *State v. Zurawski* to illustrate differences between the post-*Dobbs* and pre-*Roe* orders.[35] We then discuss claims in *Alliance* and *Moyle* as part of the post-*Dobbs* landscape.[36] We show that each case addresses questions of statutory interpretation yet is resonant with constitutional concerns.

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.[37] Some are literally

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

[33] See infra Section I.B.

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

[35] See infra Section I.A.

[36] See infra Section I.B.

[37] 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, 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 [https://perma.cc/72LW-FBNW].

revived from the pre-*Roe* period.[38] These features of the post-*Dobbs* landscape suggest a story of continuity, in which the government includes narrow and unworkable exceptions in abortion bans, not to protect patients, but to limit access.[39] 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 of abortions that are critically needed to protect life and health.[40]

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.[41] Moreover, physicians are no longer solo practitioners; today, most are embedded in institutional licensing regimes that may impose liability on the doctors practicing within them.[42]

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

[38] See infra note 60 and accompanying text.

[39] 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, The Atlantic (Aug. 2, 2022, 5:53 PM), 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).

[40] See infra Sections II.A–B.

[41] See infra Section II.A (discussing a good-faith standard in the abortion context); infra note 218 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 48–54 and accompanying text.

[42] 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)).

of life imprisonment for abortion offenders.[43] The scope of the state's exceptions for life and health are nevertheless exceptionally ambiguous. In *State v. Zurawski*, a group of 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."[44] Were the statute not to permit such abortions, the plaintiffs further argued, it would violate state protections for life, liberty, and equality.[45]

The Texas Supreme Court rejected the plaintiffs' arguments.[46] Chiding physicians for failing to understand what the justices of the court characterized as a perfectly clear law,[47] the court held that good faith was not enough—a prosecutor would have to decide whether a doctor objectively used reasonable medical judgment.[48] 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,"[49] the state medical board issued a final rule that still left critical questions unanswered, signaling that it is the legislature's responsibility to clarify when physicians can act without fear of prosecution.[50]

[43] 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 Tex. Penal Code Ann. §§ 12.32–.33 (West 2023), and a law permitting anyone to sue a provider or "aid[er] or abet[tor]," Tex. Health & Safety Code Ann. §§ 171.002, 171.203, 171.208–.210 (West 2023).

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

[45] Id. at 13.

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

[47] 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.").

[48] 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.

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

[50] 22 Tex. Admin. Code §§ 163.10, 163.12–.13 (2025); see also 49 Tex. Reg. 5142 (July 12, 2024) (stating that "[t]he Board cannot change statutory definitions" in response to medical organizations' stated concerns about "confusion and uncertainty"). For a 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 [https://perma.cc/873N-5UE4].

Not long after the court's decision, *ProPublica* published the stories of two Texas women—eighteen-year-old Nevaeh Crain and twenty-eight-year-old Josseli Barnica—who died from complications related to post-miscarriage infections.[51] In both cases, medical experts believed that the patients' deaths were likely preventable, yet state law deterred physicians from intervening because they could still detect fetal cardiac activity.[52] After publication of the *ProPublica* stories, a group of 111 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.[53]

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."[54]

State prosecutors have made clear that acting in good faith will not protect physicians from prosecution.[55] 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

[51] On Crain's death, see Lizzie Presser & Kavitha 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 [https://perma.cc/D59C-AXFD]. On Barnica's death, see Cassandra 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 [https://perma.cc/S9ZB-UWXN].

[52] Presser & Surana, supra note 51; Jaramillo & Surana, supra note 51.

[53] Pooja Salhotra, Texas OB-GYNs Urge Lawmakers to Change Abortion Laws After Reports on Pregnant Women's Deaths, Tex. Trib. (Nov. 3, 2024, 4:00 PM), https://www.texastribune.org/2024/11/03/texas-ob-gyn-letter-abortion-laws/ [https://perma.cc/48L7-VRQM]. *ProPublica* subsequently reported on a third death tied to Texas's law. 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. 25, 2024, 6:00 AM), https://www.propublica.org/article/porsha-ngumezi-miscarriage-death-texas-abortion-ban [https://perma.cc/NP5T-FKJ2].

[54] Okla. Call for Reprod. Just. v. Drummond, 2023 OK 24, ¶ 9, 526 P.3d 1123, 1130.

[55] See infra notes 56–59 and accompanying text.

threats to her health and future fertility qualified Cox for an abortion.[56] Cox went to court and secured an order from a judge permitting the termination of her pregnancy.[57] Ken Paxton, the Texas Attorney General, responded by threatening any physician who treated Cox with criminal charges[58]—at a time when a lower court had already ruled in Cox's favor (the state supreme court subsequently reversed this decision).[59]

Not only do prosecutors assume that physicians caring for pregnant patients have little discretion, but the penalties authorized by many state laws have increased in severity. Some states have retained pre-*Roe* bans, which often authorize penalties of up to six years in prison.[60] More recent criminal laws, including trigger bans and prohibitions passed after *Dobbs*, designate abortion a felony and impose far more draconian punishments.[61] These severe punishments have had a significant chilling effect on the care received by pregnant women.[62] 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*.[63]

[56] Response to Petition for Writ of Mandamus & 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.").

[57] Temporary Restraining Order at 4–5, Cox v. State, No. D-1-GN-23-008611 (Tex. Dist. Ct. Dec. 7, 2023), 2023 WL 8628762, at *3, *vacated per curiam*, *In re State*, 682 S.W.3d at 895.

[58] 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 [https://perma.cc/CUD6-NT4E] (reporting that Paxton's guidance explained that the previous court order "will not insulate hospitals, doctors or anyone else from civil and criminal liability").

[59] *In re State*, 682 S.W.3d at 895 (per curiam).

[60] 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. § 13-3603 (2024), *repealed by* H.B. 2677, 56th Leg., 2d Reg. Sess., 2024 Ariz. Sess. Laws ch. 181.

[61] In Alabama and Texas, state law authorizes penalties of up to life in prison. Ala. Code §§ 26-23H-4 to -6 (2024); id. § 13A-5-6(a)(1) (2024); Tex. Health & Safety Code Ann. §§ 170A.001–.007 (West 2023); Tex. Penal Code Ann. §§ 12.32–.33 (West 2023).

[62] See infra notes 63–64 and accompanying text.

[63] Usha Ranji, Alina Salganicoff & Laurie Sobel, Dobbs-Era Abortion Bans and Restrictions: Early Insights About Implications for Pregnancy Loss, KFF (May 2, 2024),

Research has shown that fewer medical students are applying for residencies in ban states, creating a prospective lack of access for more patients.[64]

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.[65] A report by the organization Pregnancy Justice identified more than two hundred such cases in the year after *Dobbs*—a high-water mark for such prosecutions.[66] 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.[67]

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.[68] 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.[69] Yet today, as before *Roe*, women of color and low-income patients are disproportionately unable to

https://www.kff.org/womens-health-policy/issue-brief/dobbs-era-abortion-bans-and-restrictions-early-insights-about-implications-for-pregnancy-loss [https://perma.cc/ZQ4X-WRLZ].

[64] Kendal Orgera & Atul Grover, States With Abortion Bans See Continued Decrease in U.S. MD Senior Residency Applicants, Ass'n of Am. Med. Colls. Rsch. & Action Inst. (May 9, 2024), https://www.aamcresearchinstitute.org/our-work/data-snapshot/post-dobbs-2024 [https://perma.cc/ACP3-K7BT].

[65] Wendy A. Bach & Madalyn K. Wasilczuk, Pregnancy Just., Pregnancy as a Crime: A Preliminary Report on the First Year After *Dobbs* 2, 9, 20 (2024), https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Pregnancy-as-a-Crime.pdf [https://perma.cc/734H-95UM].

[66] Id. at 2, 20.

[67] Id. at 9–17.

[68] See infra notes 70–71 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).

[69] Kimya Forouzan, Amy Friedrich-Karnik & Isaac Maddow-Zimet, The High Toll of US 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 [https://perma.cc/3FGL-BA4C]; see also Soc'y of Fam. Plan., #WeCount Report: April 2022 to December 2023, at 11 (2024), https://societyfp.org/wp-content/uploads/2024/05/WeCount-report-6-May-2024-Dec-2023-data_Final.pdf [https://perma.cc/5PNL-KYAK] (reporting that abortions increased nationally in the United States between 2022 and 2023).

easily circumvent bans: they are more likely to live in ban states and often lack the resources for interstate travel for care.[70] 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.[71]

In other ways, however, the burdens of criminalization after *Dobbs* have changed because of developments in technology and law.[72] Abortion pills now account for well over half of all abortions in the United States.[73] 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.[74] 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.[75]

Abortion pills do little to help those least prepared to deal with abortion's new criminalization: those experiencing health- or even life-threatening complications in 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.[76] 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

[70] Latoya Hill, Samantha Artiga, Usha Ranji, Ivette Gomez & Nambi Ndugga, What Are the Implications of the Dobbs Ruling for Racial Disparities?, KFF (Apr. 26, 2024), https://www.kff.org/womens-health-policy/issue-brief/what-are-the-implications-of-the-dobbs-ruling-for-racial-disparities [https://perma.cc/BWL4-TBCG].

[71] Id.; see also Bridges, supra note 13, at 1257–62 (explaining the impact of a lack of access to quality maternal care).

[72] See infra notes 73–77, 81 and accompanying text.

[73] Rachel K. Jones & Amy Friedrich-Karnik, Medication Abortion Accounted for 63% of All US 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 [https://perma.cc/K9UD-AKBJ].

[74] 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 [https://perma.cc/JDM2-LARR].

[75] Pam Belluck, Abortion Shield Laws: A New War Between the States, N.Y. Times (Feb. 23, 2024), https://www.nytimes.com/2024/02/22/health/abortion-shield-laws-telemedicine.html; see also Soc'y of Fam. Plan., supra note 69, at 6 (finding that an average of 5,800 telehealth abortions took place each month between October 2023 and December 2023 in ban states).

[76] See infra notes 77–83 and accompanying text.

rupture of membranes.[77] Because physicians could still detect fetal cardiac activity, they refused to treat Zurawski, fearing the loss of their medical licenses and serious criminal charges.[78] 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.[79]

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*,[80] and Idaho's largest hospital reported airlifting six pregnant patients facing medical emergencies out of the state in the first three months of 2024 alone.[81] Bans are most heavily burdening women of color: seven in ten obstetrician-gynecologists report that racial disparities in maternal outcomes have grown worse since the *Dobbs* decision.[82]

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, experiencing grave complications late in pregnancy. The burdens of *Dobbs* fall most heavily not only on low-

[77] 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.

[78] Affidavit of Plaintiff Amanda Zurawski in Support of Application for Temporary Injunction ¶¶ 6–8, Zurawski v. State, No. D-1-GN-23-000968 (Tex. Dist. Ct. Aug. 4, 2023). 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." Id.

[79] Id. ¶¶ 13–17.

[80] Amanda Seitz, Emergency Rooms Refused to Treat Pregnant Women, Leaving One to Miscarry in a Lobby Restroom, Associated Press, https://apnews.com/article/pregnancy-emergency-care-abortion-supreme-court-roe-9ce6c87c8fc653c840654de1ae5f7a1c [https://perma.cc/Y6MP-T8LX] (last updated Apr. 19, 2024, 4:41 PM).

[81] 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 [https://perma.cc/6KPN-UDJ8].

[82] Brittni Frederiksen, Usha Ranji, Ivette Gomez & Alina Salganicoff, A National Survey of OBGYNs' Experiences After Dobbs, KFF (June 21, 2023), https://www.kff.org/report-section/a-national-survey-of-obgyns-experiences-after-dobbs-report/ [https://perma.cc/D4XD-KJL8]. These disparities in care 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. Am. Coll. of Obstetricians & Gynecologists, Issue Brief: Training and Workforce After *Dobbs* 1 (2024), https://www.acog.org/advocacy/abortion-is-essential/trending-issues/issue-brief-training-and-workforce-after-dobbs [https://perma.cc/3AXC-S8EB]. Women of color are already disproportionately likely to live in health-care deserts. See Bridges, supra note 13, at 1257–60.

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. *Moyle* offers a particularly acute example of a post-*Dobbs* ban interpreted by the Idaho Supreme Court to prohibit virtually all health-preserving abortions.[83] 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 EMTALA, which prohibits hospitals receiving federal funds from denying stabilizing care to patients who seek emergency treatment,[84] could preempt abortion bans that interfered with the statute's mandate to provide that stabilizing emergency care.[85] In *Moyle*, the Administration argued that Idaho's Defense of Life Act was preempted by EMTALA.[86] 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.[87] In the late

[83] Given concerns that Idaho's Defense of Life Act, Idaho Code § 18-622 (2024), 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. 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 [https://perma.cc/99JG-J8ZD] (reporting on the justification for the bill).

[84] See infra notes 87–91 and accompanying text.

[85] Memorandum QSO-22-22-Hospitals from the Dirs., Quality, Safety & Oversight Grp. & Surv. & Operations Grp., Ctrs. for Medicare & Medicaid Servs., to State Surv. Agency Dirs. 1 (Aug. 25, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf [https://perma.cc/A9TT-CCP7].

[86] 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").

[87] Mark Nelson, David U. Himmelstein & Steffie Woolhandler, 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

1980s, following the passage of EMTALA, patient dumping remained a particularly acute problem facing pregnant and laboring patients.[88] 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.[89] 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.[90] These horror stories prompted Congress to amend the statute in 1989 to clarify that EMTALA's protections applied to *all* patients in labor.[91]

When the Biden Administration argued in the U.S. District Court for the District of Idaho that EMTALA preempted Idaho's Defense of Life Act, the state appealed to a legal tradition of separated powers, stressing

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").

[88] For an example, see Stillbirth Traced to 'Dumping,' Chi. Trib., Dec. 19, 1985, at 1A (attributing a stillbirth to an "ill-advised transfer" of a low-income pregnant patient); see also infra notes 89–90 and accompanying text.

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

[90] Id. at 43 (statement of Judith G. Waxman, Managing Attorney, National Health Law Program).

[91] Compare Examination and Treatment for Emergency Medical Conditions and Women in Active Labor, Pub. L. No. 99-272, § 9121(b), 100 Stat. 164, 164 (1986) (codified as amended at 42 U.S.C. § 1395dd) (modifying "labor" with "active"), with Medicare Hospital Patient Protection Amendments, Pub. L. No. 101-239, § 6211(h)(2), 103 Stat. 2245, 2249 (1989) (codified as amended at 42 U.S.C. § 1395dd) (striking "active"). The 1989 amendments also created two categories of emergency medical conditions: labor and non-labor emergency medical conditions. Medicare Hospital Patient Protection Amendments, Pub. L. No. 101-239, § 6211(f), 103 Stat. 2245, 2247–48 (1989) (codified as amended at 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 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). Generally, however, EMTALA requires consideration of the unborn child only in "the case of labor" and does not require physicians treating a non-labor-related emergency to take into account fetal harms. Id. at 196 (quoting 42 U.S.C. § 1395dd(c)(1)(A)(ii)).

that the Biden Administration's preemption theory contravened the states' "primary authority over healthcare."[92]

The Supreme Court reached out before judgment in the district court, apparently to protect Idaho's prerogative to enforce its abortion ban.[93] But after argument and just before the end of the Term, a fractured Court decided to dismiss Idaho's petition as improvidently granted, with Chief Justice Roberts and Justices Barrett and Kavanaugh, likely the three deciding votes in the case, writing a separate concurrence explaining why a dismissal was appropriate.[94]

Moyle demonstrates how obstetric care under abortion bans is riven 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.

The Court's liberal Justices reflected the perspective of medical science in emphasizing that abortion is an ordinary and valuable form of health care, especially in cases of medical emergency.[95] Writing for Justices Sotomayor and Ketanji Brown Jackson (who dissented in part),[96] Justice Kagan emphasized the "medical reality" of pregnancy's dangers.[97] 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."[98] For the liberals, the case for including abortion as a stabilizing medical condition was straightforward.

[92] Brief for Petitioners at 53, Moyle v. United States, 144 S. Ct. 2015 (2024) (No. 23-726); see also Brief of Amicus Curiae National Right to Life Committee in Support of Petitioners at 21, *Moyle*, 144 S. Ct. 2015 (Nos. 23-726, 23-727) (emphasizing "the implementation and oversight of clinical standards has traditionally fallen under states' jurisdiction").

[93] Justice Ketanji Brown 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").

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

[95] For medical and movement arguments of this kind, see Facts Are Important: Abortion Is Healthcare, Am. Coll. of Obstetricians & Gynecologists, https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare [https://perma.cc/U23W-GM5L] (last visited Jan. 29, 2025) (arguing that "abortion is an essential component of women's health care"); Abortion Is Essential Health Care, Even with Wanted Pregnancies, Ctr. for Reprod. Rts. (Aug. 1, 2023), https://reproductiverights.org/abortion-health-care-wanted-pregnancies [https://perma.cc/F5K7-VQ3D] (asserting that "[a]bortion is [e]ssential [h]ealth [c]are").

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

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

[98] Id. (citation omitted).

"The statute simply requires the hospital to offer the treatment necessary to prevent the emergency condition from spiraling downward," Justice Kagan explained in her concurring opinion.[99] "And on rare occasions that means providing an abortion."[100] Justice Jackson likewise underscored the "host of emergency medical conditions that require stabilizing abortions—even when the procedure is not necessarily life saving."[101] 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.[102] 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.[103]

After *Roe*'s companion case, *Doe v. Bolton*, in which the Court emphasized that health included "psychological as well as physical wellbeing,"[104] conservatives objected that health justifications permitted elective abortion and described *mental* health justifications for abortion as an excuse for any abortion at any point in pregnancy.[105] Were

[99] Id. at 2018.

[100] Id.

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

[102] See infra note 105 and accompanying text.

[103] See *Moyle*, 144 S. Ct. at 2036 (Alito, J., dissenting, joined by Thomas, J.).

[104] 410 U.S. 179, 191–92 (1973); id. at 215 (Douglas, J., concurring) (quoting United States v. Vuitch, 402 U.S. 62, 72 (1971)).

[105] 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. (D.C.), 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 objectives . . . even though reputable medical opinion states that in today's advanced medical science there does not remain any psychiatric indications for abortion" (alteration in original) (internal quotation marks omitted)); Marjorie Fillyaw, Florida Lawyers, Doctors Attack Abortion Reform, Nat'l Cath. News Serv. (D.C.), 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" (internal quotation marks omitted)). *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

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.'"[106] 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' votes to dismiss.[107]

At the same time, Justice Barrett's concurrence recognized that pregnant patients do face "conditions posing serious jeopardy to a woman's physical health."[108] She mentioned conditions like "PPROM, placental abruption, preeclampsia, and eclampsia."[109] This stance echoes the position of antiabortion groups that insist certain lifesaving terminations are simply not abortions.[110] The American 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 procedures qualify as "maternal-fetal separation"[111]—and that medicine should "'establish a clear difference between treating an ectopic pregnancy' as well as other life-

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: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 97th Cong. 628 (1981) (statement of Joseph P. Witherspoon, Professor, University of Texas School of Law). 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 Another 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 [https://perma.cc/65VL-ANSW].

[106] *Moyle*, 144 S. Ct. at 2021 (Barrett, J., concurring, joined by Roberts, C.J. & Kavanaugh, J.) (quoting Reply in Support of Emergency Application for a Stay Pending Appeal at 6, Idaho v. United States, 144 S. Ct. 541 (No. 23A-470) (mem.)).

[107] Id. (citing Brief for the Respondent at 26 n.5, *Moyle*, 144 S. Ct. 2015 (Nos. 23-726, 23-727)).

[108] 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).

[109] Id. at 2021.

[110] See infra note 112 and accompanying text.

[111] Am. Ass'n of Pro-Life Obstetricians & Gynecologists, Practice Guideline: Concluding Pregnancy Ethically 10 (2022), https://aaplog.org/wp-content/uploads/2020/12/FINAL-AAPLOG-PB-10-Defining-the-End-of-Pregnancy.pdf [https://perma.cc/FXU7-KKYT].

threatening cases 'and elective terminations of intrauterine pregnancies.'"[112]

But the Justices on the Court's rightmost flank went further—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 the life of the pregnant patient.[113] 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.[114] 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 does not 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."[115] 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.[116] 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]

[112] Ingrid Skop, Charlotte Lozier Inst., Fact Sheet: Medical Indications for Separating a Mother and Her Unborn Child 1 (2022) (quoting Am. Ass'n of Pro-Life Obstetricians & Gynecologists, Practice Bulletin 9: Evidence Directing Pro-Life Obstetricians & Gynecologists 4 (2020), https://aaplog.org/wp-content/uploads/2020/03/Practice-Bulletin-9-Ectopic-Pregnancy.pdf [https://perma.cc/NQ7A-3MTN]), https://lozierinstitute.org/fact-sheet-medical-indications-for-separating-a-mother-and-her-unborn-child [https://perma.cc/MN5P-WRVK].

[113] See infra notes 119–21 and accompanying text.

[114] See Mary Ziegler, Personhood: The New Civil War over Reproduction (forthcoming 2025) (manuscript at ix, xi, 1–2, 22) (on file with authors).

[115] Moyle v. United States, 144 S. Ct. 2015, 2028–30 (2024) (Alito, J., dissenting, joined by Thomas & Gorsuch, JJ.).

[116] See supra notes 88–91 and accompanying text; see also Brief for the Respondent at 41–42, *Moyle*, 144 S. Ct. 2015 (Nos. 23-726, 23-727) (arguing that three of EMTALA's four references to an "unborn child" "direct hospitals to consider[] risks to an 'unborn child' in determining whether a woman in labor may be permissibly transferred before delivery" (citing 42 U.S.C. § 1395dd(c)(1)(A)(ii), (c)(2)(A), (e)(1)(B)(ii))).

the health or safety of the woman or the unborn child."[117] Justice Alito mentioned none of this. He invoked the 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."[118] EMTALA, Justice Alito wrote, "obligates Medicare-funded hospitals to *treat*, not abort, an 'unborn child.'"[119] 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.[120] On Justice 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.[121]

[117] 42 U.S.C. § 1395dd(e)(1)(B)(ii); id. § 1395dd(e)(2) (1988) (amended 1989). 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. Id. § 1395dd(e)(1)(A)(i). Indeed, for the most part, the transfer and stabilization provisions of EMTALA differentiate labor- and non-labor-related emergency medical conditions. Aronin, supra note 91, at 193–96. For example, Congress expressly cabined concern about the welfare of the unborn child "in the case of a woman in labor." See 42 U.S.C. § 1395dd(c)(2)(A). 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 "[i]n the case of a pregnant woman in labor").

[118] See infra notes 119–21 and accompanying text.

[119] *Moyle*, 144 S. Ct. at 2028 (Alito, J., dissenting, joined by Thomas & Gorsuch, JJ.); 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 "[t]he text speaks for itself: EMTALA requires hospitals to stabilize both the pregnant woman and her unborn child" (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56–58 (2012))).

[120] See *Moyle*, 144 S. Ct. at 2038–39 (Alito, J., dissenting, joined by Thomas, J.) (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 preliminary decision to enjoin Idaho law "thwarts the will of the people of Idaho as expressed in law by their elected representatives").

[121] Id. at 2029 (Alito, J., dissenting, joined by Thomas & Gorsuch, JJ.). We observe that Justice 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 Scholars of Jurisprudence John M. Finnis & Robert P. George in Support of Petitioners at 33, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (recognizing that "the mother's

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*.[122] In that case, the Alliance, an association of antiabortion doctors who challenged the Food and Drug Administration's ("FDA") authorization of medication abortion, argued that mailing abortion-related materials violated the Comstock Act—a postal obscenity statute from 1873.[123] At the Supreme Court, Alliance Defending Freedom's brief claimed that the Comstock Act 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 lawful or unlawful,[124] disparaging the many federal cases that say otherwise.[125] During oral 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.[126]

In *Alliance*, the Court ruled unanimously that the plaintiffs had not suffered injury conferring standing to sue.[127] Its decision included lengthy passages of dicta discussing conscience objections to performing abortions that health-care providers might advance.[128] 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,

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?").

[122] 144 S. Ct. 1540 (2024).

[123] See infra Section II.B.

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

[125] Reva B. Siegel & Mary Ziegler, Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It, 134 Yale L.J. 1068, 1137–38, 1138 n.398 (2025) [hereinafter Siegel & Ziegler, Comstockery].

[126] Transcript of Oral Argument at 26–30, 48, 90, *All. for Hippocratic Med.*, 144 S. Ct. 1540 (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 Act problem").

[127] *All. for Hippocratic Med.*, 144 S. Ct. at 1551–52, 1565.

[128] See infra notes 129–31 and accompanying text.

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.[129] This 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.[130] *Alliance* makes no mention of such balancing. The "doctor," Justice Kavanaugh wrote, "may simply refuse."[131] 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."[132]

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.[133]

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 health-care 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

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

[130] See, e.g., Zubik v. Burwell, 578 U.S. 403, 408 (2016) (per curiam) (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, *Zubik*, 578 U.S. 403 (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191))); see also Douglas NeJaime & Reva Siegel, Religious Exemptions and Antidiscrimination Law in *Masterpiece Cakeshop*, 128 Yale L.J.F. 201, 216–18 (2018) (discussing the concern the Court has repeatedly expressed about religious refusals that inflict third-party harm); id. 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).

[131] *All. for Hippocratic Med.*, 144 S. Ct. at 1560.

[132] Moyle v. United States, 144 S. Ct. 2015, 2021 (2024) (Barrett, J., concurring) (citing Transcript of Oral Argument at 89, *Moyle*, 144 S. Ct. 2015 (Nos. 23-276, 23-767)).

[133] See supra note 130 and accompanying text.

for pregnant patients with urgent health-care needs: "Conscientious providers find scarce refuge in the manifold safeguards to practice medicine according to conscience."[134]

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. While the Trump Administration has ended the Biden Administration's EMTALA lawsuit against Idaho in *Moyle*, a separate lawsuit brought by St. Luke's Health System has revived the question of EMTALA's interpretation.[135] At the same time, the Trump Administration may enforce the Comstock Act as a no-exceptions ban[136]—or further expand conscience protections for physicians who refuse care to pregnant patients, building on a precedent set during Trump's first term.[137]

[134] Fox, supra note 42, 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"). We have observed that conscience-based regimes have privileged certain kinds of conscience claims over others. See Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 Yale L.J. 2516, 2587–88 (2015) (raising concern about harms involved when "lawmakers and courts distinguish among religious claimants" (emphasis omitted)); supra note 16 and accompanying text.

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*, which was then still unlawful. See Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling 29–31 (Linda Greenhouse & Reva Siegel eds., 2010) [hereinafter Before *Roe*] (chronicling the work of the Clergy Consultation Service); accord Tom Davis, Sacred Work: Planned Parenthood and Its Clergy Alliances 126–35 (2005); Gillian Frank, The Pastoral Was Political: Religious Rights and Reproductive Freedom Before *Roe*, J. Am. Acad. Religion (forthcoming) (manuscript at 5–10) (on file with authors).

[135] Ollstein, supra note 18. Project 2025, a blueprint for the second Trump Administration, called for the withdrawal of both the Biden Administration's EMTALA guidance and the suits it had filed. Heritage Found., 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]. On the St. Luke's Health System suit and the district court injunction protecting St. Luke's providers, see Kelcie Moseley-Morris, New Court Order Shields Certain Idaho Doctors from Prosecution for Emergency Abortion Care, Idaho Cap. Sun (Mar. 21, 2025, 3:37 PM), https://idahocapitalsun.com/2025/03/21/new-court-order-shields-certain-idaho-doctors-from-prosecution-for-emergency-abortion-care/ [https://perma.cc/E64F-CEFG].

[136] On the Trump Administration's potential use of the Comstock Act, see Siegel & Ziegler, Comstockery, supra note 125, at 1156–57.

[137] See 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/hea

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' lives 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 the 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 an article in the *Yale Law Journal* on the Comstock Act[138] while developing new evidence from a wide range of sources: statutes, judicial decisions, newspaper reports, and market practices. Section II.C canvasses examples of exemptions protecting health care in other statutory contexts.

Our account identifies 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, much more than inaction was involved. The evidence we present demonstrates that American law made self-conscious commitments—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

lth-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").

[138] See Siegel & Ziegler, Comstockery, supra note 125.

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.

A. Physician Discretion in the First Era of Criminalization

Today, laws criminalizing abortion allow physicians relatively little discretion.[139] 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.[140]

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 ("AMA") had succeeded in making abortion a crime, even early in pregnancy, in most states.[141] 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 physicians' professional judgment.[142]

[139] See supra Section I.A.

[140] Monica Eppinger argues that this discretion reflected an older common law understanding of exceptions for health. Monica E. Eppinger, The Health Exception, 17 Geo. J. Gender & L. 665, 692–706 (2016) (charting the rise of a "curative intent" doctrine in the context of a health exception).

[141] See Reagan, supra note 68, at 10–18 (describing waves of criminalization in the nineteenth century); see also Janet Farrell Brodie, Contraception and Abortion in Nineteenth-Century America 266–88 (1994) (detailing the criminalization campaign of the nineteenth century).

[142] 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 "poison[s]" 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's 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 C. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800–1900, at 175–82 (1978), and worried that abortion providers would damage the reputation of a fledgling medical profession, see Reagan, supra note 68, at 85–87. Regular physicians thus expected criminal abortion laws to strictly regulate the practice of their competitors while protecting the discretion of regular physicians. See id. at 13.

The system that resulted was not without its tensions: arrests and investigations were unusual but more common than convictions;[143] regular physicians worried that non-physician abortion providers would damage the reputation of an emerging profession,[144] while assuming that regular physicians themselves deserved wide latitude in making decisions about when the life of a patient was threatened.[145] 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 professional judgment to protect life and health.[146] 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, convictions, and harsh penalties.[147] 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.[148]

[143] See Reagan, supra note 68, at 97, 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 169–71.

[144] Id. at 86–87 (detailing the "[a]nxiety [within the medical profession] about the damage done by physician-abortionists to the reputation of the medical profession as a whole").

[145] See, e.g., Wm. H. Parish, Communications: Criminal Abortion, *in* 68 Medical and Surgical Reporter 644, 645–46 (Harold H. Kynett ed., Philadelphia, R.C. Penfield 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 though 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.").

[146] 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 328–29 (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 lifesaving or advised by other physicians to be as 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, 111 n.11 (1938) (collecting cases). 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.").

[147] Alicia Gutierrez-Romine, From Back Alley to the Border: Criminal Abortion in California, 1920–1969, at 73–104 (2020).

[148] See infra notes 162–80 and accompanying text.

These exemptions helped delineate criminal acts of abortion. Criminal abortion laws often referred to the crime of "procuring of abortion."[149] In the late nineteenth century, "abortion" was synonymous with miscarriage.[150] 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."[151] *Black's Law Dictionary* long employed a similar definition.[152]

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,[153] made clear that the law should exempt defendants from prosecution when "abortion [was] necessitated at the hands of physicians to save the mother's life."[154]

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."[155] Hale further observed that Virginia and Ohio also "exempt[ed] from punishment any physician, or other person, where the act is done in good faith, with intent to preserve the life of either mother or child."[156]

[149] See infra notes 197–201 and accompanying text.

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

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

[152] 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).

[153] Reagan, supra note 68, at 11; Sara Dubow, Ourselves Unborn: A History of the Fetus in Modern America 16–20 (2010).

[154] Horatio R. 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 146, 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").

[155] Hale, supra note 146, at 327, 331. There was slight variation in how each state worded its exemption. See id.

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

State statutes sometimes made this discretion explicit, in some cases permitting abortion when "advised by two physicians to be necessary for [such] purpose"[157] or when "advised by a respec[t]able physician" or a "physician to be necessary for that purpose."[158] Still others exempted any procedure "deem[ed] . . . necessary" by a physician[159] or where a physician had the "intent to save the life of such woman, or to prevent serious and permanent bodily injury to her."[160] 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.[161]

[157] An Act to Prevent and Punish Feticide or Criminal Abortion in the State of Georgia, *in* Acts and Resolutions of the General Assembly of the State of Georgia, Passed at the Regular Session of January, 1876, at pt. 1, tit. 12, No. 130, § 2 (n.p., H.G. Wright 1876); An Act Concerning Crimes and Punishments; Proceedings in Criminal Cases; and Prison Discipline, *in* The Revised Statutes of the State of New-York pt. 4, ch. 1, tit. 2, § 9 (Albany, Packard & Van Benthuysen 1829); id. tit. 6, § 21; Rights of Persons Accused of Crimes and the Punishment Thereof, *in* The Revised Statutes of the State of Michigan, Passed and Approved May 18, 1846, at tit. 30, ch. 153, §§ 33–34 (Detroit, Bagg & Harmon 1846); An Act to Punish Certain Crimes Therein Named, *in* Laws of the State of New Hampshire, Passed November Session, 1848, at ch. 743, §§ 1–2 (Concord, Butterfield & Hill 1849); Offenses Against Life and Person, *in* The Revised Statutes of the State of Wisconsin ch. 164, § 11 (Chicago, W.B. Keen 1858); An Act to Provide for the Punishment of Crime, and Proceedings in Criminal Cases, *in* The Acts and Resolutions Adopted by the Legislature of Florida, At Its First Session (1868), at ch. 3, § 11 (Tallahassee, Tallahassee Sentinel 1868). There was variation in how each state worded the conditions under which abortion was permitted.

[158] Alabama, for example, used the "respec[t]able physician" language, see An Act Regulating Punishments Under the Penitentiary System, *in* Acts Passed at the Annual Session of the General Assembly of the State of Alabama ch. 6, § 2 (Tuscaloosa, Hale & Phelan 1841), while Kansas referred to procedures "advised by a physician," see An Act Regulating Crimes and Punishments of Crimes Against the Persons of Individuals, *in* General Laws of the Territory of Kansas, Passed at the Fifth Session of the Legislative Assembly ch. 28, §§ 10, 37 (Lawrence, Herald of Freedom Steam Press 1859). Missouri referred to procedures "advised by a physician to be necessary for" preserving life. Crimes and Punishments, *in* The Revised Statutes of the State of Missouri, 1899, at ch. 15, art. 2, § 1825 (Jefferson City, Trib. Printing Co. 1899).

[159] An Act Concerning Crimes and Punishments, *in* Laws of the Territory of Idaho, First Session ch. 4, § 42 (Lewiston, James A. Glascock 1864); An Act Concerning Crimes and Punishments, *in* Acts, Resolutions and Memorials, of the Territory of Montana, Passed by the First Legislative Assembly ch. 4, § 41 (Virginia City, D.W. Tilton & Co. 1866); Of Crimes and Punishments, *in* The Howell Code, Adopted by the First Legislative Assembly of the Territory of Arizona ch. 10, § 45 (Prescott, Off. of the Ariz. Miner 1865).

[160] An Act Defining Crime and Providing for the Punishment Thereof, *in* General Laws, Memorials and Resolutions of the Territory of Wyoming, Passed at the First Session of the Legislative Assembly ch. 3, § 25 (Cheyenne, S. Allan Bristol 1870).

[161] See Brief for Amici Curiae Historians with Expertise in the History of Abortion Medicine, Law & 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.[162] 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 lifesaving reasons.[163]

In 1878, for example, the Illinois Supreme Court explained that if "abortion was produced or attempted in good faith [in the belief that] it

[162] State courts often exempted procedures believed in good faith to be lifesaving. 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, 77 N.Y. 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 [abortion was] necessary for the protection of the life and health of the patient"), *rev'd on other grounds*, 46 N.E. 607 (N.Y. 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.").

[163] Treatises of the era established that "the majority of the 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 likewise exempted procedures believed in good faith to be lifesaving. See supra note 162 and accompanying text.

were necessary to preserve the life of the mother, there would be no crime."[164] 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."[165] Other courts likewise sought evidence of "an honest effort on the part of the physician to preserve [the patient's] life"[166]—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."[167]

Some medical commentators connected a physician's exemption from prosecution in cases of a threat to a pregnant patient's 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,"[168] and Framers from James Wilson[169] to Alexander Hamilton described the right to self-preservation as "paramount to all positive forms of government."[170] In the nineteenth century, with the increasing criminalization of abortion, physician commentators explained the lawful termination of pregnancy in cases of threats to life and health in terms of "the right of the mother to self-preservation."[171] 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

[164] Beasley v. People, 89 Ill. 571, 577 (1878).

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

[166] *Clements*, 14 P. at 415.

[167] Commonwealth v. Brown, 121 Mass. 69, 77 (1876) (quoting and affirming superior court jury instructions focused on an honest belief that a patient's life or health was threatened).

[168] 554 U.S. 570, 594 (2008) (quoting 1 William Blackstone, Commentaries *139).

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

[170] The Federalist No. 28, at 175 (Alexander Hamilton) (New York, J. & A. McLean 1788). For an account of these arguments, see Evan Bernick, Book Review, 17 Federalist Soc'y Rev. 52, 55–57 (2016) (reviewing Darcy Olsen, The Right to Try (2015)).

[171] C.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 (C.A. Lee ed., 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").

merely possible life."[172] In an era when the law imposed expressly gender-based and subordinate roles on women in marriage,[173] doctors expressed their understanding that there were *limits* on these roles—and therefore on the harms an abortion ban could inflict on a pregnant woman in the service of motherhood. These physicians' appeal to the patient's "right to self-preservation" suggested that she, too, was a person.

That states arrested or prosecuted physicians at all might suggest a *lack* of deference to physicians, notwithstanding standards of good faith in defining life exceptions. 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 procedures not needed to protect health.[174] 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.[175]

In the medical profession's understanding, life exceptions in abortion bans gave regular physicians latitude to respond to a wide array of conditions.[176] 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."[177] In 1914, the *Journal-Lancet*, a

[172] 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).

[173] The law of coverture defined marriage as an openly hierarchical relationship. 1 William Blackstone, Commentaries 746–72 (William G. Hammond ed., San Francisco, Bancroft-Whitney Co. 1890).

[174] 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 procedures done for health-preserving reasons from other 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).

[175] See supra note 174 and accompanying text.

[176] 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 68, at 13 ("Physicians had won the criminalization of abortion and retained to themselves alone the right to induce abortions when they determined it necessary.").

[177] L. Dennis, Ethics of Abortion, 5 Am. J. Homeopathic Materia Medica & Rec. Med. Sci. 115, 118–19 (1872); see also Robert Campbell Eve, Original Communications: The Medico-

medical journal, listed examples of when a lifesaving 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."[178] As the historian Leslie Reagan has shown, for example, one of the leading indications for lifesaving 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.[179]

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 foetus may be destroyed to save the life of the mother or to prevent serious mischief from befalling her person."[180] A well-known 1893 legal-medical treatise likewise explained that if a continuing pregnancy "is going to destroy the life or intellect, or to permanently ruin the health of a patient, abortion should be brought on."[181] Though it was "always best to fortify one's opinion by consultation with a reputable colleague," as another physician explained in the *Lancet-Clinic* in 1906, if a physician "believes the life of the mother is dependent on the sacrifice of the fetus, he can operate without fear."[182] Writing in 1914 in the *American Journal of Obstetrics and Diseases of Women and Children*, a leading medical journal, Dr. William Nicholson described the "wide latitude" physicians were granted under then-prevailing ethical rules when determining

Legal, Legal, and Moral Aspects of Criminal Abortion and Infanticide, 11 Atlanta Med. & Surgical J. 516, 520 (1894) (describing as justifications pelvic deformation, "obstinate vomiting," "cases of pregnancy complicated with insanity," "certain diseases of the uterus," "placenta praevia," and vaginal scarring).

[178] Criminal Abortions, 34 J.-Lancet 82, 82 (1914). Some physicians took a narrower view, see Reagan, supra note 68, at 64–65, which describes the comparably narrow view articulated by the AMA, but discretion to disagree was woven into the system.

[179] Reagan, supra note 68, at 63 ("Excessive vomiting was the most important indication for abortion and one which allowed women and their doctors room for maneuvering."); Luker, supra note 176, at 36–38; see also W.W. Jaggard, Society Reports: The Relation of Endometritis Gravidarum to the Persistent Vomiting of Pregnancy, 58 Med. & Surgical Rep. 634, 634 (1888) (discussing abortion as a response to "the [p]ersistent [v]omiting of [p]regnancy").

[180] Dennis, supra note 177, at 118.

[181] T. Gaillard Thomas, Abortion and Its Treatment, from the Stand-Point of Practical Experience 99 (New York, D. Appleton & Co. 1893).

[182] M.A. Tate, Response, The Legal Responsibility of the Physician for the Unborn Child, 96 Lancet-Clinic 155, 156 (1906); Bacon, supra note 171, at 1983.

whether abortion was justified to protect a woman against a "danger of losing her life or health."[183]

There were shifts over time. After allowing greater access to abortion during the Great Depression of the 1930s,[184] many jurisdictions seemed to have increased prosecutions in the 1940s, targeting not only negligent physicians but also skilled providers.[185] 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.[186] But these committees failed to satisfy the members of a growing movement for abortion's decriminalization.[187] States began to enact laws codifying a range of indications for therapeutic abortion,[188] one of which was challenged in *Roe*'s companion case, *Doe v. Bolton*.[189] *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.[190]

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 were also derived from customary understandings that guided the judgments of the 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

[183] See Nicholson, supra note 172, at 1004–05 (emphasis omitted).

[184] See Reagan, supra note 68, at 130–52; Luker, supra note 176, at 52–65.

[185] See Reagan, supra note 68, at 160–73 (arguing that "[t]he repression of abortion during the 1940s and 1950s took new forms"); Gutierrez-Romine, supra note 147, at 138–60 (describing how "law enforcement's handling of abortion took a startlingly repressive turn").

[186] 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).

[187] On the reform movement, see David J. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of *Roe v. Wade* 210–43 (1998); Before *Roe*, supra note 134, at 24–42.

[188] On the spread of therapeutic exceptions as part of a model developed by the American Law Institute, see Before *Roe*, supra note 134, at 24; Garrow, supra note 187, at 210–43.

[189] 410 U.S. 179, 182–83, 201 (1973) (striking down as unconstitutional a statute "patterned upon the American Law Institute's Model Penal Code").

[190] See Roe v. Wade, 410 U.S. 113, 154, 164–65 (1973).

professional norms. There was both 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.[191] 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 of the Comstock Act's obscenity provision, judges and even Anthony Comstock himself assumed protection for certain forms of health care.

B. The Comstock Act and the Preservation of Health

Dobbs canvassed the state abortion bans we have just considered,[192] yet devoted little attention to the case law enforcing life exceptions in those laws.[193] Similarly, the *Dobbs* opinion made no mention of the Comstock Act, which Justice Alito called a "prominent provision" in the oral argument in *Alliance*.[194] "It's not some obscure subsection of a complicated obscure law," Justice Alito remarked.[195] "Everybody in this field knew about it."[196] 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.[197] It was not.

[191] See infra Section III.A.

[192] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2249–56 (2022) (offering a lengthy historical account to "set the record straight").

[193] See id. at 2260 (observing "if the 'long sweep of [our] 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" (quoting id. at 2326 (Breyer, Sotomayor & Kagan, JJ., dissenting))).

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

[195] Id.

[196] Id.

[197] This claim was part of the briefing in the Supreme Court in *Alliance*, in which Alliance Defending Freedom argued for the Alliance for Hippocratic Medicine that the Comstock Act

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 an article in the *Yale Law Journal*.[198]

Congress passed the Comstock Act in 1873 to curb obscenity—from stimulants to illicit sex, including sex without procreation in marriage—not to criminalize health care.[199] 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.[200] 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.[201]

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, 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.[202]

A second provision prohibiting writings and articles in the U.S. mails stated

> [t]hat 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

ban on mailing applied to all abortion, whether lawful or unlawful, and disparaged the many federal cases that say otherwise. See supra notes 124–25 and accompanying text.

[198] See supra note 138 and accompanying text.

[199] Siegel & Ziegler, Comstockery, supra note 125, at 1105–15.

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

[201] Id. at 1114–37 (tracing how resistance to the Comstock Act changed understandings of "health care" exempted from criminalization).

[202] Act of Mar. 3, 1873, ch. 258, § 1, 17 Stat. 598, 598 (emphasis omitted). This provision was eventually repealed by Congress in 1948. Act of June 25, 1948, ch. 645, § 21, 62 Stat. 683, 862–64 (repealing 18 U.S.C. § 512 (1946)).

> 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.[203]

A third provision prohibited the importation of "any of the hereinbefore-mentioned articles or things."[204]

We read the provision on items "for causing unlawful abortion" and the second section on writings or articles "designed or intended for . . . procuring of abortion"[205] as regulating terminations done with unlawful intent. Recall that in the era, "abortion" was understood to have the same meaning as "miscarriage."[206] To cause a miscarriage was not understood to be criminal unless done with unlawful intent.[207] As *Black's Law Dictionary* later explained, abortion was a "crime in law" only if "brought about with a malicious design, or for an unlawful purpose."[208] 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.[209]

Early interpretations of the Comstock Act reinforced this understanding of the statute's exemption for life- and health-preserving care.[210] 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

[203] Act of Mar. 3, 1873, ch. 258, § 2, 17 Stat. 598, 599.

[204] Id. § 3, 17 Stat. at 599. For enactment history of the Comstock Act, including discussion of the exemption of health care, see Siegel & Ziegler, Comstockery, supra note 125, at 1092–1100. 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 Exemption, 1873–1936, 23 J. Gilded Age & Prog. Era 444, 444–47 (2025).

[205] In cases like *United States v. One Package*, 86 F.2d 737, 738–39 (2d Cir. 1936), courts offered a detailed account of the differences between Sections One and Two of the Comstock Act.

[206] See supra notes 150–52 and accompanying text.

[207] See supra notes 150–52 and accompanying text.

[208] Abortion, Black's Law Dictionary, supra note 152.

[209] Siegel & Ziegler, Comstockery, supra note 125, at 1077, 1079, 1098, 1167.

[210] See id.

related to life and health.[211] 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."[212] Other judges reasoned that "proper and necessary communication between physician and patient touching any disease may properly be deposited in the mail,"[213] as well as "standard medical works" and direct physician-patient communications about "physical ailments, habits, and practices."[214] Even Anthony Comstock, in a 1915 interview with *Harper's Weekly*, explained that the Comstock Act exempted medically necessary procedures and targeted only "infamous doctors who advertise or send their foul matter by mail," not physicians seeking to protect the life or health of their patients.[215]

By the early twentieth century, market demand for condoms seemed to have expanded health-based access beyond the confines of the patient-physician relationship.[216] 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.[217] 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."[218] In the early twentieth century, "health" and "hygiene"

[211] See id. at 1077, 1098.

[212] Burton v. United States, 142 F. 57, 63 (8th Cir. 1906).

[213] United States v. Smith, 45 F. 476, 478 (E.D. Wis. 1891).

[214] United States v. Clarke, 38 F. 732, 735 (E.D. Mo. 1889).

[215] Mary Alden Hopkins, Birth Control and Public Morals: An Interview with Anthony Comstock, Harper's Wkly., May 22, 1915, at 489.

[216] 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 condoms available only through a doctor's prescription).

[217] See Siegel & Ziegler, Comstockery, supra note 125, at 1135–37.

[218] People v. Sanger, 118 N.E. 637, 637–38 (N.Y. 1918) (citing N.Y. Penal Law § 1145 (1918)). Margaret Sanger had violated New York law by 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 125, at 1118–30, 1143–48.

became euphemisms for over-the-counter access to birth control and even abortifacient drugs for women.[219]

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.[220] 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.[221]

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 health care from criminal regulation existed in other contexts. We briefly consider yet another example of this tradition.

C. Health-Care Access Beyond Reproductive Care

Laws regulating the sale of alcohol also protected health care against criminalization by exempting alcohol used for medical purposes.[222] 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).[223] Even though the AMA concluded in

[219] David M. Kennedy, Birth Control in America: The Career of Margaret Sanger 212 (1970) (explaining that "[u]nder cover of [the prevention of diseases] 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 66 (Dec. 2020) (Ph.D. dissertation, State University of New York at Albany) (ProQuest).

[220] See Siegel & Ziegler, Comstockery, supra note 125, at 1132–38.

[221] Id.

[222] See infra notes 224–29 and accompanying text.

[223] 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. 541, 542 (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 (1895) (holding that a license-holding

1917 that use of medicinal alcohol had "no scientific basis" and should be discouraged,[224] 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 some known ailment."[225] 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.[226] 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."[227]

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.[228]

pharmacist could not be prosecuted if he acted in good faith in prescribing alcohol for medicinal purposes).

[224] 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).

[225] National Prohibition Act, ch. 85, tit. 2, § 7, 41 Stat. 305, 311 (1919), *invalidated by* U.S. Const. amend. XXI, § 1.

[226] On the abuse of medicinal alcohol exceptions, see Jones, supra note 224, 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); Sherman v. United States, 10 F.2d 17, 18–19 (6th Cir. 1926) (same).

[227] 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 law-breakers").

[228] 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

In *Lambert v. Yellowley*, the Court likewise rejected a challenge to a law limiting the volume of liquor a physician could prescribe.[229]

Nevertheless, even in *Everard's* and *Lambert*, 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 for other conduct.[230] 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.[231] The prevalence of medicinal alcohol reinforced that physicians still enjoyed significant discretion: "By the end of prohibition, 10 million prescriptions for whiskey for medicinal purposes were being filled by pharmacists each year."[232]

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

the government's control, but "to the professional judgment of the physician." Appel, supra note 224, at 360.

[229] 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 . . . .").

[230] See supra Section II.A. We observe distinctions, too, between the regulation of abortion and that of medicinal alcohol. While the medical profession became increasingly divided about whether alcohol had any medical benefit, as the Court noted in *Everard's* and *Lambert*, 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 Developmental Drugs v. von Eschenbach, 495 F.3d 695, 697, 713 (D.C. Cir. 2007) (en banc) (holding that patients had no right to access potentially toxic drugs with no proven benefit).

[231] See supra notes 224–29 and accompanying text.

[232] Joshua H. Stout, Just What the Doctor Ordered: Medicinal Alcohol, Opioid Prescriptions, and the Accessibility of Folk Devils, 44 Deviant Behav. 313, 321–22 (2023) (citations omitted). 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.

prerogatives of doctors and the welfare of the patients they treated.[233] 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 of abortion bans—legislators, physicians, and prosecutors coordinated in protecting doctors' prerogative to provide pregnant patients urgently needed health care.[234] *Roe v. Wade* gave express constitutional protection to this customary understanding and widespread practice 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.[235]

Does *Dobbs* end—or instead protect—the centuries-old tradition of protecting a pregnant woman's access to life- or health-preserving medical care under abortion bans? In what follows, we make the case that *Dobbs preserves* that traditional understanding.

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[233] 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 703–11 (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.").

[234] See supra Section II.A.

[235] 410 U.S. 113, 136–43 (1973) (tracing criminalization of abortion in England and the United States with attention to protections 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").

Addressing the question whether the Constitution protected "elective abortion[],"[236] *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."[237] In cases like *Moyle*, states reason as if *Dobbs* provides states the 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.[238]

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 throughout the case.[239] 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,"[240] a category that excluded procedures performed in good faith to preserve life or health.[241] In short, *Dobbs* does not address—and may not even reverse—the portions of *Roe* that, consistent with longstanding tradition, authorize terminations that doctors judge necessary to protect life or health.[242] At the very least, *Dobbs* is not 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 discretion to provide pregnant patients urgently needed medical care, *Dobbs* provides authority for claims on the Constitution's due-process liberty guarantee.[243]

[236] For the question presented in *Dobbs*, see supra note 1 and accompanying text.

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

[238] For sources discussing this federalism claim, see supra note 92 and accompanying text.

[239] *Dobbs*, 142 S. Ct. at 2244 ("We granted certiorari to resolve the question whether all pre-viability prohibitions on elective abortions are unconstitutional . . . ." (internal quotation marks omitted) (citation omitted)); id. at 2310 (Roberts, C.J., concurring).

[240] See supra notes 151–52 and accompanying text.

[241] See supra text accompanying notes 151–81.

[242] Roe v. Wade, 410 U.S. 113, 164–65 (1973) (allowing regulation of abortion in the third trimester to protect potential life, "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother").

[243] 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

This question has taken on increasing importance in federal court. One plaintiff, Dr. Stacy Seyb, has 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 governmental interference because this right is deeply rooted in the nation's history and tradition."[244] The plaintiff points 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—and has survived a motion to dismiss by persuading the District of Idaho that the state's abortion bans arguably violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[245]

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 and the history of physician discretion we have documented. We ask: Under *Dobbs*, is it sufficient to show that protection for a fundamental liberty interest is "deeply rooted in this Nation's history and tradition"[246]—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.[247]

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.[248] Finally, we discuss recent cases in abortion-ban states in which courts claiming to

'implicit in the concept of ordered liberty.'" *Dobbs*, 142 S. Ct. at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[244] See Complaint ¶ 8, Seyb v. Members of the Idaho Bd. of Med., No. 24-cv-00244 (D. Idaho Mar. 31, 2025).

[245] Memorandum Decision & Order at 29–37, *Seyb*, No. 24-cv-00244, 2025 WL 963957, slip op. at 11–13; Plaintiffs' Consolidated Response in Opposition to Defendants' Motions to Dismiss at 15–20, *Seyb*, No. 24-cv-00244.

[246] *Dobbs*, 142 S. Ct. at 2283 (quoting *Glucksberg*, 521 U.S. at 721).

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

[248] See infra Section III.B.

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.[249]

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 Fourteenth Amendment and defends this reading of *Glucksberg*'s history-and-tradition 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 *Planned Parenthood of Southeastern Pennsylvania v. 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."[250] 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.'"[251] *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.'"[252]

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."[253] Historical inquiry, the Court reasoned, would

[249] See infra Section III.C.

[250] *Dobbs*, 142 S. Ct. at 2236 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

[251] Id. at 2242 (quoting *Glucksberg*, 521 U.S. at 721).

[252] Id. at 2247 (quoting *Glucksberg*, 521 U.S. at 711, 720–21).

[253] Id.

constrain judicial review and prevent "judicial policymaking."[254] 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.[255] "[I]f the 'long sweep of [our] 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."[256]

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."[257] 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.[258] 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 tradition if at the Founding and for generations after, the common law allowed abortion until 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 issued.[259]

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[254] Id. at 2248.

[255] Id. at 2248–49, 2253.

[256] Id. at 2260 (quoting id. at 2326 (Breyer, Sotomayor & Kagan, JJ., dissenting)).

[257] Id. at 2253–54.

[258] 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.").

[259] Specifically, the Organization of American Historians explained that

> [o]ur 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.

Org. of Am. Historians, Joint OAH-AHA Statement on the *Dobbs v. Jackson* Decision 1 (2022), https://www.oah.org/site/assets/files/8924/oah-aha_dobbs.pdf [https://perma.cc/ULS3-NPFV].

To shore up its argument that the abortion right recognized in *Roe* was at odds with the nation's history and tradition, *Dobbs* discounted the significance of quickening[260] and 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 legal *right*."[261] *Dobbs* emphasized that "no common-law case or authority . . . remotely suggests a positive *right* to procure an abortion at any stage of pregnancy."[262]

Did the Court include the quoted passages in *Dobbs* to offset weaknesses in the majority's historical case for overruling *Roe*—or to announce elements of a new standard for all substantive-due-process rights? 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.[263] May states now criminalize such conduct, given

[260] *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. But *Dobbs* itself relies on the work of antiabortion scholars to reject the overwhelming consensus of historians about the role of quickening. Id. at 2254 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) (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).

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

[262] Id. at 2251. As the Court summarized,

> [u]ntil 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.

[263] See supra notes 256, 261–62 and accompanying text.

that, before *Roe*, states that provided a pregnant woman access to urgently needed medical care did not characterize 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 claims under the liberty guarantee today. Consider how the Court responded to the *Dobbs* dissenters' worry that *Dobbs* undermined other rights.[264] The right to use contraception recognized in *Griswold v. Connecticut*[265] 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.[266] 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.[267] 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.[268] 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* and *Casey* termed 'potential life.'"[269] Writing in concurrence in *Dobbs*, Justice Thomas called on the Court to overturn *Griswold v. Connecticut*, *Lawrence v. Texas*, and

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

[265] 381 U.S. 479, 485–86 (1965).

[266] See Siegel & Ziegler, Comstockery, supra note 125, at 1085–1114; Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 175 (1985) ("[T]here were few explicit restrictions on contraception until the 1870s.").

[267] Siegel & Ziegler, Comstockery, supra note 125, at 1080, 1085–1114.

[268] *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'" (citation omitted)).

[269] Id. (quoting Roe v. Wade, 410 U.S. 113, 150 (1973) (emphasis omitted)); 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.").

Obergefell v. Hodges, but other members of the *Dobbs* majority declined to join his opinion.[270]

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*."[271] Here, the Court intimated that its decision was grounded in a moral judgment about abortion (centered on the value of what *Roe* and *Casey* called "potential life")[272]—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-Tradition 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."[273] *Dobbs* seemed to cite *Glucksberg* for the proposition that the Court should protect only those interests recognized as rights in our history and tradition.[274] 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* over twenty times.[275] *Glucksberg* opens by announcing, "We begin, as we do in all due process cases, by

[270] Id. at 2301, 2303–04 (Thomas, J., concurring) (calling for the overruling of *Griswold*, *Lawrence*, and *Obergefell* and stressing that "[t]he harm caused by this Court's forays into substantive due process remains immeasurable").

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

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

[273] Id. at 2246.

[274] See supra notes 258–62 and accompanying text.

[275] See Washington v. Glucksberg, 521 U.S. 702, 726–29 (1997); see also id. at 727 (situating *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").

examining our Nation's history, legal traditions, and practices," and then cites *Casey first* in support of this proposition.[276]

Nor does *Glucksberg* extend constitutional protection to only those liberties long recognized as rights. *Glucksberg* repeatedly speaks of fundamental "liberty interest[s]" as well as "fundamental rights,"[277] and illustrates its approach to history and tradition by citing cases concerning rights recognized in the late twentieth century, most prominently *Roe*, *Casey*, *Griswold*, and *Loving v. Virginia*.[278] *Glucksberg* relies particularly on *Moore v. City of East Cleveland*,[279] which discussed a venerable *custom* of cohabitation among non-nuclear blood relatives without asserting that such cohabitation was regarded as a right.[280]

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.[281] The Supreme Court never

[276] Id. at 710.

[277] Id. at 709, 719–21.

[278] Id. at 720–21, 727 & n.19.

[279] Id. at 710 (citing to *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 to *Moore*, 431 U.S. at 503, for the importance of "examining our Nation's history, legal traditions, and practices" in determining the scope of substantive due process).

[280] *Moore*, 431 U.S. at 504–05 (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").

[281] 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 279, that *Casey* faithfully employed the history-and-tradition test applied in *Glucksberg* itself. See Memorandum from C.J. William H. Rehnquist to the Conf. 1, Washington v. Glucksberg, No. 96-110 (June 11, 1997) (on file with John Paul Stevens Papers, Library of Congress, Box 758, Folder 2) (explaining that *Casey* applied rather than "supplant[ed] the traditional method of 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." 491 U.S. 110, 127 n.6 (1989) (Scalia, J., concurring, joined by Rehnquist, C.J.). Chief Justice 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

understood *Glucksberg* as requiring *Casey*'s overruling until the shifts in the Court's membership that produced the *Dobbs* decision itself.[282] Does

and restrain our exposition of the Due Process Clause." C.J. William H. Rehnquist, 5th Draft Opinion 16, Washington v. Glucksberg, No. 96-110 (June 17, 1997) (on file with John Paul Stevens Papers, Library of Congress, Box 757, Folder 7). 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. Sandra Day O'Connor to C.J. William H. Rehnquist 1, Washington v. Glucksberg, No. 96-110 (June 19, 1997) (on file with the John Paul Stevens Papers, Library of Congress, Box 758, Folder 2); 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 Justice O'Connor's efforts to protect *Casey* in the drafting of *Glucksberg*).

Chief Justice Rehnquist accommodated this request. C.J. William H. Rehnquist, 6th Draft Opinion 14–17, Washington v. Glucksberg, No. 96-110 (June 24, 1997) (on file with the John Paul Stevens Papers, Library of Congress, Box 757, Folder 7); *Glucksberg*, 521 U.S. at 721 (explaining that "[o]ur Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking' " (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); Reva B. Siegel, Foreword: Democratizing Constitutional Memory, 123 Mich. L. Rev. (forthcoming 2025) (manuscript at 6–7) (on file with authors) [hereinafter Siegel, Democratizing Constitutional Memory]; see also Reva B. Siegel, The Levels-of-Generality Game: "History and Tradition" in the Roberts Court, 47 Harv. J.L. & Pub. Pol'y 563, 579–90 (2024) [hereinafter Siegel, The Levels-of-Generality Game] (explaining how the *Dobbs* Court "dialed down the level of generality" when analyzing how abortion rights were understood in 1868); infra note 282 and accompanying text (reconstructing the fight over *Michael H.*, 491 U.S. at 127 n.6).

[282] Conservatives on the Court sought to narrow the standard for substantive due process to foreclose sexual and reproductive rights claims but were outvoted for decades. 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.*, which they were the only Justices to join, during the same Term that they sought to overrule *Roe* in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). See *Michael H.*, 491 U.S. at 127 n.6 (Scalia, J., concurring, joined by Rehnquist, C.J.). But Justice Scalia and Chief Justice Rehnquist failed—and failed to secure a majority for this view so long as Justices O'Connor and Kennedy were on the Court.

In 1989, Justices O'Connor and Kennedy refused to join *Michael H.* footnote 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, Justices 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

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 interest[s],"[283] and required "a 'careful description' of *the asserted fundamental liberty interest*."[284] *Dobbs* obscures this by referring to *Glucksberg*'s careful-description requirement as pertaining to a "right" rather than directly quoting the "fundamental liberty interest"[285] 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.[286]

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 in either *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.

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.*, 491 U.S. at 127 n.6 (Scalia, J., concurring, joined by Rehnquist, C.J.))). In 1997, Justices O'Connor and Kennedy insisted on removing references to *Michael H*. in *Glucksberg*. See supra note 281 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").

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

[284] Id. at 721 (emphasis added) (citations omitted).

[285] 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.").

[286] See supra notes 268, 273 and accompanying text.

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.[287] 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 historical recognition of a right, but by identifying dense and binding customs, many of which were written into state statute. We observe that jurists evaluating rights claims in conservative abortion-banning states are unlikely to dilute history-and-tradition standards.[288]

Consider the Oklahoma Supreme Court's spring 2023 decision in *Oklahoma Call for Reproductive Justice v. Drummond* (*Drummond I*).[289] 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."[290] 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."[291] The court acknowledged that Oklahoma had criminalized most abortions since

[287] See supra Sections III.A–B.

[288] 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, 99 N.Y.U. L. Rev. 2082, 2084–85, 2102–05 (2024). Some states have been more overtly critical of *Dobbs*'s approach to history and tradition. See, e.g., Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 906, 910 (Pa. 2024) (rejecting a history-and-tradition framework and applying a state-based "inherent right[s]" 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."

[289] 2023 OK 24, 526 P.3d 1123.

[290] Id. ¶ 7, 526 P.3d at 1129.

[291] Id.

shortly after statehood.[292] But while "*Dobbs* focused on the criminal element of such statutes," the court insisted "that is only half the story in Oklahoma."[293]

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."[294] 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.[295] "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."[296]

At the same time, breaking from the practice of most jurisdictions before *Roe*,[297] the Oklahoma Supreme Court—like the Texas Supreme Court in the case of Kate Cox[298]—suggested that physicians would be protected only if their decisions about protecting life were objectively reasonable.[299] As a result, most abortions in the state remain criminalized, and intense chill persists.[300] Patients are forced to travel out of state—at least 2,300 did so in 2022 alone[301]—or to order pills online (Oklahoma remains one of the states that receives the largest number of pill requests per capita from shield states).[302] *Drummond I* shows how state courts do not require recognition of an antecedent right, even as it reminds us that recognizing a right to lifesaving health care may not be transformative if

[292] Id.
[293] Id. ¶ 8, 526 P.3d at 1130.
[294] Id.
[295] Id.
[296] Id.
[297] See supra Section II.A.
[298] In re State, 682 S.W.3d 890, 894 (Tex. 2023) (per curiam).
[299] *Drummond I*, ¶ 9, 526 P.3d at 1130. For discussion of Cox's case, see supra notes 56–59 and accompanying text.
[300] See infra notes 301–02 and accompanying text.
[301] Ari Fife, As More Women Leave Oklahoma to End Pregnancies or Order Pills Online, Lawmakers Seek Tougher Laws, The 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 [https://perma.cc/3C2M-VJZT].
[302] Id.; Abigail R.A. Aiken, Jennifer E. Starling, James G. Scott & Rebecca Gomperts, Requests for Self-Managed Medication Abortion Provided Using Online Telemedicine in 30 US States Before and After the *Dobbs v. Jackson Women's Health Organization* Decision, 328 JAMA 1768, 1769 (2022).

it does not explain (as exemptions once did) how such a right protects physician discretion.

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.[303] In *Members of the Medical Licensing Board of Indiana 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."[304] As evidence of this tradition, the court cited both Indiana's longstanding life exception and similar provisions recognized by *Dobbs*, which the court stated 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."[305] 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."[306] Partly for this reason, Indiana, like Oklahoma, has seen obstetric medical practice chilled even in cases in which an abortion exception might apply,[307] and

[303] In *Blackmon v. State*, a Tennessee Chancery Court held that plaintiff-patients' right to life is fundamental under Article I, Section Eight of the Tennessee Constitution. Memorandum & Order on Plaintiffs' Motion for Temporary Injunction at 18–19, Blackmon v. State, No. 23-1196-IV(I) (Tenn. Ch. Oct. 17, 2024). 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' in the sense that [it] involve[s] 'the basic values that underlie our society.'" Id. (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)) (citing Est. of Alley v. State, 648 S.W.3d 201, 225 (Tenn. Crim. App. 2021)).

[304] 211 N.E.3d 957, 976 (Ind. 2023).

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

[306] Id.

[307] 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 [https://perma.cc/LDB6-TB5W] (citing providers reporting a reluctance to intervene because of "concerns about the potential legal risk of determining what qualifies under the exception").

a new group of plaintiffs has filed suit, insisting on a broader interpretation of the life-and-health exceptions in the state's ban.[308]

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.[309] Without explicitly claiming to interpret *Dobbs*, the North Dakota Supreme Court in *Wrigley v. Romanick* adopted a similar approach to identifying unenumerated rights to the court in *Drummond I*, asking whether North Dakota had "a long history of permitting women to obtain abortions to preserve their life or health."[310] 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.[311] 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."[312] By its terms, the state's exception applied only to threats to life.[313] 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."[314]

The state responded that the idea of a *right* to abortion did "not have long-standing roots in American culture."[315] 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."[316] 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

[308] 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.

[309] Wrigley v. Romanick, 2023 ND 50, ¶ 26, 988 N.W.2d 231, 241.

[310] Id. ¶ 23, 988 N.W.2d at 240.

[311] Compare *Drummond I*, 2023 OK 24, ¶¶ 7–8, 526 P.3d 1123, 1129–30 (explaining that "[t]he law in Oklahoma has long recognized a woman's right to obtain an abortion in order to preserve her life"), with *Romanick*, ¶¶ 22–23, 26, 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 obtaining safety," which "implicitly include[s] the right to obtain an abortion to preserve the woman's life or health" (citing N.D. Const. art. I, § 1)).

[312] *Romanick*, ¶¶ 23–24, 988 N.W.2d at 240–41.

[313] Id. ¶ 24, 988 N.W.2d at 241 (describing an exception for procedures necessary "to preserve . . . life").

[314] Id. ¶ 25, 988 N.W.2d at 241.

[315] Id. ¶ 26, 988 N.W.2d at 241.

[316] Id. (emphasis added).

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."[317]

But the scope of the right recognized in *Romanick* remains in dispute.[318] 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,[319] and litigation about its constitutionality under *Romanick* continues in the state courts, with a district court enjoining enforcement of the law in 2024 and the state supreme court affirming that order in January 2025.[320]

[317] Id. ¶ 31, 988 N.W.2d at 242–43.

[318] See infra notes 319–20 and accompanying text.

[319] N.D. Cent. Code § 12.1-19.1-02 (2023). The older language is set forth in *Romanick*, ¶ 2, 988 N.W.2d at 234–35.

[320] Order on Plaintiffs' Motion for Preliminary Injunction & Defendants' Motion to Strike ¶¶ 22–23, 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). For the state supreme court's decision, see Access Indep. Health Servs., Inc. v. Wrigley, 2025 ND 26, ¶ 31, 16 N.W.3d 902, 915 (reiterating that in North Dakota, a pregnant woman has "a fundamental right to obtain an abortion to preserve her life or her health"). Two justices dissented, arguing that case law, newspaper accounts, and medical literature suggested protection only if a woman was "all but certain to die if the pregnancy continued, and more than one physician was consulted." Id. ¶¶ 69, 71, 73, 16 N.W.3d at 926–28 (Tufte, J., dissenting); see also id. ¶ 97, 16 N.W.3d at 932 (Jensen, C.J., dissenting) (noting he was "persuaded by Justice Tufte's separate" analysis).

Recent lower court decisions in both North Dakota and Georgia again show some concern for access to health- and life-preserving care. See Order on Defendant's Motion for Summary Judgment ¶¶ 25–27, *Wrigley*, No. 08-2022-CV-01608 (N.D. Dist. Ct. Sept. 12, 2024) (holding 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"); Final Order at 18–19, SisterSong Women of Color Reprod. Just. Collective v. State, No. 2022CV367796 (Ga. Super. Ct. Sept. 30, 2024) (enjoining enforcement of Georgia's six-week abortion ban, reasoning that a law that saves a patient "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 . . . violative of the equal protection rights of pregnant women suffering from acute mental health issues"). The Georgia Supreme Court has since vacated the ruling. State v. SisterSong Women of Color Reprod. Justice Collective, No. S25A0300, slip op. at 2 (Ga. Feb. 20, 2025).

We observe that the court in *Wrigley* voiced broader concerns about history-and-tradition analysis that we have voiced in other work. See Order on Defendant's Motion for Summary Judgment ¶ 43, *Wrigley*, No. 08-2022-CV-01608 (N.D. Dist. Ct. Sept. 12, 2024) ("[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."). For discussion of our prior writings on history and tradition, see infra note 398 and accompanying text.

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

To this point we have shown that when state criminal laws obstruct access to urgently needed health care—as abortion bans now do—plaintiffs can invoke the longstanding, widespread custom of exempting health care from criminalization and assert a liberty right to access such care under federal and state constitutions. 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.[321]

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,[322] a claim Professor Sachs advances on originalist grounds. Professor Sachs may be the most prominent originalist to defend *Dobbs*'s reasoning. He reads *Dobbs* to align the decision with his own approach to originalism and with broader interest among originalists in eliminating substantive due process in favor of analysis under the Privileges or Immunities Clause—a position Justice Thomas asserted in *Dobbs*.[323]

We show that Professor Sachs's "Privileges or Immunities"-aligned reading of *Dobbs* is in deep tension with the reasoning of *Glucksberg*, *Dobbs*, and many of the state health-access cases decided after *Dobbs*. We observe at the outset that Professor Sachs reasons on grounds that appear doctrinal but are in fact originalist. He maintains that the Roberts Court was impelled by party presentation—and by fidelity to its own case law—to overturn *Roe* because *Glucksberg* established a history-and-tradition test that required *Casey*'s overruling.[324] But Sachs advances

[321] 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).

[322] See Sachs, Dobbs, supra note 24, at 550–58.

[323] See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2300–04 (2022) (Thomas, J., concurring).

[324] See Sachs, Dobbs, supra note 24, at 548–49, 548 n.50. Sachs briefly notes in a footnote that "*Glucksberg* acknowledged a right to abortion in then-governing precedent, . . . [b]ut this acknowledgment doesn't entail that *Casey* actually *passed* the *Glucksberg* test," drawing an

these claims, which are contestable on doctrinal grounds, as proxies for his own distinctive conception of originalism—and the intuitions on which it rests.

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 day."[325] "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."[326] Sachs characterizes this account as a "positive" account of the law, reflecting "the shared foundations of our legal reasoning."[327] He 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 the Reconstruction Amendments as wartime measures[328]—and yet he does not view *these* social facts about legality as part 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."[329] As we will see, reasoning from this selective rule of recognition, Professor

analogy to debates over the reading of *Grutter v. Bollinger*, 539 U.S. 306 (2003). Sachs, Dobbs, supra note 24, at 548 n.50. For our rejoinder to 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 282 and accompanying text.

[325] Sachs, Dobbs, supra note 24, at 541–42, 541 n.15 (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 24, at 539) ("*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.").

[326] Sachs, Originalism as a Theory of Legal Change, supra note 325, at 838–39.

[327] Id. at 835–36.

[328] Id. at 829–30; see, e.g., Bruce Ackerman, We the People: Transformations 99–119 (1998) (showing how the Reconstruction Amendments conflict with the requirements of Article V); 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.").

[329] Sachs, Originalism as a Theory of Legal Change, supra note 325, at 844.

Sachs reads *Glucksberg* as the modern successor to the Privileges or Immunities Clause, which he then interprets to require *Roe*'s overruling.[330]

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.[331] 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 meaning."[332] Sachs argues *Dobbs*'s approach to *Glucksberg* and the reach of substantive due process aligns with an originalist account of the Privileges or Immunities Clause—advanced by Sachs and his coauthors Professors William 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."[333]

In a coauthored article, 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 the *Slaughter-House Cases*.[334] But just as importantly, Baude, Campbell, and Sachs

[330] Sachs, Dobbs, supra note 24, at 542–49.

[331] 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, 1485 (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").

[332] Sachs, Dobbs, supra note 24, at 539 (emphasis altered) ("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." (emphasis omitted)).

[333] Baude, Campbell & Sachs, General Law, supra note 7, at 1191–93.

[334] 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).

acknowledge that the Supreme Court *rejected* this view in *Slaughter-House* and later in *Erie Railroad Co. v. Tompkins*.[335] For this reason, the three scholars recognize that present authority of the general-law interpretation is indeterminate,[336] and reserve judgment about their history's contemporary implications.[337] 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, thus providing a resource that "might help us both to ground and to redefine substantive due process doctrine."[338]

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 coauthored piece, he argues that general law provides an originalist justification for the dramatic changes that *Dobbs* has introduced into substantive-due-process doctrine.[339] 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."[340] Sachs, by contrast, employs the general-law approach to explain *Dobbs*,[341] and thus to "ground and to *redefine* substantive due process [law]"[342] 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.[343] He speaks as if there are few difficulties in employing a general-law approach that he and his coauthors 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

[335] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75–76 (1873); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938).

[336] See Baude, Campbell & Sachs, General Law, supra note 7, at 1250–52.

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

[338] Id. at 1251–52.

[339] See infra notes 341, 346–50 and accompanying text.

[340] Baude, Campbell & Sachs, General Law, supra note 7, at 1251.

[341] Sachs, Dobbs, supra note 24, at 552–57.

[342] See Baude, Campbell & Sachs, General Law, supra note 7, at 1252 (emphasis added).

[343] Sachs, Dobbs, supra note 24, at 552.

recognized as secured by its Privileges or Immunities Clause in 1868.[344] 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).[345] 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 asserted 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.[346]

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 as a "privilege of American citizenship" or "among the inalienable rights of American citizens" at the time of the Fourteenth Amendment's ratification.[347] "[W]hat matters isn't just whether states [banned the practice]," Sachs concludes, "but whether the American legal system thought they could."[348]

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[344] Id. at 552–55.

[345] Brief for Amici Curiae American Historical Ass'n & Organization of American Historians in Support of Respondents at 4, 6 n.2, 30, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (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").

[346] Sachs, Dobbs, supra note 24, at 552–55, 557–58 (emphasis altered). This leap to apply general law requires more explanation than Sachs has provided. Professors Baude, Campbell, and Sachs 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, General Law, supra note 7, at 1252–53. Sachs's solo-authored account of general law scarcely acknowledges this problem and seems to suggest that a 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 24, at 552–57.

[347] Sachs, Dobbs, supra note 24, at 555.

[348] 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. Id. at 554–55; see infra notes 349–50 and accompanying text.

Speaking as an original-law originalist, Sachs declares the Court was correct 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.[349] "It just shows that most states chose not to prohibit it at the time."[350] 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."[351]

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 did not 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*.

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" (citations omitted)).

[349] Sachs, Dobbs, supra note 24, at 554.

[350] Id. at 554–55 ("In identifying these privileges, what matters isn't just whether states did ban chewing gum . . . , but whether the American legal system thought they could." (emphasis omitted)).

[351] Id. at 539.

i. "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.[352] Simply put, Sachs offers no normative argument for following the Founders' law other than what he observes: that Americans do follow the Founders' law, as lawfully changed.[353] Sachs recognizes that at epochal moments, Americans have accepted changes that the Founders' law did not authorize,[354] 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."[355]

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—particularly the Fourteenth Amendment—had not been ratified in accordance with Article V.[356] Yet Sachs does not cite or describe their

[352] Sachs, Originalism as a Theory of Legal Change, supra note 325, 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.").

[353] Id. at 837 (insisting that originalist claims are "standard features of our legal practice"); see also supra note 327 and accompanying text.

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

[355] Id. at 869.

[356] In the immediate aftermath of the Fourteenth Amendment's ratification, Democrats across the South refused to accept its validity. See Colby, supra note 328, at 1661 & n.209. 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 Origin 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 That 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 258–61 (1957) [hereinafter Kilpatrick, The Sovereign States] (challenging the Fourteenth Amendment's ratification); James Jackson Kilpatrick, The Southern Case for School

claims.[357] Here, Sachs reasons at 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."[358] But why is this so? He explains: "[T]o 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."[359]

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[360] espoused by the *dissenters* in *Slaughter-*

Segregation 140 (1962) (detailing the "tainted parenthood" of the Fourteenth Amendment); Forrest McDonald, Was the Fourteenth Amendment Constitutionally Adopted?, 1 Ga. J. S. Legal 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 editor of *U.S. News and World Report*. David Lawrence, "There Is No Fourteenth Amendment!" Records of History Prove It, Shreveport Times, Oct. 6, 1957, at 3-B; David Lawrence, 14th Amendment Adopted by Force, Daily Item (Sumter, S.C.), Apr. 22, 1970, at 4B.

[357] He does acknowledge the work of several other scholars on this point, primarily Bruce Ackerman. See Sachs, Originalism as a Theory of Legal Change, supra note 325, at 868 & n.199.

[358] Id. at 844.

[359] Id.

[360] Sachs, Dobbs, supra note 24, at 552–53 (emphasizing that *Glucksberg* 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 under their own names"). Baude, Campbell, and Sachs emphasize that "the general-law approach helps us better understand how the Privileges or Immunities Clause was originally designed to work." Baude, Campbell & Sachs, General Law, supra note 7, at 1252.

House—a view no more accepted in the American constitutional order than the South's challenge to the legality of the Fourteenth Amendment itself.[361]

What does it mean for Sachs to selectively 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?[362]

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 Fourteenth Amendment.[363] 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 one hundred and fifty years. But if so, those grounds require articulation, as do the implications for law beyond the abortion right. If Sachs and his coauthors cannot say how general law applies nearly one hundred and fifty years after *Slaughter-House*,[364] on what ground can Sachs reason with such confidence about its application to abortion—and in what sense is this analysis "positive"?

ii. 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."[365] 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

[361] Sachs, Dobbs, supra note 24, at 541 (insisting that *Dobbs* was "correct as a matter of originalist substance"). As recently as 2010, the Court refused to rest incorporation on the Privileges or Immunities Clause in *McDonald v. City of Chicago*, 561 U.S. 742, 758 (2010).

[362] See supra Section III.B.

[363] Kilpatrick, The Sovereign States, supra note 356, at 261 (arguing that it was "only by virtue of a palpably unconstitutional series of actions that the Fourteenth Amendment ever was ratified at all"); id. at 258–61 (detailing constitutional objections to the Fourteenth Amendment's ratification).

[364] See supra notes 335–38 and accompanying text.

[365] 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230). For Sachs's discussion of *Coryell*, see Sachs, Dobbs, supra note 24, at 551 (pointing to *Coryell* as identifying rights that were "fundamental rights of American citizenship").

separate reason that general law follows custom.[366] Sachs's chewing-gum hypothetical papers over 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 across jurisdictions and over time.

An ordinary reader would infer from Sachs's defense of *Dobbs* that courts should *not* look to customary understandings limiting criminalization of health care in the past to define the constitutional rights of pregnant patients to access health care today. But perhaps if Professor Sachs focused specifically on the question of access to urgently needed health care, he 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.

iii. Interpretive Choices That Entrench Inequality: Sachs's preferred reading—which ties the Fourteenth 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,

[366] 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, woolliness, and customary background principles." Baude, Campbell & Sachs, General Law, supra note 7, at 1193, 1206 (emphasis omitted).

Baude, Campbell, and 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. See supra note 351 and accompanying text.

unless it is enforced at a very high level of generality.[367] 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.[368] He roots this (apparently color-blind) reading of the Fourteenth 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"[369]—not the record of deliberations about emancipation before or after the Amendment's ratification. Sachs and his coauthors characterize general law as color-blind, 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."[370] They focus on how the Amendment applied to the Black Codes, which regulated civil rights on the basis of race,[371] without discussing race-conscious debate over the Amendment's drafting and enforcement.[372]

If Professor Sachs had asked how the 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

[367] For discussion of the ways in which changing levels of generality can be used to contest or defend inequality, see Siegel, History of History and Tradition, supra note 26, at 104–07, 145–46; Siegel, The Levels-of-Generality Game, supra note 281, at 565–67.

[368] Sachs, Dobbs, supra note 24, at 553 (emphasis omitted).

[369] See id. at 553 & n.77 (citing U.S. Const. amend. XIV, § 1) (explaining that it included "as citizens '*All* persons born or naturalized in the United States, and subject to the jurisdiction thereof' " (citing U.S. Const. amend. XIV, § 1 (emphasis added))).

[370] Baude, Campbell & Sachs, General Law, supra note 7, 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"). Even in the North, in the antebellum period, Black Americans faced complex and interlocking forms of discrimination. See generally Kate Masur, Until Justice Be Done: America's First Civil Rights Movement, from the Revolution to Reconstruction (2021) (recounting fights over restrictions on the rights of free Blacks before the Civil War culminating in the drafting of the Fourteenth Amendment).

[371] See Baude, Campbell & Sachs, General Law, supra note 7, at 1212–14.

[372] See Masur, supra note 370, at 304–05, 312–41, 352–53 (chronicling the passage of the Fourteenth Amendment and the 1866 Civil Rights Act); infra note 373 and accompanying text (discussing debates over civil, political, and social rights during Reconstruction).

the Amendment prohibited race discrimination in political or social rights—the very distinctions that *Plessy v. Ferguson* invoked in defending the constitutionality of Jim Crow.[373] 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.[374] Sachs and his

[373] 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 and 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 Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111, 1119–23 (1997) (showing how proponents of anti-miscegenation statutes argued that marriages were not contracts protected by the 1866 Civil Rights Act, emphasizing the difference between equality in civil and social rights); 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) (documenting how "[m]any, including some Republicans, resisted the notion that African Americans should have constitutionally protected social rights" at the time the Fourteenth Amendment was ratified (citing Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 19 (2004))); Masur, supra note 370, at 263–81 (describing how "Republicans were virtually unanimous in support of racial equality in civil rights" but "diverged . . . when it came to racial equality in other areas" in the early 1860s).

[374] Blackstone, supra note 173, at *746; see also infra note 387 (quoting Supreme Court Justice Bradley affirming this view in 1873); see 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.").

coauthors are circumspect in explaining whether, in their view, these status-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; they then declare they "take no position" on whether these gender, but not race, distinctions should govern the Fourteenth Amendment today.[375]

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 Framers 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.[376]

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 v. Board of Education*.[377]

Notably, Professor Sachs views the gender-status elements of the common law dating to the Founding[378] as an essential feature of general law that interpreters of the Fourteenth Amendment could give continuing significance today.[379] 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 that American citizenship

[375] Compare Sachs, Dobbs, supra note 24, at 559–60, with Baude, Campbell & Sachs, General Law, supra note 7, at 1242–43.

[376] See Sachs, Dobbs, supra note 24, at 559–60 (footnote omitted) (citation omitted). 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 561 ("Of course, if we want to enact new rights, we still can, as the electoral process since *Dobbs* has repeatedly showed.").

[377] See Charles W. Tyler, Genealogy in Constitutional Law, 77 Vand. L. Rev. 1713, 1756–57 (2024) (discussing scholarship showing how segregation's defenders advanced claims on original intent and original understanding to attack *Brown*).

[378] See supra note 374 and accompanying text (quoting Blackstone, supra note 173, at *746).

[379] See supra note 376 and accompanying text.

already guaranteed," privilege-or-immunity rights enunciated in *Corfield* "to which citizens had been entitled 'at all times' since the Founding"—the "'rights of Englishmen,' as Justice Bradley put it in his *Slaughter-House* dissent."[380] "If so," Professor Sachs speculates, "new rights couldn't be added to the mix; the tradition was a bounded set rather than a growing thing."[381]

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 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[382] and then, after the War, on the Privileges or Immunities Clause of the Fourteenth Amendment.[383] But within a few years, the Supreme Court wrote the *Slaughter-House Cases*[384] 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.[385]

[380] Sachs, Dobbs, supra note 24, at 553 (emphasis omitted) (first quoting Corfield v. Coryell, 6 F. Cas 546, 551 (C.C.E.D. Pa. 1825) (No. 3230); and then quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 114 (1873) (Bradley, J., dissenting)).

[381] Id.

[382] See, e.g., Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit 93–102 (2021) (showing the importance of privileges and immunities in early abolitionist constitutionalism); Masur, supra note 370, at 44–60, 69–72, 81–82, 162–67, 208–09 (examining the claims of free Blacks on the Privileges and Immunities Clause of Article IV in the decades before the Civil War).

[383] 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) (reviewing Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship (2014)) (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). For accounts of "the New Departure"—women's efforts to vote under the newly ratified Fourteenth Amendment in the 1872 presidential 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) [hereinafter Siegel, She the People] (discussing the constitutional basis of New Departure claims and the Supreme Court's response in several decisions of the 1870s).

[384] 83 U.S. (16 Wall.) 36 (1873).

[385] See Siegel, She the People, supra note 383, at 973–94; infra notes 386–89 and accompanying text.

The day after deciding *Slaughter-House*, the Court applied its *Slaughter-House* holding to deny suffragist Myra Bradwell her claim to practice law,[386] and soon thereafter, in *Minor v. Happersett*,[387] the Court denied suffragists' claims that 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.[388]

One hundred and 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 rejects the majority's holding in *Slaughter-House* and appeals instead to the *Slaughter-House* dissenters' understanding of general law while preserving the gender-exclusionary privileges-or-immunities rulings the Court handed down with its *Slaughter-House* decision. Differently put, 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*.[389]

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[386] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873) ("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 . . . ." (footnote omitted)).

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 383, 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").

[387] 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."). Justice Bradley, who dissented in *Slaughter-House*, concurred in *Bradwell* to justify denying women the 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).

[388] *Minor*, 88 U.S. (21 Wall.) at 172.

[389] The day after Justice Bradley dissented in *Slaughter-House*, 83 U.S. (16 Wall.) at 111–24 (Bradley, J., dissenting), 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-*

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 find this core claim 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*.[390] 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."[391]

Some set of commitments does 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 "self-preservation"[392] and to "the enjoyment of life" and the pursuit of "safety"[393] entitling them to access urgently needed medical care under any of the general-law 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 privileges-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

House dissenters in the *Bradwell* case, explaining their view that women did not have such a federally protected right. See *Bradwell*, 83 U.S. (16 Wall.) 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 citizens" 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").

[390] See supra Section III.B.

[391] Siegel, The Levels-of-Generality Game, supra note 281, at 563 (emphasis added).

[392] See supra notes 168–72 and accompanying text.

[393] See supra note 365 and accompanying text (quoting Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230)).

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 "[d]emocratiz[e] constitutional memory"[394] 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[]"[395] 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,[396] 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.[397]

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*,[398] yet we believe that history has much to teach about the

[394] See Siegel & Ziegler, Comstockery, supra note 125, at 1181; see also Siegel, Democratizing Constitutional Memory, supra note 281 (manuscript at 12) (observing that "[w]hen we democratize constitutional memory—consider[ing] the views of lawmakers and the people they governed, including those denied voice . . . 'we may arrive at fundamentally different understandings of freedom's meaning'" (quoting Siegel & Ziegler, Comstockery, supra note 125, at 1180)).

[395] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022); see also id. at 2310 (Roberts, C.J., concurring) (identifying the same question presented).

[396] See supra Sections II.A–B.

[397] See supra Sections III.A–B.

[398] See, e.g., Siegel, The Levels-of-Generality Game, supra note 281, at 566–67 (showing an "account of constitutional memory undermines the judicial-constraint justification for

constitutionality of laws 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;[399] 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.[400] 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 a 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 laws

conservative historicism, as well as the levels-of-generality claims associated with it"); Siegel, History of History and Tradition, supra note 26, at 108 (arguing that "a backward-looking standard that 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").

[399] For examples, see Additional Report from the Select Committee to Whom Was Referred S.B. No. 285, *in* The Journal of the Senate of the State of Ohio, for the Adjourned Session of the Fifty-Seventh General Assembly 233–34 (Columbus, L.D. Myers & Bro. 1867); Reva 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 114 (manuscript at 6–9).

[400] On the antiabortion movement's interest in fetal protection, see Siegel, supra note 399, at 297–300; Ziegler, supra note 114 (manuscript at 6–9). On the restriction of abortion to protect women from unsafe drugs and poisons, see Mohr, supra note 142, at 26, 142–43 (describing how early abortion regulations were "as much poison control measures as anti-abortion measures"); Reagan, supra note 68, at 10.

banning abortion 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 we have 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 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.[401]

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.[402] The public is increasingly aroused to witness shameful and shocking scenes: pregnant women left to bleed in parking lots, or worse, simply to die.[403] The Constitution guarantees women freedom from coercive state

[401] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (permitting the state to have 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 121 and accompanying text. For discussion of the complex relationship between personhood and life exceptions, see Ziegler, supra note 114 (manuscript at 11, 17–18, 57–58, 70–71, 79–80).

[402] Presser & Surana, supra note 53 (reporting on women who die because of 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").

[403] 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-intervi

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.

ew [https://perma.cc/A7SH-99N9]; Jacqueline Howard & Tierney Sneed, Texas Woman Denied an Abortion Tells Senators She "Nearly Died on Their Watch," CNN (Apr. 26, 2023, 8:24 PM), https://www.cnn.com/2023/04/26/health/abortion-hearing-texas-senators-amanda-zurawski/index.html [https://perma.cc/HBQ8-7EV3]. Pew Research Center found in 2022 that sizable majorities of U.S. adults supported access to abortion 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 Rsch. Ctr., America's Abortion Quandary 9 (2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary [https://perma.cc/TVT4-F82S]. 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-poll-finds-6021c712.