From Liberation To (Re)Criminalization: *Dobbs v. Jackson Women's Health Organization*, Bodily Autonomy, and the Expansion of State Rights

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Introduction.

For more than a generation, the U.S. Supreme Court recognized the constitutionally protected right to an abortion, and, in turn, the dignity-affirming power of reproductive autonomy and its role in designing one's own destiny.[1] The Court's endorsement of the liberatory value of bodily autonomy in *Roe v. Wade*,[2] as later affirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3], rejected attempts to justify restrictive prohibitions on abortion as valid exercises of state police powers. However, the Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization* threatens to fundamentally redefine the boundaries between the rights of individuals and those of the state. Concluding that the decisions in *Roe* and *Casey* were "egregiously wrong," Justice Alito's majority opinion in *Dobbs* asserts that the Court's recognition of an individual right to reproductive autonomy damaged our democratic infrastructure because the decision to grant or withhold such a right should be left to the states.[4]

This paper explores the Court's broad abdication of abortion regulation to state legislatures within the context of the expansion of state regulation of bodily autonomy, specifically in the areas

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[1] Roe v. Wade, 410 U.S. 113 (1973).

[2] "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

[3] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 851, 869 (1992).

[4] Dobbs v. Jackson Women's Health Organization, No. 19-1392, slip. op. at 44 (U.S. June 24, 2022).

of transgender rights, gender expression, and access to gender-affirming healthcare.[5] Reproductive rights jurisprudence, including cases like *Griswold*,[6] *Casey*, and *Roe*, undoubtedly provided a recognizable constitutional frame for the evolution of modern transgender rights challenges.[7] Despite the inherent differences in the nature of the lived and legal realities of cisgender women and transgender people, both communities share common demands for dignity and self-determination informed by access to life-defining healthcare services and individual expression. The Court's dismissal of a fundamental right to abortion in *Dobbs* sanctioned – if not invited – more restrictive state level regulation of reproductive care and narrowed respect for individual autonomy in the abortion context.[8] Given the legal and societal commonalities between access to gender-affirming care and reproductive care, it should be no surprise that state legislatures are waging similar lines of attack on the rights of transgender people.[9]

This paper proceeds in three parts. The first part explores the evolving judicial treatment of constitutional challenges to state regulation of transgender status and identity. This part positions the right to free gender expression and access to necessary gender-affirming care within the broader conversation regarding the right to bodily autonomy. The second part addresses the state legislative landscape regarding the regulation and attempted erasure of transgender lives

[5] *Id.* at 79.
[6] Griswold v. Connecticut, 381 U.S. 479 (1973).
[7] "The existence of unspecified constitutionally protected freedoms cannot be doubted. *E.g.*, Roe v. Wade, 410 U.S. 113, 152-54 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Chicago v. Wilson, 75 Ill. 2d 525, 529 (1978).
[8] State legislatures, including West Virginia and Indiana, held special legislative sessions to introduce restrictive abortion legislation. *See*, Veronica Stracqualursi, *West Virginia Governor Signs Bill into Law Banning Abortion with Few Exceptions*, CNN, https://www.cnn.com/2022/09/16/politics/west-virginia-governor-signs-abortion-bill/index.html (Sept. 16, 2022); Sarah McCammon, *Indiana Becomes the First State to Approve an Abortion Ban Post-Roe*, NPR (Aug. 6, 2022) (currently blocked), https://www.npr.org/2022/08/06/1116135408/indiana-becomes-the-first-state-to-approve-an-abortion-ban-post-roe.
[9] Currently, in 2023 ____ anti-abortion bills and ____ bills specifically targeting the rights of transgender people have been introduced. *Human Rights Campaign Slams Gov. Gordon's Decision to Allow Anti-Transgender Sports Ban to Become Law*, HUM. RIGHTS CAMPAIGN (Mar. 18, 2023), https://www.hrc.org/press-releases/human-rights-campaign-slams-gov-gordons-decision-to-allow-anti-transgender-sports-ban-to-become-law.

immediately before and after the *Dobbs* decision. Finally, the third section examines the impact of *Dobbs* on the future viability of autonomy-based claims involving transgender rights under the 14th Amendment. Recognizing the importance of the "second founding," this section argues that the any reliance on the original design of structural federalism to realize dignity or individual autonomy would be misplaced today. Instead, this paper urges the use of a revolutionary lens that is faithful to the intent of the drafters of the14th Amendment – a lens that is essential to understand the liberatory nature of the early transgender and reproductive rights cases, as well as the human cost of the impending retrenchment.

Part I.

Growing secularization,[10] increased immigration,[11] and popularization of egalitarian and progressive movements[12] in America in the mid 1800s challenged the continued efficacy of norm policing and extra-legal violence as mechanisms to enforce ideological uniformity and general social conformity.[13] In response, conservative reformers aggressively campaigned for the codification of Christian and morality-based restrictions particularly through municipal and state legal codes.[14] Previously normalized behaviors of early American life became associated with the disintegration of civil society and the decay of public morals. For example, at the turn of the 19th century states and municipalities frequently relied on lotteries to fundraise for community infrastructure projects.[15] Early Americans also routinely consumed alcohol socially and

[10] R. Laurence Moore, *Religion, Secularization, and the Shaping of the CUlture Industry in Antebellum America*, 41 AM. Q. 216, 233, 236-37, (1989).
[11] *Nativism, Racism, and Immigration Restriction*, B.C., https://globalboston.bc.edu/index.php/nativism-and-racism/ (Mar. 7, 2023).
[12] Rebecca Rix, *Anti-Suffragism in the U.S.*, NAT'L PARK SYS., https://www.nps.gov/articles/anti-suffragism-in-the-united-states.htm (Apr. 10, 2019).
[13] Herbert J. Hovenkamp, *The Classical American State and the Regulation of Morals*, PENN L: LEGAL SCHOLARSHIP REPOSITORY, Mar. 25, 2013, at 1.
[14] *Id*.
[15] *Id.*

medicinally with little state interference or regulation.[16] However, the moral crusaders characterized these activities and other similarly innocuous elements of early American life as having deleterious effects on national health and welfare – demanding their prohibition.[17] By the early 20th century these reforms succeeded, culminating in their criminalization as well as the creation of so-called vice squads operating across all levels of government targeting recently criminalized nonconformists.[18]

In addition to broadly applicable laws regulating gambling and alcohol consumption, state legislatures and municipal boards also began criminalizing certain forms of intimate personal conduct, including reproductive care[19] and gender nonconforming dress.[20] These legal sanctions targeted marginalized and politically powerless communities by design – undermining emerging sources of liberty and autonomy for women and sexual and gender minorities. Laws regulating or criminalizing reproductive care and cross dressing equipped local vice squads with the sticks necessary to enforce social and ideological norms when the carrots of conformity were either refused or out of reach. Characterized as threats to public health, civic unity, and overall community well-being, the social and political outsiders of the early 19th century were rapidly transformed into the outlaws of the 20th century.

As amply studied and documented by historians, abortion prior to quickening was not criminalized under common law.[21] In fact, the cessation of an 18th or early 19th century woman's

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[16] Paul Aaron & David Musto, *Temperance and Prohibition in America*: *A Historical Overview*, *in* ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 127 (Nat'l Acad. Press, 1981).
[17] Kerry Kelly, *The Volstead Act*, NAT'L ARCHIVES, https://www.archives.gov/education/lessons/volstead-act (Feb. 24, 2017).
[18] *See*, D. KELLY WEISBERG, MODERN FAMILY LAW 5-7 (2020).
[19] BOSTON WOMEN'S COLLEGE COLLECTIVE, OUR BODIES, OURSELVES FOR THE NEW CENTURY (9th ed. 2011) (1970).
[20] Kate Redburn, *Before EqualPprotection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963 -86*, L. & HIST. REV., Jan. 25, 2023, First View, at 1-45.
[21] Nicola Beisel & Tamara Kay, *Abortion, Race, and Gender in Nineteenth-Century America*, 69 **Am. Socio. Soc'y**, 498, 507 (2004).

menstrual cycle was perceived to be an indication of a more systemic imbalance of the woman's "delicate equilibrium" demanding intervention.[22] As a result, abortifacients were commonly prescribed and sought to encourage the return of monthly menstruation separate from the concern of pregnancy.[23] Under common law, women were not perceived to have a moral or legal obligation to a fetus prior to quickening. As Leslie Reagan described in her foundational book *When Abortion was a Crime*,

> What we would now identify as an early induced abortion was not called an 'abortion' at all. If an early pregnancy ended, it had 'slipp[ed] away,' or the menses had been 'restored.' At conception and the earliest stage of pregnancy before quickening, no one believed that a human life existed; not even the Catholic Church took this view. Rather, the popular ethic regarding abortion and common law were grounded in the female experience of their own bodies.[24]

Abortifacients were legal, accessible, and normalized until the second half of the 19th century.[25] Makers of herbal tonics promising to induce menstruation filled newspapers and magazines with advertisements. Providers of abortion and contraception in large cities became infamous.[26] The earliest regulation of ingested abortifacients were designed to protect pregnant women from purchasing products that posed significant risk of poisoning or other long term personal health risks.[27] These laws did not prevent women from growing their own abortifacient herbs or ingesting them for the purpose of ending a pregnancy.[28] The continued characterization of sexual health and domestic activities as taboo for both women and men presumptively excluded the state's regulation of perceived intimate decisions. The law only sought to regulate the commercialization of abortion and reproductive services. Even following the proliferation of state

[22] LESLIE REAGAN, WHEN ABORTION WAS A CRIME 8 (1997).
[23] *Id.*
[24] REAGAN**,** *supra* note 22, at 14.
[25] *Id.*
[26] Robert Sneddon, *The Notorious Madame Restell*, NEW YORKER, Nov. 15, 1941.
[27] REAGAN**,** *supra* note 22, at 10.
[28] *Id*. at 9.

level laws prohibiting the sale of abortifacients, the rate and availability of ingested abortifacients as well as instrumental abortions in the United States continued to grow through the 1840s.[29]

The privacy-bound, noninterventionist approach to state level regulation of women's bodily autonomy imploded prior to the American Civil War. A perfect storm of factors including xenophobia, racism, and patriarchal insecurity fed a movement of diverse voices and interests to criminalize abortion and the women who depended upon it. The newly-minted American Medical Association (AMA) led one of the most public – and powerful – movements against legal abortion.[30] Historians have since documented that the campaign to criminalize abortion was a strategic tool to short circuit the growing number of providers of informal medicine or healing – primarily delivered by women doctors and midwives.[31] After the Civil War, the AMA and its physician members became prominent state and federal lobbyists for the criminalization of abortion through legislation.[32]

Advocates of abortion criminalization also did not shy away from ginning up public support for otherwise unpopular reforms based on xenophobia and racism.[33] Images of white, middle and upper class women seeking abortion during waves of increased immigration and the abolition of slavery pushed voters – all male, nearly all white – to the polls to secure their political power.[34] One physician leader of the AMA's abortion criminalization movement threatened that the population of the current American western expansion would be racially diverse – made up of immigrants from China, Mexico, and predominantly Catholic nations like Ireland and Italy. Race

[29] *Id*. at 10.
[30] Annalies Winny, *A Brief History of Abortion in the U.S.*, HOPKINS BLOOMBERG PUB. HEALTH, https://magazine.jhsph.edu/2022/brief-history-abortion-us (Nov. 2, 2022).
[31] REAGAN**,** *supra* note 22, at 10-11.
[32] *Id.* at 11-13; *Historical Abortion Law Timeline: 1850 to Today*, PLANNED PARENTHOOD ACTION FUND, https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/historical-abortion-law-timeline-1850-today (last visited Mar 17, 2023).
[33] Beisel & Kay, *supra* note 20.
[34] *Id*. at 501, 509-11.

baiting, he asked, "Shall [the West] be filled by our own children or by those of aliens? This is a question our women must answer; upon their loins depends the future destiny of the nation." As Reagan has articulated, "male patriotism demanded that maternity be enforced among white Protestant women."[35]

The abortion criminalization movement of the late 1800s dismissed quickening as a mere "sensation" rather than a diagnostic marker of pregnancy, transforming the narrative surrounding abortion.[36] With the idea of quickening discarded as a marker, anti-abortion activists were able to characterize even the earliest term abortions, which had previously been considered to be a return of menses, as equivalent to infanticide and "barbarism."[37] This narrative persists within the modern anti-abortion movement today. The laws passed between 1860 and 1880 criminalized abortion at every stage and targeted the women seeking them – unless a licensed physician deemed it to be medically necessary.[38] This therapeutic addition to abortion regulation further cemented the privileged role of physicians and the control they would exercise over women's lives for the next century.

The weakening of the white Christian monopoly over American democracy and the ensuing panic-induced policy-making of the 1880s cast long shadows into intimate, gender-based conduct beyond the reproductive health realm. Cities across the country adopted ordinances explicitly designed to police gender. Local leaders urging passage of gender expression and role legislation often cited to the perceived moral decay of the Progressive Era, the rising danger posed by nonconforming radicals including suffragists, and growing non-Western European immigrant

[35] REAGAN, supra note 22.
[36] *Id.* at 12.
[37] Beisel & Kay, *supra* note 21, at 507.
[38] REAGAN, *supra* note 22, at 11, 13.

populations. More than 68 cities passed laws targeting personal dress.[39] Nearly a hundred state or municipal laws focused on gendered dress, some specifically barring men from wearing clothing "belonging" to women.[40] These laws not only codified existing clothing and gender norms, but solidified a gender binary more narrowly and finitely than ever before.[41] Fear-based morality campaigns relied on the same public health and welfare claims used to criminalize abortion and contraception. Although initially seeming to target behavior, nonconforming dress,[42] these laws rapidly became ready tools to be used by vice squads and local police departments to harass and criminalize transgender and gender nonconforming people.[43]

The most common type of statute targeting gender expression criminalized individuals appearing "upon any public street or other public place. . . in a dress not belonging to his or her sex."[44] St. Louis, Missouri adopted the first of these bans in 1843 barring public nudity or "dress not belonging to their sex, or in an indecent or lewd dress."[45] Municipal codes were often more explicit in policing gender expression and criminalizing gender nonconforming behavior, whereas state laws were commonly more vague, prohibiting "disguise" and "masquerading to commit a crime."[46] While the initial intent of these laws may have varied and included an aim to silence

[39] Redburn, *supra* note 20, at 9, 40-45.
[40] *Id.*
[41] *Id.* at 3, 9-13; Jennifer Levi & Kevin Barry, *Transgender Tropes & Constitutional Review*, 37 YALE L. REV. 589, 596-99 (2019).
[42] *See* Jeanne Gutierrez, *Behind the Halloween Mask: Power, Identity, and the Law in New York*, N.Y. HIST. SOC'Y (Oct. 26, 2020) https://www.nyhistory.org/blogs/behind-the-halloween-mask-power-identity-and-the-law-in-new-york.
[43] Jesse Bayker, *Cross-Dressing Laws Map*, https://map.transpast.org/about/ (last visited Mar. 17, 2023); Redburn, *supra* note 20, at 12, 14.
[44] Redburn, *supra* note 20, at 9.
[45] *Id.* at 40; Clare Sears, *This Isn't the First Time Conservatives Have Banned Cross-Dressing in America*, JACOBIN (Mar. 15, 2023), https://jacobin.com/2023/03/cross-dressing-law-united-states-history-drag-bans/.
[46] *Id.* at 40; Levi & Barry, *supra* note 39, at 596.

political dissenters[47] or target ethnic minorities, by the mid-20th century they were used nearly exclusively to criminalize gender nonconforming people and erase transgender people from public life.[48]

According to their proponents, early cross-dressing bans served two distinct state interests: promoting public safety and safeguarding a uniform community morality. Supporters of the laws argued that they were essential to protect the public from fraud and women from sexual assault. These arguments characterized cross dressing or wearing gender nonconforming clothes generally as an indicator of criminal intent. Specifically, supporters argued that gender conforming dress ordinances protected "citizens from being misled or defrauded" and were necessary in order to "aid in the description and detection of criminals" and to "prevent crimes in washrooms."[49] Under this rationale, violators of the statute were not necessarily inherently criminal, but had criminal intent. This approach is illustrated by a San Francisco case in 1895.[50] Here, a man was charged with violating the dress statute multiple times.[51] He was convicted, but after serving a brief sentence in the city prison he was released. The only condition the judge placed on his release was sentence was that he never wear women's clothing in public again'.[52]

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[47] *See, e.g.*, Gutierrez, *supra* note 40. For societal views on the rise in popularity of bloomers, see Lori Duin Kelly, *Bipeds in Bloomers: How the Popular Press Killed the Dress Reform Movement*, 13 Pop. Culture Ass'n 67, 71 (1991).

[48] Courts also recognized this in the language that they could be used arbitrarily to target vulnerable populations. *See* City of Cincinnati v. Adams, 330 N.E. 2d 463, 466 (Ohio Mun. Ct. 1974) (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)) ("Such boundless discretion granted by the ordinance encourages arbitrary and capricious enforcement of the law. It provides a convenient instrument for 'harsh and discriminatory enforcement by prosecuting officials, against particular groups deemed to merit their displeasure.").

[49] Levi & Barry, *supra* note 39, at 597.

[50] CLARE SEARS, ARRESTING DRESS (2015).

[51] *Id.* The man, a carpenter who lived in the neighborhood where he was arrested, was specifically charged with "masquerading in female attire." *Id.*

[52] *Id.*

Proponents who argued that cross-dressing bans were necessary to safeguard public morality targeted transgender individuals more directly, criminalizing mere existence. Cross dressing was described as "inherently antisocial conduct which is contrary to the accepted norms of our society."[53] Gender nonconforming behavior was characterized as an independently dangerous activity, even in isolation from other criminal activity.[54] It is also significant that proponents of cross dressing bans perceived it to be a step towards engaging in same-sex sex, also recently criminalized, as courts and the general public conflated same-sex attraction with gender nonconformity. Under this analysis the dangerousness of the individual could not be separated from the dangerousness of the conduct. This narrative continues today, epitomized by politicians who advocate artificial distinctions between public cross dressing by straight, cisgender men and drag performances by LGBTQ people. The former is characterized as "lighthearted tradition" while the latter as "sexualized entertainment in front of children."[55] The only actual distinction between the two is the perceived gender identity or sexual orientation of the performer.[56] The person's status as LGBTQ makes the dress dangerous, not the conduct itself.

Though distinct in nature and scope, the 20th century statutes barring abortion and cross dressing share a common legal foundation that has shaped the evolving modern rights-based trajectory for women and transgender people. The foundational reproductive rights case *Griswold*

[53] Chicago v. Wilson, 389 N.E.2d 522, 524 (Ill. 1978) (citing the city's rationale for the municipal code provision).
[54] "As one court noted, according to the Book of Deuteronomy, '[t]he woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for all that do so are abomination unto the Lord, thy God.' The same court offered a second moral defense for gender-norming laws, suggesting that the violation of gender norms was at odds with biology because it 'frustrat[es] the reproductive urge' by making it more difficult for the male and female of the species to recognize each other's differences.'" Levi & Barry, *supra* note 39, at 598. (quoting People v. Simmons, 357 N.Y.S.2d 362, 365 (N.Y. Crim. Ct. 1974)).
[55] Matt Lavietes, *Tennessee Governor Appears to have Dressed in Drag, an Art Form he wants to Restrict* (Feb. 27, 2023) https://www.nbcnews.com/nbc-out/out-politics-and-policy/tennessee-governor-appears-dressed-drag-art-form-wants-restrict-rcna72569.
[56] Marianna Bacallao, *Tennessee Becomes the First State to Pass a Ban on Public Drag Shows*, NPR (Mar. 2, 2023) https://www.npr.org/2023/03/02/1160784530/tennessee-ban-public-drag-shows-transgender-health-care-youth (discussing Gov. Lee's comments).

v. Connecticut constitutionalized the right to contraception focusing on the privacy interest inherent to the marital relationship.[57] It is critical to note here that although the right to privacy was elemental to both *Griswold* and *Roe v. Wade* in 1973, abortion rights litigators had consistently relied on a robustly diverse set of constitutional challenges to state abortion restrictions.[58] For example in *Doe v. Scott*, Illinois state litigators argued that the state's abortion ban violated the 14th Amendment's Due Process clause because of vagueness.[59] The court agreed. It also eloquently concluded that compelling a woman to carry an unwanted baby to term "constitutes an intrusion on constitutionally protected areas too sweeping to be justified as necessary to accomplish any compelling state interest. These protected areas are women's rights to life, to control over their own bodies, and to freedom and privacy in matters relating to sex and procreation."[60] The *Doe v. Scott* court joined other federal district courts that had struck down state level abortion bans by relying on *Griswold's* privacy-based penumbra reasoning, as well as broader understandings of foundational liberty interests as articulated in the foundational liberty cases *Meyers* and *Pierce*.[61] These robust arguments not only led to *Roe* and *Casey*, but fundamentally shifted the public perception of the scope of women's liberty interest in procreation, specifically the federal constitutional investment in limiting state intrusion and the boundary-setting role of the federal judiciary.[62]

[57] Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).
[58] REAGAN**,** *supra* note 22, at 235-240.
[59] *Id.*; Doe v. Scott, 321 F. Supp. 1385, 1389 (N.D. Ill. 1971).
[60] Doe v. Scott, 321 F. Supp. at 1389. *See* United States v. Vuitch, 305 F. Supp. 1032, 1035 (D.D.C. 1969); People v. Belous, 458 P.2d 194 (Cal. 1969).
[61] *See* Doe v. Scott, 321 F. Supp at 1389-91.
[62] *America's Abortion Quandary*, PEW RSCH. CTR. (May 6, 2022) https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/.

Similarly, beginning in the 1970s transgender activists challenged municipal level bans as 14th Amendment Due Process violations.[63] Across the country, courts struck down laws targeting transgender people throughout the 1970s and 1980s.[64] Courts were consistently receptive to arguments asserting that the laws were unconstitutionally vague or otherwise violations of the substantive due process of law under liberty and autonomy umbrellas. For example, in the landmark case *City of Columbus v. Rogers*, the Ohio Supreme Court upheld the trial court's reasoning that the municipal ordinance prohibiting "dress not belonging to his or her sex" was unconstitutionally vague "when considered in light of the contemporary dress habits."[65] The court concluded that this vagueness would encourage "arbitrary and capricious enforcement of the law."[66] It noted that the municipal ordinance "provides a convenient instrument for harsh and discriminatory enforcement by prosecuting officials, against particular groups deemed to merit their displeasure."[67]

In addition to vagueness arguments, courts also held that laws punishing gender nonconforming dress violated the substantive due process protections of the 14th Amendment. Specifically holding that these laws infringed on the liberty interests of transgender people by threatening the national values of "privacy, self-identity, autonomy, and personal integrity that. . . the Constitution was designed to protect."[68] For example, the Illinois Supreme Court held that the state failed to present even a rational basis for banning gender nonconforming dress in violation

[63] For discussion of due process challenges asserted, see Lee Clark, *The Pressures of Passing, Reinforced by Precedent*, 22 CUNY L. REV. F. 17, 24-25 (2019).
[64] Redburn, *supra* note 20, at 3, 36.
[65] City of Columbus v. Rogers, 324 N.E.2d 563 (Ohio 1975).
[66] *Id.* at 164.
[67] City of Cincinnati v. Adams, 330 N.E. 2d 463, 466 (Ohio Mun. Ct. 1974) (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).
[68] City of Chicago v. Wilson, 389 N.E.2d 522, 524 (Ill. 1978) (quoting Kelley v. Johnson, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting)).

of the liberty interest of the defendant. The court held that Chicago's ordinance failed to achieve its stated intent of curbing "criminal activity" because the plaintiffs in question were "cross-dressing . . . as part of a sex-reassignment preoperative therapy program" rather than with intent to commit a criminal act. Importantly, the court further concluded that Chicago's ban did nothing to "protect the public morals" because dressing in a gender nonconforming way is not proven to be "in and of itself harmful to society."[69] The court refused to accept that offending "the general public's aesthetic preferences" was sufficient proof of public harm.[70] Even the Federal District Court for Southern Texas held that "the public's desire and the police department's need to know someone's true sexual identity" could not be used as a state interest to infringe on an individual's well-being.[71] Further, the court held that an individual's "choice of appearance" is protected under the Fourteenth Amendment as a core element of individual identity.[72]

Part II.

The evolution of substantive due process jurisprudence that occurred across the federal court system in the 1970s and 1980s resulted in a clearly articulated right to legally access abortion and to free gender expression as protected liberty interests under the 14th Amendment.[73] The courts' recognition of self-defining conduct and expressions of autonomy as national, liberatory, and constitutionally protected values further insulated such conduct from state level regulatory control. Although optically distinct in substance and form, the current wave of state legislation targeting transgender people poses familiar constitutional questions of liberty, autonomy,

[69] *Id.* at 525.
[70] *Id.*
[71] Doe v. McConn, 489 F. Supp. 76, 80 (S.D. Tex. 1980).
[72] *Id.* at 78; Levi & Barry, *supra* note 39, at 601.
[73] *E.g.*, Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); City of Cincinnati v. Adams, 330 N.E. 2d 463, 466 (Ohio Mun. Ct. 1974).

expression, and self-determination.[74] These laws also echo the demands raised by advocates of last century's vice squads: state policed gender roles and conformity informed by conservative Christian ideology rather than evidence-based science and policy data. The stated legislative intent for modern anti-transgender proposals varies from the pseudo-benevolent – safeguarding transgender youth from so-called experimental treatments – to chillingly "semi-fascist"[75] – "eradicating transgenderism."[76]

Today's anti-transgender legislative trend began in earnest in the years immediately following the Supreme Court decision *Obergefell v. Hodges* in 2015 and the election of Donald Trump in 2016.[77] Far right advocacy and political groups committed significant financial resources and political capital to extensive media and membership campaigns targeting transgender people, particularly students.[78] Many of the mischaracterizations of the role and prevalence of medical intervention offered to transgender youth by the American medical establishment can be traced to these (mis)education efforts.[79] The first set of anti-transgender legislative packages swept through

[74] In 2023 alone there are hundreds of proposed pieces of legislation. See *Human Rights Campaign Condemns Oklahoma Senate Passage of Three Anti-LGBTQ+ Bills and Slams Oklahoma House for Censuring Rep Turner*, Human Rts. Campaign (Mar. 7, 2023), https://www.hrc.org/press-releases/human-rights-campaign-condemns-oklahoma-senate-passage-of-three-anti-lgbtq-bills-and-slams-oklahoma-house-for-censuring-rep-turner.

[75] President Joseph Biden, *Remarks at a Reception for the Democratic National Committee in Bethesda, Maryland* (Aug. 25, 2022) (transcript at https://www.whitehouse.gov/briefing-room/speeches- remarks/2022/ 08/26/remarks-by-president-biden-at-a-reception-for-the-democratic-national-committee-3/).

[76] Katie Hawkinson, *Michael Knowles Says Transgenderism Must Be 'Eradicated' at CPAC*, DAILY BEAST, https://www.thedailybeast.com/michael-knowles-calls-for-eradication-of-transgender-people-at-conservative-political-action-conference (Mar. 6, 2023).

[77] *Anti-Transgender Legislation Spreads Nationwide, Bills Targeting Transgender Children Surge*, HUMAN RIGHTS CAMPAIGN FOUND. (2016) http://assets2.hrc.org/files/assets/resources/HRC-Anti-Trans-Issue-Brief-FINAL-REV2.pdf (last visited Mar. 17, 2023).

[78] *Far-Right Groups Flood State Legislatures with Anti-Trans Bills Targeting Children*, S. POVERTY L. CTR. (Apr. 26, 2021) https://www.splcenter.org/hatewatch/2021/04/26/far-right-groups-flood-state-legislatures-anti-trans-bills-targeting-children.

[79] For a description of an event held March 28, 2019 by conservative think tank The Heritage Foundation, see *The Medical harms of Hormonal and Surgical Interventions for Gender Dysphoric Children*, THE HERITAGE FOUND., https://www.heritage.org/gender/event/the-medical-harms-hormonal-and-surgical-interventions-gender-dysphoric-children (last visited Mar. 17, 2023).

twenty-one states and focused on transgender students' access to athletics[80] and other single-sex services and programs.[81] Despite conservative enthusiasm and support for bills focused on student access to single-sex programs, the Supreme Court's decision in *Bostock v. Clayton County* severely undermined the statutes' already murky legal viability. In *Bostock* the Court held the sex discrimination protections under Title VII of the Civil Rights Act of 1964 prohibited discrimination on the basis of sexual orientation and gender identity[82]. Although *Bostock* is a Title VII case, it is instructive in education content. Courts typically look to Title VII precedent for guidance when determining interpretations for other federal civil rights laws including Title IX.[83] Both statutes also share a similar legislative history.[84]

Throughout this first wave of modern state anti-transgender legislation in the 2010s, decisions regarding medical treatments were largely left to the discretion of doctors, patients, and the parents of transgender youth.[85] Legal and policy challenges regarding gender affirming care focused on access based on affordability and healthcare coverage rather than legal bars.[86] This initial legal dismissal may be due to the fact that medical intervention in the context of a diagnosis of gender dysphoria is far from novel. In 1919 Berlin, the Institute for Sexual Research opened

[80] Colorado, Connecticut, Florida, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Missouri, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming all introduced anti-transgender legislation in 2015 and 2016. *Anti-Transgender Legislation Spreads Nationwide, Bills Targeting Transgender Children Surge, supra* note 70 at 3, 4, 6.
[81] These state laws were contrary to the Education Department's interpretation of Title IX. *Anti-Transgender Legislation Spreads Nationwide, Bills Targeting Transgender Children Surge*, supra note 74, at 3.
[82] Bostock v. Clayton, 140 S. Ct. 1731 (2020).
[83] *See, e.g.*, Franklin v. Gwinnett County Schools, 503 U.S. 60, 75 (1992) (adopting Title VII precedent regarding sexual harassment in schools); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1090-91 (D. Minn. 2000) (discussing application of Title VII precedent).
[84] *See, e.g.*, Emeldi v. Univ. of Oregon, 698 F.3d 715, 724 (9th Cir. 2012) ("[T]he legislative history of Title IX 'strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII.'").
[85] *See*, Daphna Stroumsa, *The State of Transgender Health Care: Policy, Law, and Medical Frameworks*, 104 AM. J. OF PUB. HEALTH, no. 3, Mar. 2014, at 31, 34-35, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953767/.
[86] *See, e.g.*, O'Donnabhain v Comm'r, 134 T.C. 34 (2010).

and as early as 1930 hormonal treatments were prescribed, and doctors performed the first modern gender-affirmation surgeries for trans-women.[87]

In fact, many of the individuals challenging municipal level dress restrictions in the 1970s discussed above, including those reporting the most heinous incidents of police abuse and harassment, had also been receiving medical treatment like hormone therapy for years.[88] Many other plaintiffs were undergoing a social transition under the care of a doctor or psychologist.[89] Although unique to every individual, social transition may include changing a name and pronouns, as well as beginning to dress in accordance with the target gender.[90] This is still often under care of a physician or provider and includes gender-affirming talk therapy and supervision.[91] For young children seeking treatment, social transition is the only care recommended to treat gender dysphoria. Prior to the onset of puberty, transgender children may be prescribed medications to suppress puberty. Often referred to as "puberty blockers," this hormone-based treatment prevents the development of secondary sex characteristics. Medical transition for adults may include hormone therapy and eventually surgical intervention. Mainstream medical and social welfare organizations in the United States including the American Association of Clinical Endocrinology[92], American Academy of Pediatrics[93], and American College of Obstetrics and

[87] *Magnus Hirschfeld*, U.S. HOLOCAUST MEM'L MUSEUM (Dec. 17, 2021) https://encyclopedia.ushmm.org/content/en/article/magnus-hirschfeld-2; Brandy Shillace, *The Forgotten History of the World's First Trans Clinic*, SCI. AM.(MAY 10, 2021) https://www.scientificamerican.com/article/the-forgotten-history-of-the-worlds-first-trans-clinic/.
[88] Redburn, *supra* note 20, at 15, 33.
[89] *Id.* at 15, 29, 32-33.
[90] *Let's Talk About Transitions*, SOC'Y FOR RSCH. ON ADOLESCENTS, https://www.s-r-a.org/trans-transitions (last visited Mar. 18, 2023).
[91] *Id*.
[92] *AACE Position Statement: Transgender and Gender Diverse Patients and the Endocrine Community*, AM. ASS'N OF CLINICAL ENDOCRINOLOGY (Mar. 7, 2022) https://pro.aace.com/recent-news-and-updates/aace-position-statement-transgender-and-gender-diverse-patients.
[93] *AAP Policy Statement Urges Support and Care of Transgender and Gender Diverse Children and Adolescents*, AM. ACAD. OF PEDIATRICS (Sept. 17, 2018) https://www.aap.org/en/news-room/news-releases/aap/2018/aap-policy-statement-urges-support-and-care-of-transgender-and-gender-diverse-children-and-adolescents/.

Gynecology have affirmed the importance of comprehensive gender-affirming care for all individuals living with gender dysphoria.[94] Countries like Argentina have recognized gender identity and access to gender-affirming care in the healthcare system as a human right for over a decade. For example, in Argentina it is against the law to not respect the gender identity of children and adolescents, and only their chosen first name respecting their gender identity can be used.[95] Physicians providing gender-affirming care follow best practice guidelines developed over the past five decades.

Despite the consensus within the medical and science community supporting these evidence-based best practices, in the past eight years over forty state legislatures have proposed bills prohibiting or limiting access to gender-affirming care.[96] In 2021 Arkansas passed the first state level ban prohibiting access to gender-affirming care for youth.[97] The Arkansas law prohibited healthcare professionals from providing or referring transgender youth under the age of 18 for gender-affirming health care.[98] The law barred use of state funds or insurance coverage for gender-affirming health care for transgender people under 18, and empowered private insurers to refuse to cover gender-affirming care for all transgender people regardless of age.[99]

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[94] *Health Care for Transgender and Gender Diverse Individuals: Committee Opinion March 2021*, *AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS*, https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/03/health-care-for-transgender-and-gender-diverse-individuals (last visited Mar. 18, 2023).
[95] Ley Nacional No. 26.743, May 23, 2012, Identidad de Genero, articulo 12 [Identity and Gender, Article 12] (translation available at https://globalhealth.usc.edu/wp-content/uploads/2017/03/english-translation-of-argentina_s-gender-identity-law-as-approved-by-the-senate-of-argentina-on-may-8-2012.pdf)
[96] *Anti-Transgender Legislation Spreads Nationwide, Bills Targeting Transgender Children Surge*, *supra* note 74; *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU, https://www.aclu.org/legislative-attacks-on-lgbtq-rights (Mar. 14, 2023); *Legislation Affecting LGBTQ Rights Across the Country*, ACLU, https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country-2022 (Dec. 2, 2022).
[97] Eliza Fawcett, *After Arkansas Trial, Judge Weighs Legality of Ban on Care for Transgender Youth*, N.Y. TIMES (Dec. 4, 2022), https://www.nytimes.com/2022/12/04/us/arkansas-hormone-therapy-transgender.html.
[98] Arkansas Save Adolescents from Experimentation (SAFE) Act 626, ARK. CODE ANN. §§ 20-9-1501 to 1504, 23-79-164.
[99] *Id.*

Litigators challenged the Arkansas statute arguing that it violated both the Due Process Clause and the Equal Protection Clause of the 14th Amendment.[100] As articulated in the complaint, restrictions on access to care for minors presents a number of constitutional questions. In addition to potentially infringing on the autonomy and liberty rights of individual patients to define their own destiny and make personal medical decisions, these laws also strip parents of the right to determine the appropriate course of medical care for their children. Since the early 20th century the Supreme Court has recognized the rights of parents to make decisions regarding the care, education, and overall well-being of their children.[101] Any state infringement on this liberty interest must satisfy a very high burden. A preliminary injunction from the district court blocked enforcement of the Arkansas law in July 2021. The 8th Circuit Court of Appeals upheld the injunction in August 2022.[102]

In addition to prohibiting or limiting access to medical care, in 2023 state legislatures took even more intrusive steps towards criminalizing their transgender residents. In March 2023, the Tennessee legislature not only prohibited all transition related care for young people,[103] but also passed a bill severely restricting drag performances under the guise of child health and safety.[104] Both bills were described as safeguarding the safety and welfare of Tennessee children.[105] The latter added the terms "male and female impersonators" to the Tennessee code regulating and restricting adult cabaret performances alongside "topless dancers," "exotic dancers," "strippers" "who provide entertainment that appeals to a prurient interest."[106] These laws are designed to

[100] Complaint at 41-43, Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (No. 4:21CV00450 JM).
[101] Meyers v. United States, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).
[102] Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022).
[103] S.B.1, 113 Gen. Assemb. (Tenn. 2023).
[104] S.B. 3, 113 Gen. Assemb. (Tenn. 2023).
[105] *Id.*
[106] *Id.*

criminalize and stigmatize transgender and gender nonconforming residents.[107] Their legislative intent and language echo the gender norming regulations of the last century, which were deemed unconstitutional infringements on individual liberty, as well as overly vague.[108] Whether these laws will meet the same fate however, is in the hands of a very different Supreme Court operating in an increasingly unstable socio-political moment.

Part III.

Despite the success of the early 20th century state and municipal level dress bans in punishing and marginalizing transgender and gender nonconforming people,[109] transgender and women's rights activists of the 1970s and 1980s succeeded in achieving freedom from state mandated gender conformity and role restrictions.[110] The socio-legal impact of this freedom on the ability of individuals to live fully within communities cannot be overstated. Every court that overturned a cross dressing ban on the grounds of liberty, autonomy, and dignity signaled that transgender and gender nonconforming lives could no longer be alienated from the law simply because they did not conform with the chokingly narrow gender norms of the day.[111] These victories transformed transgender and gender nonconforming people from faceless public welfare threats into lives worthy of recognition and protection from state mandated marginalization.[112]

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[107] Matt Lavietes, *Tennessee Governor Signs First-Of-Its-Kind Bill Restricting Drag Shows*, NBC (Mar. 2, 2023), https://www.nbcnews.com/feature/nbc-out/tennessee-governor-signs-first-its-kind-bill-restricting-drag-shows-n1303262.

[108] *See* S.B. 3, 113 Gen. Assemb. (Tenn. 2023); Fresh Air, *Drag Queen (And Ordained Minister) Bella DuBalle Won't be Silenced by New Tenn. Law,* NPR, (Mar. 16, 2023) https://www.npr.org/transcripts/1163815547 (explaining that "male and female impersonators" is vague and worries the language could be used to target trans-people).

[109] *See supra* notes 38-51 and accompanying text.

[110] *See supra* notes 60-69 and accompanying text.

[111] *See, e.g.*, City of Chicago v. Wilson, 389 N.E.2d 522, 524 (Ill. 1978) (quoting Kelley v. Johnson, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting)).

[112] *See* Kylar W. Broadus & Shannon Price Minter, *Legal Issues, in* TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY ch. 10 (Laura Erickson-Schroth ed., 2014).

Given the significant role that the 14th Amendment played within this transformation, it is important to examine the potential impact of *Dobbs* when weighing these national values of liberty, autonomy, and dignity against state values mandating restriction and conformity. After engaging in a searching review of our nation's history and tradition, *Dobbs* "returns" decision-making authority to the state level under the guise of respect for federalism. However, the *Dobbs* opinion fails to take into account the "second founding." The Constitution's original inclusion of the institution of chattel slavery hollowed out the document's liberatory promises at the root.[113] By extension, the original design of structural federalism as the source for protecting individual rights and state governments from the intrusive arm of the federal government should not be relied upon to realize dignity or individual autonomy today.[114]

The Civil War Amendments and the period of Reconstruction triggered a tectonic transformation of the Constitution by explicitly infusing equality as a core, national value.[115] The inevitable recalibration of our understanding and relationship with the role of federalism over the past century has been similarly character-defining for the nation. The very unified and public engagement with the Constitution throughout the post-Civil War amendment process and the people's commitment to constitutionalizing equality "dramatically alter[ed] the federalism conventions underlying the 1787 Constitution in aid of newly minted equality rights."[116] Further, these changes and the "re-founding" that ensued demand a "reconsideration of the entire document."[117] Thurgood Marshall has asserted that although "The Union survived the civil war,

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[113] Burt Neuborne, *Federalism and the "Second Founding:" Constitutional Structure as a "Double Security" for "Discrete and Insular" Minorities"*, 77 N.Y.U. ANN. SURV. AM. L. 59 (2022).
[114] *Id.*
[115] Seminole Tribe v. Florida, 516 U.S. 44, 65-66 (1996) (holding that "the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.").
[116] Neuborne, *supra* note 110.
[117] *Id.*

the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws."[118]

Examining the application of the Substantive Due Process clause through this revolutionary lens provides a meaningful frame to understand the liberatory nature of the earlier transgender and reproductive rights case law, while also placing the human cost of the impending retrenchment into stark relief. The drafters of the 14th Amendment intended it to serve as a moderating force for state policymaking – unifying otherwise invariably disparate state approaches to questions of autonomy and liberty within a prescribed set of national values.[119] The 14th amendment is also a clear eyed acceptance that the structural protections of 1789 are insufficient to prevent bias and discrimination against marginalized populations.[120] The consistent recognition of constitutional protections from state-sanctioned gender policing of the 1970s and 1980s created a fabric for understanding the nature of transgender rights rooted broadly in traditional, national values rather than as a disjointed narrative of marginalized estrangement from the law. This recognition contributed to the development of the legal identity of transgender people, not only bolstering the dignity of the impacted individuals, but demanding recognition of their inherent value and personhood within their communities.

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[118] Thurgood Marshall, Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987), *in* THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 284 (Mark V. Tushnet ed., 2001).

[119] Neuborne, *supra* note 110, at 72-73 ("Justices Field, Bradley, Swayne, and Chief Justice Chase dissented, arguing that the majority's microscopic reading of the 14th Amendment's reach gutted the Second Founders' effort to limit the power of the states to act oppressively against the weak. Justice Swayne, protesting the majority's narrow construction, correctly characterized the Reconstruction Amendments as a Second Founding, arguing that "fairly construed, these amendments may be said to rise to the dignity of a new *Magna Carta*.'").

[120] For a fuller discussion on the framing and adoption of the 14th Amendment and the perspectives of the drafters, see WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 163-64 (1988). *See, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 56 (1998); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

For more than a century, the 14th Amendment evolved into a nationalized baseline for legally valuing autonomy and individual dignity, safeguarding against the arbitrary weight of discrimination and marginalization meted out based solely on geography.[121] In *Dobbs*, the Supreme Court has removed the guardrails, empowering states to regulate abortion free from the constitutional constraints of fundamental rights protections.[122] Justice Alito's majority opinion makes swift work of dismantling the decades-old fundamental rights infrastructure of *Roe* and *Casey*, stripping abortion access of any protective judicial review action beyond a rational basis standard.[123] In determining the absence of a "deeply rooted" history or tradition of abortion access, Justice Alito concluded that "[t]he right to abortion does not fall within this category."[124] He explained,

> Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe's* defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."[125]

The majority expressly declined to address the impact of the *Dobbs* analysis on other unenumerated fundamental rights, including the right to same-sex marriage, contraception, familial cohabitation, to educate one's children, and to be free from involuntary sterilization. However, Justice Thomas's concurrence specifically mentions contraception, queer sex, and

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[121] David Luban, *The Warren Court and Concept of a Right*, 34 HARV. C.R.-C.L.L. REV. 7, 8 (1999) (acknowledging the Court stepped into the role of protecting individual rights post-WWII).
[122] Dobbs v. Jackson Women's Health Org., No. 19-1392, slip. op., at 77 (U.S. June 24, 2022).
[123] *Id.* at 77.
[124] *Id.* at 5.
[125] *Id*.

marriage equality as substantive due process jurisprudence that should be revisited as examples of flawed legal reasoning and misplaced reliance on substantive due process under the Fourteenth Amendment.[126] The Court's willingness to overturn longstanding rights-affirming precedent paired with Justice Thomas's concurrence is undoubtedly concerning.[127]

Concurring, Justice Kavanaugh succinctly concluded that the Court's decision to abandon women's bodily autonomy to individual state legislatures is "scrupulously neutral" as demanded by the neutrality of the Constitution itself with respect to abortion.[128] The autonomy and liberty interest inherent in abortion is in fact unique and demands protection rather than neutrality. The reduction of these broader autonomy and dignity values to narrow animating points of conduct demean the clear goals of the second founding.[129] It is also far from neutral. As Kavanaugh includes only three paragraphs above, "when it comes to abortion, one interest must prevail over the other at any given point in a pregnancy."[130] After the Civil War amendments, the nation took steps to ensure that "neutrality" would not be used to sanction denial of basic dignity and recognition of individual autonomy.[131] The *Dobbs* decision has done just that.

Under the guise of even-handedness and neutrality, the Court has sanctioned state discrimination and dehumanization inconsistent with the intent and spirit of the 14th Amendment and the nation that adopted it. In the absence of the moderating hand of the Constitution, states

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[126] Dobbs v. Jackson Women's Health Org., No. 19-1392, Thomas, J., concurrence at 3 (U.S. June 24, 2022) ("For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including Griswold, Lawrence, and Obergefell.").

[127] *See id.*; Dobbs v. Jackson Women's Health Org., No. 19-1392, slip. op., at 5.

[128] Dobbs v. Jackson Women's Health Org., No. 19-1392, Kavanaugh, J., concurrence at 3 (U.S. June 24, 2022).

[129] Perhaps "some outcomes … are so substantively unfair that no process that produced them could count as "due."" RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW 81-82 (2004).

[130] Dobbs, Kavanaugh, J., concurrence at 3.

[131] Justice Felix Frankfurter recognized the end of slavery and "the participation of [Black people] in the free life of the nation" as "political changes of stupendous meaning" but thought "even more important consequences, perhaps, flow from the new subjection of the states to national control through the effectual veto power exercised by the Supreme Court over state legislation" FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 43 (1930).

have used the Court's so-called neutrality to sanction severe restrictions. Facing only a rational basis review, states are enforcing trigger laws and introducing legislation that would not have passed the undue burden standard demanded by *Casey*. The leaked draft and anticipated *Dobbs* decision motivated states without trigger laws to introduce new legislation. [132] For example, in April 2022, Florida Governor Rob DeSantis signed the current Florida law banning abortions after fifteen weeks with no exceptions for rape or incest.[133] Lacking a constitutional baseline from the federal government, DeSantis now has his eyes on a ban after only six weeks.[134] Texas, already using SB 8 to reduce abortions,[135] now has a trigger-law in effect banning all abortions.[136] Other states introduced bills banning abortions which were passed in special sessions immediately following the *Dobbs* decision.[137]

This rapid reclamation of state control over women's reproductive autonomy is a disheartening bellwether not only for transgender people, but for every community whose conformity – or lack thereof – has been historically policed. The rapid state movement towards recriminalization of abortion and transgender rights belies an effort to erase nonconformity, narrow role options, and concretize and exacerbate current power imbalances across American society.

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[132] CONN. GEN. ASSEMBLY, OFF. OF LEGIS. RSCH, STATE ABORTION LAWS ENACTED POST-DOBBS Decision (Sept. 29, 2022), https://cga.ct.gov/2022/rpt/pdf/2022-R-0227.pdf.

[133] FLA. STAT. § 390.0111 (2022); Steve Contorno, *In Florida, Both Sides in Abortion Fight Wait to See How Far De Santis Will Go,* CNN, *https://www.cnn.com/2022/06/30/politics/ron-desantis-abortion-florida/index.html* (June 30, 2022).

[134] Geoff Mulvihill & Anthony Izaguirre, *DeSantis Backing Stricter Abortion Ban in Florida*, PBS (Mar. 10, 2023) https://www.pbs.org/newshour/politics/governor-ron-desantis-backing-stricter-abortion-ban-in-florida#:~:text=Florida%20wasn't%20among%20those,not%20for%20rape%20or%20incest. For the current status of HB 7, see *HB 7: Pregnancy and Parenting Support*, FLA. S., https://www.flsenate.gov/Session/Bill/2023/7#:~:text=Pregnancy%20and%20Parenting%20Support%3B%20Prohibits,from%20knowingly%20performing%20or%20inducing (last updated Mar. 16, 2023).

[135] Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022). https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law.

[136] TEX. HEALTH & SAFETY CODE § 170A.002.

[137] *See, e.g.,* Stracqualursi, *supra* note 8; McCammon, *supra* note 8.