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

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FROM LIBERATION TO (RE)CRIMINALIZATION:  
*DOBBS V. JACKSON WOMEN'S HEALTH*  
ORGANIZATION, BODILY AUTONOMY, AND THE  
EXPANSION OF STATE RIGHTS

*Robin Maril\**

ABSTRACT

*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. The Court's endorsement of the liberatory value of bodily autonomy in *Roe v. Wade*, as later affirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 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.*

*This Article 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 of transgender rights, gender expression, and access to gender-affirming healthcare. Reproductive rights jurisprudence, including cases like *Griswold*, *Casey*, and *Roe*, undoubtedly provided a recognizable constitutional frame for the evolution of modern transgender rights challenges. 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. 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.*

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*This Article proceeds in three parts. Part I 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. Part II addresses the state legislative landscape regarding the regulation and attempted erasure of transgender lives immediately before and after the Dobbs decision. Finally, Part III examines the impact of Dobbs on the future viability of autonomy-based claims involving transgender rights under the Fourteenth Amendment. Recognizing the importance of the “second founding,” this section argues that any reliance on the original design of structural federalism to realize dignity or individual autonomy would be misplaced today. Instead, this Article urges the use of a revolutionary lens that is faithful to the intent of the drafters of the Fourteenth 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.*

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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.<sup>1</sup> The Court’s endorsement of the liberatory value of bodily autonomy in *Roe v. Wade*,<sup>2</sup> as later affirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>3</sup> 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.<sup>4</sup> 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

1. *Roe v. Wade*, 410 U.S. 113, 163–64 (1973), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

2. *Id.* at 153 (“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.”).

3. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 851, 869 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

4. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2234–39 (2022).

to reproductive autonomy damaged our democratic infrastructure because the decision to grant or withhold such a right should be left to the states.<sup>5</sup>

This Article 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 of transgender rights, gender expression, and access to gender-affirming healthcare. Reproductive rights jurisprudence, including cases like *Griswold*,<sup>6</sup> *Casey*, and *Roe*, undoubtedly provided a recognizable constitutional frame for the evolution of modern transgender rights challenges.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

This Article proceeds in three parts. Part I 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. Part II addresses the state legislative landscape regarding the regulation and attempted erasure of transgender lives immediately before and after the *Dobbs* decision. Finally, Part III examines the impact of *Dobbs* on the future viability of autonomy-based claims involving transgender rights under the Fourteenth Amendment. Recognizing the importance of the “second founding,” this Part III argues that any reliance on the original design of structural federalism to realize dignity or individual autonomy would be misplaced today. Instead, this Article urges the use of a liberatory lens that is faithful to the intent of the drafters of the Fourteenth Amendment—a lens that is essential to

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5. *Id.* at 2243, 2257–59.

6. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

7. “The existence of unspecified constitutionally protected freedoms cannot be doubted.” *City of Chicago v. Wilson*, 389 N.E.2d 522, 523 (Ill. 1978) (citing *Roe* and *Griswold*).

8. State legislatures, including West Virginia and Indiana, held special legislative sessions to introduce restrictive abortion legislation. *See, e.g.*, Veronica Stracqualursi, *West Virginia Governor Signs Bill into Law Banning Abortion with Few Exceptions*, CNN (Sept. 16, 2022, 1:41 PM), <https://www.cnn.com/2022/09/16/politics/west-virginia-governor-signs-abortion-bill/index.html> [<https://perma.cc/VSB3-RDFD>]; Sarah McCammon, *Indiana Becomes the First State to Approve an Abortion Ban Post-Roe*, NPR (Aug. 6, 2022, 8:11 AM), <https://www.npr.org/2022/08/06/1116135408/indiana-becomes-the-first-state-to-approve-an-abortion-ban-post-roe> [<https://perma.cc/668J-SDKJ>].

9. Less than three months into 2023, already 175 bills specifically targeting the rights of transgender people were introduced. *Human Rights Campaign Slams Gov. Gordon's Decision to Allow Anti-Transgender Sports Ban to Become Law*, HUM. RTS. 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> [<https://perma.cc/68AH-XD8H>].

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,<sup>10</sup> increased immigration,<sup>11</sup> and popularization of egalitarian and progressive movements<sup>12</sup> 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.<sup>13</sup> In response, conservative reformers aggressively campaigned for the codification of Christian and morality-based restrictions particularly through municipal and state legal codes.<sup>14</sup> Previously normalized behaviors of early American life became associated with the disintegration of civil society and the decay of public morals.<sup>15</sup> For example, at the turn of the nineteenth century, states and municipalities frequently relied on lotteries to fundraise for community infrastructure projects.<sup>16</sup> Early Americans also routinely consumed alcohol socially and medicinally with little state interference or regulation.<sup>17</sup> 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.<sup>18</sup> By the early twentieth 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.<sup>19</sup>

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<sup>20</sup> and gender nonconforming dress.<sup>21</sup> These legal sanctions targeted

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10. See R. Laurence Moore, *Religion, Secularization, and the Shaping of the Culture Industry in Antebellum America*, 41 AM. Q. 216, 233, 236–37 (1989).

11. See *Nativism, Racism, and Immigration Restriction*, GLOB. BOS., <https://globalboston.bc.edu/index.php/nativism-and-racism> [<https://perma.cc/8H6T-LLPK>].

12. See Rebecca A. Rix, *Anti-Suffragism in the United States*, NAT'L PARK SERV. (Apr. 10, 2019), <https://www.nps.gov/articles/anti-suffragism-in-the-united-states.htm> [<https://perma.cc/MBV4-WKY6>].

13. See Herbert J. Hovenkamp, *The Classical American State and the Regulation of Morals*, FAC. SCHOLARSHIP PENN CAREY L., Feb. 25, 2013, at 1.

14. *Id.* at 9.

15. *See id.* at 6.

16. *Id.* at 15.

17. Paul Aaron & David Musto, *Temperance and Prohibition in America: A Historical Overview*, in ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 127, 131 (Mark H. Moore & Dean R. Gerstein eds., 1981).

18. See Kerry C. Kelly, *The Volstead Act*, NAT'L ARCHIVES (Feb. 24, 2017), <https://www.archives.gov/education/lessons/volstead-act> [<https://perma.cc/XF8H-QYBP>].

19. See D. KELLY WEISBERG, MODERN FAMILY LAW 5–7 (7th ed. 2020).

20. See Lauren MacIvor Thompson, “*The Offspring of Drunkards*”: *Gender, Welfare, and the Eugenic Politics of Birth Control and Alcohol Reform in the United States*, 49 J. L., MED. & ETHICS 357, 362 (2021); *see generally* BOS. WOMEN'S HEALTH BOOK COLLECTIVE, OUR BODIES, OURSELVES FOR THE NEW CENTURY (40th anniversary ed. 2011).

21. See Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963–86*, 40 L. & HIST. REV. 679, 679–85 (2022).

marginalized and politically powerless communities by design, undermining emerging sources of liberty and autonomy for women and sexual and gender minorities.<sup>22</sup> 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.<sup>23</sup> Characterized as threats to public health, civic unity, and overall communal well-being, the social and political outsiders of the early nineteenth century were rapidly transformed into the outlaws of the twentieth century.<sup>24</sup>

As amply studied and documented by historians, abortion prior to quickening was not criminalized under common law.<sup>25</sup> In fact, the cessation of an eighteenth- or early-nineteenth-century woman's menstrual cycle was perceived to be an indication of a more systemic imbalance of the woman's "delicate system of equilibrium" demanding intervention.<sup>26</sup> As a result, abortifacients were commonly prescribed and sought to encourage the return of monthly menstruation separate from the concern of pregnancy.<sup>27</sup> Under common law, women were not perceived to have a moral or legal obligation to a fetus prior to quickening.<sup>28</sup> 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.<sup>29</sup>

Abortifacients were legal, accessible, and normalized until the second half of the nineteenth century.<sup>30</sup> Makers of herbal tonics promising to induce menstruation filled newspapers and magazines with advertisements.<sup>31</sup> Providers of abortion and contraception in large cities became infamous.<sup>32</sup> The earliest regulation of ingested abortifacients were designed to protect pregnant women from purchasing products that posed significant risk of

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22. *See id.* at 692–94.

23. *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> [<https://perma.cc/A5ET-353J>].

24. *Cf.* Redburn, *supra* note 21, at 699.

25. *See* Nicola Beisel & Tamara Kay, *Abortion, Race, and Gender in Nineteenth-Century America*, 69 AM. SOCIO. REV. 498, 507 (2004).

26. LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973*, at 8 (1997).

27. *See id.* at 8–9.

28. *Id.* at 9.

29. *Id.* at 8 (alteration in original).

30. *See id.* at 8–14.

31. *See id.* at 9–10.

32. *See* Robert Sneddon, *The Notorious Madame Restell*, NEW YORKER (Nov. 15, 1941), <https://www.newyorker.com/magazine/1941/11/15/the-notorious-madam-restell> [<https://perma.cc/V6T7-VVGR>] (discussing "[t]he story of the city's most prosperous abortionist").

poisoning or other long-term personal health risks.<sup>33</sup> These laws did not prevent women from growing their own abortifacient herbs or ingesting them for the purpose of ending a pregnancy.<sup>34</sup> The continued characterization of sexual health and domestic activities as taboo for both women and men presumptively excluded the states' regulation of perceived intimate decisions.<sup>35</sup> The law only sought to regulate the commercialization of abortion and reproductive services.<sup>36</sup> Even following the proliferation of state-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.<sup>37</sup>

The privacy-bound, non-interventionist approach to state-level regulation of women's bodily autonomy imploded prior to the American Civil War.<sup>38</sup> 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.<sup>39</sup> The newly minted American Medical Association (AMA) led one of the most public—and powerful—movements against legal abortion.<sup>40</sup> Historians have since documented that the campaign to criminalize abortion as a strategic tool to short-circuit the growing number of providers of informal medicine or healing—primarily delivered by women doctors and midwives.<sup>41</sup> After the Civil War, the AMA and its physician members became prominent state and federal lobbyists for the criminalization of abortion through legislation.<sup>42</sup>

Advocates of abortion criminalization also did not shy away from ginning up public support for otherwise unpopular reforms based on xenophobia and racism.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

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33. REAGAN, *supra* note 26, at 10.

34. *Id.*

35. *See id.* at 9–10.

36. *See id.*

37. *See id.* at 10.

38. *Abortion is Central to the History of Reproductive Health Care in America*, PLANNED PARENTHOOD ACTION FUND, <https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america> [<https://perma.cc/6K2W-2LQM>].

39. *See id.*

40. Annalies Winny, *A Brief History of Abortion in the U.S.*, HOPKINS BLOOMBERG PUB. HEALTH (Nov. 2, 2022), <https://magazine.jhsph.edu/2022/brief-history-abortion-us> [<https://perma.cc/4VHN-JRNK>].

41. *See* REAGAN, *supra* note 26, at 10–11.

42. *See id.* at 10–13; *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> [<https://perma.cc/5VJF-LPA7>].

43. *See* Beisel & Kay, *supra* note 25, at 508–09.

44. *See id.* at 501, 509–11.

45. *See id.* at 501, 509.

Race baiting, he asked, “Shall [the West and the South] be filled by our own children or by those of aliens? This is a question that our own women must answer; upon their loins depends the future destiny of the nation.”<sup>46</sup> As Reagan has articulated, “male patriotism demanded that maternity be enforced among [W]hite Protestant women.”<sup>47</sup>

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.<sup>48</sup> 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.”<sup>49</sup> This narrative persists within the modern anti-abortion movement today.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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 populations.<sup>53</sup> More than sixty-eight cities passed laws targeting personal dress.<sup>54</sup> Nearly a hundred state or municipal laws focused on gendered dress, some specifically barring men from wearing clothing “belonging” to women.<sup>55</sup> These laws not only codified existing clothing and gender norms, but solidified a gender binary more narrowly and finitely than ever before.<sup>56</sup> Fear-based morality campaigns relied on the same public health and welfare claims used to criminalize abortion and contraception.<sup>57</sup> Although initially seeming to target behavior and nonconforming dress,<sup>58</sup> these laws rapidly

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46. *Id.* at 509 (alteration in original).

47. REAGAN, *supra* note 26, at 11.

48. *Id.* at 12.

49. Beisel & Kay, *supra* note 25, at 507.

50. Cf. Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, 5:00 AM), <https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law> [<https://perma.cc/QX7P-H5HU>].

51. REAGAN, *supra* note 26, at 11, 13.

52. See Redburn, *supra* note 21, at 681, 687.

53. Cf. *id.* at 682–89.

54. *Id.* at 718–23.

55. *Id.* at 687, 718–23.

56. See *id.* at 692; Jennifer L. Levi & Kevin M. Barry, *Transgender Tropes & Constitutional Review*, 37 YALE L. & POL’Y REV. 589, 596–99 (2019).

57. See Redburn, *supra* note 21, at 689.

58. See Gutierrez, *supra* note 23.



became ready tools to be used by vice squads and local police departments to harass and criminalize transgender and gender nonconforming people.<sup>59</sup>

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.”<sup>60</sup> 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.”<sup>61</sup> 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 “masquerad[ing] for unlawful purpose.”<sup>62</sup> While the initial intent of these laws may have varied and included an aim to silence political dissenters<sup>63</sup> or target ethnic minorities, by the mid-twentieth century they were used nearly exclusively to criminalize gender nonconforming people and erase transgender people from public life.<sup>64</sup>

According to their proponents, early cross-dressing bans served two distinct state interests: promoting public safety and safeguarding a uniform community morality.<sup>65</sup> Supporters of the laws argued that they were essential to protect the public from fraud and women from sexual assault.<sup>66</sup> These arguments characterized cross-dressing or wearing gender nonconforming clothes generally as an indicator of criminal intent.<sup>67</sup> 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.”<sup>68</sup> Under this rationale, violators of the statute were not necessarily inherently criminal, but had criminal intent.<sup>69</sup> This approach is illustrated by a San Francisco case in 1895. Here, a man was charged with violating the dress statute for “masquerading in female attire.”<sup>70</sup> He was convicted, but after serving a brief sentence in the city prison, he was

59. See Jesse Bayker, *Cross-Dressing Laws Map*, <https://map.transpast.org/about> [<https://perma.cc/T499-XR6E>]; Redburn, *supra* note 21, at 690, 692.

60. Redburn, *supra* note 21, at 687 (omission in original).

61. *Id.* at 718; see also 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> [<https://perma.cc/CY9P-SAN6>].

62. See Redburn, *supra* note 21, at 718–23; Levi & Barry, *supra* note 56, at 596.

63. See Gutierrez, *supra* note 23. 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 *STUD. POPULAR CULTURE* 67, 71 (1991).

64. Courts also recognized this in the language that they could be used arbitrarily to target vulnerable populations. “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.’” *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)).

65. Levi & Barry, *supra* note 56, at 597, 609–12.

66. See *id.* at 609.

67. See *id.* at 597 (quoting *City of Chicago v. Wilson*, 389 N.E.2d 522, 524 (Ill. 1978)).

68. *Id.*

69. See *id.*; see also CLARE SEARS, *ARRESTING DRESS: CROSS-DRESSING, LAW, AND FASCINATION IN NINETEENTH-CENTURY SAN FRANCISCO* 2 (2015).

70. SEARS, *supra* note 69, at 2.

released.<sup>71</sup> The only condition the judge placed on his release was that he “never wear women’s clothing in public again.”<sup>72</sup>

Proponents who argued that cross-dressing bans were necessary to safeguard public morality targeted transgender individuals more directly, criminalizing mere existence.<sup>73</sup> Cross-dressing was described as “inherently antisocial conduct which is contrary to the accepted norms of our society.”<sup>74</sup> Gender nonconforming behavior was characterized as an independently dangerous activity, even in isolation from other criminal activity.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> The former is characterized as “light-hearted tradition” while the latter as “sexualized entertainment in front of children.”<sup>78</sup> The only actual distinction between the two is the perceived gender identity or sexual orientation of the performer.<sup>79</sup> The person’s status as LGBTQ makes the dress dangerous, not the conduct itself.

Though distinct in nature and scope, the twentieth-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 v. Connecticut* constitutionalized the right to contraception focusing on the privacy interest inherent to the marital relationship.<sup>80</sup> It is critical to note

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71. *Id.*

72. *Id.*

73. *See id.* at 2–3.

74. *City of Chicago v. Wilson*, 389 N.E.2d 522, 524 (Ill. 1978) (citing the city’s rationale for the municipal code provision).

75. *Levi & Barry*, *supra* note 56, at 598:

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.”

(alterations in original) (quoting *People v. Simmons*, 357 N.Y.S.2d 362, 365 (N.Y. Crim. Ct. 1974)).

76. *Id.*

77. *See, e.g.,* Marianna Bacallao, *Tennessee Becomes the First State to Pass a Ban on Public Drag Shows*, NPR (Mar. 2, 2023, 7:41 PM), <https://www.npr.org/2023/03/02/1160784530/tennessee-ban-public-drag-shows-transgender-health-care-youth> [https://perma.cc/22YN-C6TX].

78. Matt Laviertes, *Tennessee Governor Appears to Have Dressed in Drag, an Art Form He Wants to Restrict* (Feb. 27, 2023, 7:42 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/tennessee-governor-appears-dressed-drag-art-form-wants-restrict-rcna72569> [https://perma.cc/RL59-MQM7].

79. *Cf. Bacallao*, *supra* note 77.

80. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

here that although the right to privacy was elemental to both *Griswold* and *Roe v. Wade*, abortion rights litigators had consistently relied on a robustly diverse set of constitutional challenges to state abortion restrictions.<sup>81</sup> For example, in *Doe v. Scott*, Illinois state litigators argued that the state's abortion ban violated the Fourteenth Amendment's Due Process Clause because of vagueness.<sup>82</sup> The court agreed.<sup>83</sup> 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."<sup>84</sup> 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 *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.<sup>85</sup> 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.<sup>86</sup>

Similarly, beginning in the 1970s, transgender activists challenged municipal-level bans as Fourteenth Amendment due process violations.<sup>87</sup> Across the country, courts struck down laws targeting transgender people throughout the 1970s and 1980s.<sup>88</sup> 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.<sup>89</sup> 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 the light of contemporary dress habits."<sup>90</sup> The court concluded that this vagueness would encourage "arbitrary and capricious enforcement of the law."<sup>91</sup> Another Ohio court

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81. See REAGAN, *supra* note 26, at 235–40, 244.

82. See *id.* at 235–40; *Doe v. Scott*, 321 F. Supp. 1385, 1388–89 (N.D. Ill. 1971), *vacated by Hanrahan v. Doe*, 410 U.S. 950 (1973).

83. *Doe*, 321 F. Supp. at 1389.

84. *Id.* See also *United States v. Vuitch*, 305 F. Supp. 1032, 1035 (D.D.C. 1969), *rev'd*, 402 U.S. 62 (1971); *People v. Belous*, 458 P.2d 194, 199–200 (Cal. 1969).

85. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); see also *Doe*, 321 F. Supp. at 1389 n.21 (collecting cases).

86. See *America's Abortion Quandary*, PEW RSCH. CTR. (May 6, 2022), <https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary> [https://perma.cc/X5SS-QZKR].

87. See Lee Clark, *The Pressures of Passing, Reinforced by Precedent*, 22 CUNY L. REV. F. 17, 22–24 (2019) (discussing due process challenges asserted).

88. Redburn, *supra* note 21, at 681, 714.

89. See generally *id.* at 714–16.

90. *City of Columbus v. Rogers*, 324 N.E.2d 563, 565 (Ohio 1975).

91. *Id.*

noted that a similar municipal ordinance provided a convenient instrument for “harsh and discriminatory enforcement by prosecuting officials, against particular groups deemed to merit their displeasure.”<sup>92</sup>

In addition to vagueness arguments, courts also held that laws punishing gender nonconforming dress violated the substantive due process protections of the Fourteenth Amendment. Specifically, courts have held 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.”<sup>93</sup> For example, the Illinois Supreme Court held that the state failed to present even a rational basis for banning gender nonconforming dress in violation of the liberty interest of the defendant.<sup>94</sup> 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.<sup>95</sup> 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.”<sup>96</sup> The court refused to accept that offending “the general public’s aesthetic preference” was sufficient proof of public harm.<sup>97</sup> Even the U.S. District Court for Southern District of 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.<sup>98</sup> Further, the court suggested that an individual’s choice of “personal appearance” is protected under the Fourteenth Amendment as a core element of individual identity.<sup>99</sup>

## 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 Fourteenth Amendment.<sup>100</sup> 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

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92. *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)).

93. *See City of Chicago v. Wilson*, 389 N.E.2d 522, 531 (Ill. 1978) (quoting *Kelley v. Johnson*, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting)).

94. *See id.* at 533–34.

95. *Id.* at 533.

96. *Id.*

97. *Id.*

98. *Doe v. McConn*, 489 F. Supp. 76, 80 (S.D. Tex. 1980).

99. *Id.* at 80; *Levi & Barry*, *supra* note 56, at 601.

100. *See, e.g., Roe v. Wade*, 410 U.S. 113, 153 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992); *City of Cincinnati v. Adams*, 330 N.E.2d 463, 465 (Ohio Mun. Ct. 1974).

in substance and form, the current wave of state legislation targeting transgender people poses familiar constitutional questions of liberty, autonomy, expression, and self-determination.<sup>101</sup> 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-fascis[t]”<sup>102</sup>—“eradicat[ing]” transgenderism.<sup>103</sup>

Today's anti-transgender legislative trend began in earnest in the years immediately following the Supreme Court decision *Obergefell v. Hodges*<sup>104</sup> in 2015 and the election of Donald Trump in 2016.<sup>105</sup> Far-right advocacy and political groups committed significant financial resources and political capital to extensive media and membership campaigns targeting transgender people, particularly students.<sup>106</sup> 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.<sup>107</sup> The first set of anti-transgender legislative packages included forty-four anti-transgender bills which swept through sixteen states and focused on transgender students' access to athletics<sup>108</sup> and other single-sex services and programs.<sup>109</sup> Despite conservative enthusiasm and support for

101. 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*, HUM. 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> [<https://perma.cc/U34Q-2N54>].

102. See President Joe Biden, Remarks at a Reception for the Democratic National Committee (Aug. 26, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/26/remarks-by-president-biden-at-a-reception-for-the-democratic-national-committee-3> [<https://perma.cc/3EZ8-NMVG>].

103. See Katie Hawkinson, *Michael Knowles Says Transgenderism Must Be “Eradicated” at CPAC*, DAILY BEAST (Mar. 6, 2023, 11:56 AM), <https://www.thedailybeast.com/michael-knowles-calls-for-eradication-of-transgender-people-at-conservative-political-action-conference> [<https://perma.cc/4ADE-BXJH>].

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

105. See *Anti-Transgender Legislation Spreads Nationwide, Bills Targeting Transgender Children Surge*, HUM. RTS. CAMPAIGN FOUND. (Feb. 19, 2016), <http://assets2.hrc.org/files/assets/resources/HRC-Anti-Trans-Issue-Brief-FINAL-REV2.pdf> [<https://perma.cc/E5ET-7KU9>].

106. See *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> [<https://perma.cc/SWB9-RQ8X>].

107. 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*, HERITAGE FOUND. (Mar. 28, 2019), <https://www.heritage.org/gender/event/the-medical-harms-hormonal-and-surgical-interventions-gender-dysphoric-children> [<https://perma.cc/8LH7-H778>].

108. HUM. RTS. CAMPAIGN FOUND., *supra* note 105, at 1–2. 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. *Id.* at 6.

109. These state laws were contrary to the federal government's interpretation of Title IX. *Id.* at 3.

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.<sup>110</sup> In *Bostock*, the Court held that sex discrimination protections under Title VII of the Civil Rights Act of 1964 prohibited discrimination on the basis of sexual orientation and gender identity.<sup>111</sup> Although *Bostock* is a Title VII case, it is instructive in educational contexts. Courts typically look to Title VII precedent for guidance when determining interpretations for other federal civil rights laws, including Title IX.<sup>112</sup> Both statutes also share a similar legislative history.<sup>113</sup>

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.<sup>114</sup> Challenges to gender-affirming care focused on access based on affordability and healthcare coverage rather than legal bars.<sup>115</sup> This initial lack of merit-based challenges to gender-affirming care may be due to the fact that medical intervention in the context of a diagnosis of gender dysphoria is far from novel. In 1919 in Berlin, Germany, the Institute for Sexual Research opened and, as early as 1930, hormonal treatments were prescribed and doctors performed the first modern gender-affirmation surgeries for trans-women.<sup>116</sup>

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.<sup>117</sup> Many other plaintiffs were undergoing a social transition under the care of a doctor or psychologist.<sup>118</sup> Although unique to every individual, social transition may include changing a name and pronouns, as well as beginning to dress in accordance

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110. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

111. *Id.*

112. *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 64, 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) (applying of Title VII precedent to a Title IX claim).

113. *See, e.g.*, *Emeldi v. Univ. of Or.*, 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.’” (quoting *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988))).

114. *See* Arleigh Rogers & Michael Goldberg, *New State Laws Force Families with Trans Kids to Seek Gender-Affirming Care Elsewhere*, PBS (July 10, 2023, 2:27 PM), <https://www.pbs.org/newshour/nation/new-state-laws-force-families-with-trans-kids-to-see-gender-affirming-care-elsewhere> [<https://perma.cc/2HMK-AF3H>].

115. *See, e.g.*, *O'Donnabhain v Comm’r of Internal Revenue*, 134 T.C. 34, 35 (2010).

116. *Magnus Hirschfeld*, U.S. HOLOCAUST MEM’L MUSEUM (Dec. 17, 2021), <https://encyclopedia.ushmm.org/content/en/article/magnus-hirschfeld-2> [<https://perma.cc/2SS3-NWK6>]; Brandy Schillace, *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> [<https://perma.cc/EWD3-5J3W>].

117. *See* Redburn, *supra* note 21, at 711.

118. *See id.* at 708–11.

with the target gender.<sup>119</sup> This is still often under care of a physician or provider and includes gender-affirming talk therapy and supervision.<sup>120</sup> For young children seeking treatment, social transition is the only care recommended to treat gender dysphoria. During puberty, transgender children may be prescribed medications to suppress puberty.<sup>121</sup> Often referred to as “puberty blockers,” this hormone-based treatment prevents the development of secondary sex characteristics.<sup>122</sup> Medical transition for adults may include hormone therapy and eventually surgical intervention.<sup>123</sup> Mainstream medical and social welfare organizations in the United States including the American Association of Clinical Endocrinology,<sup>124</sup> American Academy of Pediatrics,<sup>125</sup> and American College of Obstetrics and Gynecology have affirmed the importance of comprehensive gender-affirming care for all individuals living with gender dysphoria.<sup>126</sup> Other countries 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.<sup>127</sup> 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.<sup>128</sup> In 2021, Arkansas passed the first state-level

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119. *Let's Talk About Transitions*, SOC'Y FOR RSCH. ON ADOLESCENCE, <https://www.s-r-a.org/trans-transitions> [<https://perma.cc/4W2C-CZ8Q>].

120. *See id.*

121. *Id.*

122. *Puberty Blockers for Transgender and Gender-Diverse Youth*, MAYO CLINIC (June 14, 2023), <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075> [<https://perma.cc/6A4L-BKGZ>].

123. *See Let's Talk About Transitions*, *supra* note 119.

124. *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> [<https://perma.cc/SJ8E-QEXD>].

125. *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> [<https://perma.cc/32NP-J4TV>].

126. *Health Care for Transgender and Gender Diverse Individuals*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (Mar. 2021), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/03/health-care-for-transgender-and-gender-diverse-individuals> [<https://perma.cc/ZU63-J53P>].

127. *Identidad de Genero* art. 12 [Identity and Gender], Ley No. 26.743 (2013) (Arg.) (English 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](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)) [<https://perma.cc/GK7B-PNPZ>].

128. *See Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU (June 23, 2023), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights> [<https://perma.cc/X7YR-TV7F>]; *Legislation Affecting LGBTQ Rights Across the Country*, ACLU (Jan. 14, 2022), <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country-2022> [<https://perma.cc/5WUG-X3TV>]; HUM. RTS. CAMPAIGN FOUND., *supra* note 105.

ban prohibiting access to gender-affirming care for youth.<sup>129</sup> The Arkansas law, called the Save Adolescents from Experimentation (SAFE) Act, prohibited healthcare professionals from providing or referring transgender youth under the age of eighteen for gender-affirming health care.<sup>130</sup> The law barred use of state funds or insurance coverage for gender-affirming health care for transgender people under eighteen, and empowered private insurers to refuse to cover gender-affirming care for all transgender people regardless of age.<sup>131</sup>

Litigators challenged the Arkansas statute arguing that it violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.<sup>132</sup> As articulated in the complaint, restrictions on access to care for minors presents a number of constitutional questions.<sup>133</sup> 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 twentieth century, the Supreme Court has recognized the rights of parents to make decisions regarding the care, education, and overall well-being of their children.<sup>134</sup> Any state infringement on this liberty interest must satisfy a very high burden.<sup>135</sup> A preliminary injunction from the district court blocked enforcement of the Arkansas law in July 2021.<sup>136</sup> The Eighth Circuit Court of Appeals upheld the injunction in August 2022.<sup>137</sup>

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 passed bills not only prohibiting all transition-related care for young people,<sup>138</sup> but also severely restricting drag performances under the guise of child health and safety.<sup>139</sup> Both bills were described as safeguarding the safety and welfare of Tennessee children.<sup>140</sup> The latter expanded the definition of adult cabaret performances to include the terms “male or female impersonators,” “topless dancers,” “exotic dancers,” and “strippers.”<sup>141</sup> These

129. See 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> [https://perma.cc/24ZT-A6TE].

130. ARK. CODE § 20-9-1502.

131. *Id.* § 20-9-1503.

132. Complaint for Declaratory and Injunctive Relief at 41–43, *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (No. 4:21-cv-450).

133. See *id.*

134. See *Meyers v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925).

135. See, e.g., *Meyers*, 262 U.S. at 399–400.

136. *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 894 (E.D. Ark. 2021).

137. *Brandt v. Rutledge*, 47 F.4th 661, 672 (8th Cir. 2022).

138. S.B. 1, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

139. S.B. 3, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

140. See Alec Schemmel, *Tennessee House Passes Bills Banning Public Drag Shows, Trans Surgeries for Minors*, FOX 17 (Feb. 23, 2023, 9:20 AM), <https://fox17.com/news/local/tennessee-bills-on-drag-performances-trans-surgeries-for-minors-could-soon-be-law> [https://perma.cc/59JV-GEPW].

141. S.B. 3, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).



laws are designed to criminalize and stigmatize transgender and gender nonconforming residents. 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.<sup>142</sup> 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 twentieth century state- and municipal-level dress bans in punishing and marginalizing transgender and gender nonconforming people,<sup>143</sup> transgender and women's rights activists of the 1970s and 1980s succeeded in achieving freedom from state-mandated gender conformity and role restrictions.<sup>144</sup> 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.<sup>145</sup> These victories transformed transgender and gender nonconforming people from faceless public welfare threats into lives worthy of recognition and protection from state-mandated marginalization.<sup>146</sup>

Given the significant role that the Fourteenth 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.<sup>147</sup> However, the *Dobbs* opinion fails to take into account the "second founding."<sup>148</sup> The Constitution's original inclusion of the institution of chattel slavery hollowed out the document's liberatory promises at the root.<sup>149</sup> By extension, the original design of structural

142. See *Drag Queen (and Ordained Minister) Bella DuBalle Won't Be Silenced by New Tennessee Law*, NPR (Mar. 16, 2023, 12:51 PM), <https://www.npr.org/transcripts/1163815547> [<https://perma.cc/B5YE-27CR>] (explaining that "male and female impersonators" is vague and worries the language could be used to target transgender people).

143. See *supra* notes 48–72 and accompanying text.

144. See *supra* notes 82–94 and accompanying text.

145. See, e.g., *City of Chicago v. Wilson*, 389 N.E.2d 522, 524 (Ill. 1978).

146. See Kylar W. Broadus & Shannon Price Minter, *Legal Issues*, in *TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY* 174–210 (Laura Erickson-Schroth ed., 2014).

147. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277 (2021).

148. Cf. *Module 12: Slavery in America: From the Founding to America's Second*, NAT'L. CONST. CTR., <https://constitutioncenter.org/education/constitution-101-curriculum/12-slavery-in-america-from-the-founding-to-americas-second-founding> [<https://perma.cc/5EKN-LLGU>].

149. See 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, 67–70 (2022).

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.<sup>150</sup>

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.<sup>151</sup> 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."<sup>152</sup> Further, these changes and the "re-founding" that ensued demand a "reconsideration of the entire document."<sup>153</sup> Thurgood Marshall has asserted that although "the Union survived the [C]ivil [W]ar, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the [F]ourteenth [A]mendment, ensuring protection of the life, liberty, and property of *all* persons against deprivations without due process, and guaranteeing equal protection of the laws."<sup>154</sup>

Examining the application of the Fourteenth Amendment's Due Process Clause through this liberatory lens provides a meaningful frame to understand the 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 Fourteenth 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.<sup>155</sup> The Fourteenth Amendment is also a clear-eyed acceptance that the structural protections of 1789 are insufficient to prevent bias and discrimination against marginalized

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150. *See id.*

151. *Id.* at 70; *see also* *Seminole Tribe v. Florida*, 517 U.S. 44, 65–66 (1996) ("[T]he 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.").

152. Neuborne, *supra* note 149, at 70.

153. *Id.*

154. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 301 (Mark V. Tushnet ed., 2001) (emphasis in original).

155. Neuborne, *supra* note 149, at 72–73:

Justices Field, Bradley, Swaine, and Chief Justice Chase dissented [in *The Slaughterhouse Cases*, 83 U.S. 36 (1873)], 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 Swaine, 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*."

(internal citation omitted).

populations.<sup>156</sup> 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.

For more than a century, the Fourteenth 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.<sup>157</sup> In *Dobbs*, the Supreme Court removed the guardrails, empowering states to regulate abortion free from the constitutional constraints of fundamental rights protections.<sup>158</sup> 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.<sup>159</sup> In determining the absence of a "deeply rooted" history or tradition of abortion access, Justice Alito concluded, "The right to abortion does not fall within this category."<sup>160</sup> 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."<sup>161</sup>

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

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156. 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 generally 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).

157. See generally David Luban, *The Warren Court and Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 8 (1999) (acknowledging that the Court stepped into the role of protecting individual rights post-WWII).

158. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

159. See *id.*

160. *Id.* at 2242.

161. *Id.* at 2242–43.

children, and to be free from involuntary sterilization.<sup>162</sup> However, Justice Thomas's concurrence specifically mentions contraception, queer sex, and 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.<sup>163</sup> The Court's willingness to overturn longstanding, rights-affirming precedent paired with Justice Thomas's concurrence is undoubtedly concerning.

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.<sup>164</sup> 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.<sup>165</sup> It is also far from neutral. As Justice 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."<sup>166</sup> 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.<sup>167</sup> 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 Fourteenth Amendment and the nation that adopted it. In the absence of the moderating hand of the Constitution, states have used the Court's so-called neutrality to impose 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*.<sup>168</sup> The leaked draft and anticipated *Dobbs* decision motivated states without trigger laws to introduce new legislation.<sup>169</sup> Other states

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162. *See id.* at 2261, 2280.

163. *See id.* at 2301 (Thomas, J., concurring) ("For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

164. *Id.* at 2305 (Kavanaugh, J., concurring).

165. Perhaps "some outcomes . . . are so substantively unfair that no process that produced them could count as 'due.'" RICHARD H. FALLON & RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW* 81–82 (2004).

166. *Dobbs*, 142 S. Ct. at 2304 (Kavanaugh, J., concurring).

167. 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).

168. *See* Devan Cole & Tierney Sneed, *Where Abortion "Trigger Laws" and Other Restrictions Stand After the Supreme Court Overturned Roe v. Wade*, CNN (July 4, 2022, 8:20 PM), <https://www.cnn.com/2022/06/27/politics/states-abortion-trigger-laws-roe-v-wade-supreme-court/index.html> [https://perma.cc/C7KX-LDS3].

169. *See* NICOLE DUBE & JAMES ORLANDO, OFF. OF LEGIS. RSCH., 2022-R-0227, *STATE ABORTION LAWS ENACTED POST-DOBBS DECISION* (2022), <https://cga.ct.gov/2022/rpt/pdf/2022-R-0227.pdf> [https://perma.cc/3HPX-DGQY].

introduced bills banning abortions which were passed in special sessions immediately following the *Dobbs* decision.<sup>170</sup> The rapid state movement towards recriminalization of abortion and restriction on transgender rights belies an effort to erase nonconformity, narrow role options, and concretize and exacerbate current power imbalances across American society. In June 2022, the Supreme Court knew that the wolves were at the door. In the name of neutrality, the *Dobbs* decision opened it.

### CONCLUSION

The Supreme Court's decision in *Dobbs* struck a damaging blow to individual rights jurisprudence, particularly cases involving bodily autonomy and liberty. State legislatures, no longer restrained by constitutionalized standards, made swift work of criminalizing abortion and threatening other expressions of bodily autonomy and reproductive care. The immediate adoption of these draconian restrictions exposes the Court's assurances of neutrality as a laughable mischaracterization of the abdication of its duty to interpret and enforce the Constitution as a safeguard of individual liberty and dignity interests. This 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.

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170. See, e.g., Stracqualursi, *supra* note 8 (noting that West Virginia passed a restrictive abortion bill shortly after *Dobbs*); McCammon, *supra* note 8 (noting that Indiana passed a restrictive abortion bill shortly after *Dobbs*).