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RETHINKING FOUNDATIONS AND ANALYZING NEW CONFLICTS: TEACHING LAW AFTER *DOBBS*

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ABSTRACT

This Article draws on our diverse and complementary areas of scholarly expertise and teaching experiences across law school and public health curricula to offer a multidisciplinary model for teaching in a variety of courses after Dobbs*. Teaching reproductive rights and justice poses extensive challenges in the wake of* Dobbs*' overruling* Roe v. Wade *and* Planned Parenthood v. Casey, *upending a half century of precedents protecting a constitutional right to abortion, and returning the issue to "the people"—and the states. This Article offers theoretical and pedagogical perspectives on teaching courses in Reproductive Rights and Justice, as well as relevant foundational courses like Constitutional Law, Family Law, and Health Law, in the uncertain and shifting post-*Dobbs *landscape. We argue that including historical and theoretical context alike will aid in and enhance learning. Likewise, developing data and historical literacy will help students understand doctrinal shifts over time and provide grounding for contextualization and application for such changes.*

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I. INTRODUCTION

Teaching topics related to reproductive rights and reproductive justice demands embracing constant change in law, learning across subjects, and working across disciplines. A new challenge that will exist for many years to come is teaching any subject impacted by the decision in *Dobbs v. Jackson Women's Health Organization*.[1] Instructors are responsible for guiding learners through a contentious topic in which the Supreme Court has upended settled precedent, casting doubt on the future of other constitutional rights. *Dobbs* affects the teaching of foundational doctrine as well as specialized areas of law, theories of law and social justice, and real-life pragmatic applications. All are in flux, and there are more questions than answers for many of these developing conflicts.

This uncertain landscape elevates the importance of helping students to develop competence in foundational law school subjects, learn how to use and interpret data demonstrating the impact of law on populations, learn theoretical approaches to law, develop historical literacy, and embrace multi-disciplinarity. Adding to the challenge, instructors must create a classroom environment that facilitates dialogue and critical thinking. The legal and political divisions stoked by *Dobbs* have produced uncertainty in lawyering strategy and destabilized the field of reproductive rights.

Like many law professors, we navigate this new, increasingly complex landscape daily. Among the three of us, we personify the variety of legal specialties impacted by *Dobbs*: we have expertise in reproductive rights and justice, constitutional law, family law, health law, public health, feminist legal theory, gender and law, international law, and human rights. We teach a range of courses affected by *Dobbs*, including Reproductive Rights & Justice; Health Systems, Law & Policy; Public Health Law; Health Law, Bioethics & Human Rights; Constitutional Law; Family Law; Gender Equality Law; Human Rights; Race, Racism, and the Law; and Feminist Jurisprudence. Each subject is impacted, not just as a pedagogical matter, but also in research and practice. We also co-direct the Boston University (BU) Program on Reproductive Justice—launched on what would have been the fiftieth anniversary of *Roe v. Wade*—and co-edited a symposium of twenty-five articles published in the *Journal of Law, Medicine & Ethics* that includes legal, medical, public health, bioethics, and other scholars exploring the future of reproductive justice after *Dobbs*.[2] We also analyzed *Dobbs* and its impacts for new editions of our health law (Huberfeld) and family law (McClain) casebooks as well as other publications.[3] In short, we

1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

2. *Symposium: Seeking Reproductive Justice in the Next 50 Years*, 51 J.L. MED. & ETHICS 463, 463–625 (2023).

3. NICOLE HUBERFELD ET AL., THE LAW OF AMERICAN HEALTH CARE (3d ed. 2023); DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW (6th ed. 2023).

are living the far-reaching impacts of *Dobbs* on legal education, research, and advocacy.

Our aim is to teach the law as it exists today with historical and theoretical context to prepare students to respond to future shifts in the law related to abortion. Weaving a purposefully complex tapestry that incorporates subjects found throughout reproductive rights and justice will help students understand the immediate and long-term ramifications of doctrinal shifts over time. Instructors need to be prepared to teach students who are not only discouraged by *Dobbs* but also may believe that such doctrinal shifts have more to do with the politics of Supreme Court appointments than with constitutional principles.

One Article cannot analyze every aspect of legal education that was changed by or is morphing after *Dobbs.* Part II observes that teaching reproductive rights often has been part of Constitutional Law, making this foundational course a natural place to begin. Part III examines teaching Reproductive Rights and Justice. Parts IV and V focus on curricular areas that are critical to studying reproductive rights and justice, Family Law, Health Law, and related courses. Part VI argues for the importance of helping students to develop data and historical literacy to help with contextualization and application in the real world. To further students' comfort with the inter-disciplinarity of studying reproductive rights and justice, choosing materials from different disciplines helps students learn to use other kinds of research to inform future quandaries. Part VII briefly concludes.

II. CONSTITUTIONAL LAW

As a threshold matter, it is important to acknowledge that many Constitutional Law teachers perceive that *Dobbs* and other decisions by the Court's "hard right supermajority" created a "crisis" in teaching this subject.[4] Such cases have upended "decades of established precedent" not only concerning abortion rights but also in other areas of constitutional law, including gun rights, voting rights, affirmative action, freedom of speech, and religious liberty.[5] Constitutional Law courses generally introduce students to different theories of constitutional interpretation and the role of courts in a constitutional democracy.[6] Although *Dobbs* and other recent opinions purport to reach their results using originalist methods, this claim, combined with a selective and inaccurate use of "history," have generated widespread criticism from

4. Jesse Wegman, *The Crisis in Teaching Constitutional Law*, N.Y. TIMES (Feb. 26, 2024), https://www.nytimes.com/2024/02/26/opinion/constitutional-law-crisis-supreme-court.html.

5. *Id.*

6. *See generally* WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION (6th ed. 2019). For a helpful overview of these theories, *see* JAMES E. FLEMING, CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS (2022).

constitutional historians and theorists.[7] How can instructors navigate this crisis of legitimacy, as it relates to teaching about reproductive rights and justice?

For decades, first-year Constitutional Law surveys included *Roe v. Wade*,[8] *Planned Parenthood v. Casey*,[9] and related cases like *Harris v. McRae*,[10] as part of studying the right of privacy and protection for "liberty" under the Fourteenth Amendment's Due Process Clause.[11] Yet, even among law schools that require a Constitutional Law course, there was no guarantee that instructors would cover abortion-related cases.[12] Nevertheless, even after *Dobbs* eliminated the right to access abortion and put in question broader constitutionally-protected liberty interests, Constitutional Law courses still play an essential role in teaching reproductive rights and justice for many reasons, three of which are explored in this Part.

A. Due Process, Liberty, Stare Decisis, and the Court's Legitimacy

Justice Alito's majority opinion in *Dobbs* modified the Court's approach to liberty interests, and the doctrine of the right of privacy, by applying a narrow "history and tradition" analysis.[13] This test is meant to decide whether a fundamental right that is not explicitly named in the U.S. Constitution will be protected under the Due Process Clause.[14] This test is an unpredictable and loose

7. *See* Wegman, *supra* note 4. The number of critiques of *Dobbs* along this line is substantial and growing. For a few helpful examples, *see* Reva Siegel, *Memory Games:* Dobbs' *Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance,* 101 TEXAS L. REV. 1127 (2023); Michele Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 2002 S. CT. REV. 111 (2022); Jack Balkin, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024). We return to this point about the use of history in Part VI.

8. Roe v. Wade, 410 U.S. 113 (1973); *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

9. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

10. Harris v. McRae, 448 U.S. 297 (1980).

11. At BU Law, Constitutional Law is a required first year course. *See JD Program, Degree Details,* B.U. SCH. OF L. (Jan. 1, 2024), https://www.bu.edu/law/academics/find-degrees-and-programs/jd-program/. Some law schools include Constitutional Law in the second year; others divide it into two parts, so that individual rights and liberties might be either a required or optional upper-level course.

12. This is also true for some of the landmark contraception cases apart from *Griswold v. Connecticut,* 381 U.S. 479 (1965). *Eisenstadt v. Baird*, 405 U.S. 438 (1972), a key building block for *Roe,* is often included only as a case blurb or note with the key language extending the right of privacy to unmarried individuals. *See, e.g.,* MURPHY ET AL., *supra* note 6, at 149.

13. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 233 (2022). The "Family Law" section, Part IV below, elaborates on the competing approaches to constitutional interpretation taken by the *Dobbs* majority and dissent, relating them to prior interpretive battles over due process liberty.

14. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237 (2022).

analytical approach that leaves much to creative arguments of litigants[15] and the limited historical knowledge of federal courts.[16] The *Dobbs* majority opinion asserted that other, related "liberty" rights are not disturbed,[17] but it is important that students understand how related liberty interests may be affected in the not-too-distant future.

Building on the Court's privacy jurisprudence, the decision in *Roe* articulated a right to privacy that involved two distinct ideas that students should continue to learn: the privacy of the physician-patient relationship and the privacy of intimate decisions and acts in the home.[18] Both concepts remain important facets of the right to privacy and are implicated in other liberty interests related to intimate relationships such as the right to marry, to procreate, to use contraceptives, to raise children as parents see fit, and to consent or refuse medical treatment—some of the oldest fundamental rights.[19] If the liberty interest that protected abortion access has been eroded already, then these other rights may rest on shaky ground as well. This is one reason that queer families, for example, are concerned that *Dobbs* will threaten family formation through assisted reproductive technologies;[20] others worry that access to contraceptives is the next liberty interest at stake.[21]

15. Emily Bazelon, *How 'History and Tradition' Rulings Are Changing American Law*, N.Y. TIMES (Apr. 29, 2024), https://www.nytimes.com/2024/04/29/magazine/history-tradition-law-conservative-judges.html#:~:text=Known%20as%20the%20%E2%80%9Chistory%20and,precedents%20of%20the%20distant%20past.

16. The history and tradition analysis will be tested in the *Rahimi* case. U.S. v. Rahimi, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023). The question before the Court is whether 18 U.S.C. 922 (g)(8), which prohibits possession of firearms by persons subject to domestic violence protective orders, violated the Second Amendment. *See id.* at 448 (answering "yes" based on New York State Rifle & Pistol Assn., Inc. v. Bruen, 597 U.S. 1 (2022)). Though *Rahimi* is a Second Amendment case, in *Bruen*, the Court similarly relied on history and tradition to determine whether firearms possession could be restricted, so the *Rahimi* outcome likely will be meaningful for post-*Dobbs* litigation and interpretation as well. *See Bruen*, 597 U.S. at 22.

17. *Dobbs*, 597 U.S. at 231.

18. *Griswold*, 381 U.S. at 485; *Eisenstadt*, 405 U.S. at 447. A classic feminist critique is that privacy, as a negative right "to be let alone," fails to protect women from private violence or to secure the material and social preconditions for exercising their rights. *See* CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 93–102 (1987).

19. CONG. RSCH. SERV., LSB 10820, PRIVACY RIGHTS UNDER THE CONSTITUTION: PROCREATION, CHILD REARING, CONTRACEPTION, MARRIAGE, AND SEXUAL ACTIVITY 1, 1, 3 (2022).

20. CATHREN COHEN ET AL., UCLA CTR. ON REPRODUCTIVE HEALTH L. & POL'Y, THE IMPLICATIONS OF *DOBBS* ON REPRODUCTIVE HEALTH CARE ACCESS FOR LGBTQ PEOPLE WHO CAN GET PREGNANT 2, 5 (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Repro-Access-Oct-2022.pdf.

21. *See, e.g.,* Deanda v. Becerra, 645 F. Supp. 3d 600, 611 (N.D. Tex. 2022) (challenging aspects of Title X family planning funding).

Though no new Supreme Court decisions explicitly jeopardize these other rights, the Court heard two new abortion-related cases in the 2023 Term.[22] *Dobbs* effectively invited new litigation surrounding other basic liberties. Additionally, some state officials are limiting access to contraceptives, in part reflecting confusion over vague and baffling state laws. For example, Idaho universities are no longer allowing post-coital contraception such as Plan B after *Dobbs*, because Idaho law contains non-scientific statutory definitions of emergency contraception as an abortifacient, even though this medication cannot affect pregnancy.[23]

Restrictions on gender-affirming care for minors have increased after *Dobbs* and are also seen as a threat to nontraditional families and LGBTQ+ individuals' civil rights. Some states have enacted laws expressly protecting gender-affirming care (sometimes linking it to protection of reproductive rights).[24] However, over twenty states have enacted either civil or criminal bans on gender-affirming care, leading minors, parents, and medical professionals to challenge the bans based on Due Process, Equal Protection, and First Amendment grounds.[25] While a number of federal district courts have enjoined such laws, federal appellate courts have divided on whether such state bans require heightened scrutiny and whether they are unconstitutional.[26] In its decision upholding Kentucky's and Tennessee's bans, the Court of Appeals for the Sixth Circuit in *L.W. v. Skrmetti* repeatedly invoked *Dobbs*.[27] The issue may

22. All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210 (5th Cir.), *cert. granted sub nom*. Food & Drug Admin. v. All. for Hippocratic Med., 144 S. Ct. 537, 217 L. Ed. 2d 285 (2023), and *cert. granted sub nom*. Danco Lab'ys, L.L.C. v. All. for Hippocratic Med., 144 S. Ct. 537, 217 L. Ed. 2d 285 (2023) (Nos. 22A901, 22A902 2023 Term) (oral argument Mar. 26, 2024); United States v. Idaho, 623 F. Supp. 3d 1096 (D. Idaho 2022), *cert. granted before judgment sub nom.* Moyle v. United States, 144 S. Ct. 540 (2024), and *cert. granted before judgment,* 144 S. Ct. 541 (2024) (No. 23-726, 2023 Term) (oral argument Apr. 24, 2024).

23. Rebecca Boone, *Idaho Universities Disallow Abortion, Contraception Referrals for Students*, PBS (Sept. 27, 2022), https://www.pbs.org/newshour/education/idaho-universities-disallow-abortion-contraception-referrals-for-students; IDAHO CODE ANN. § 18-611(a) (West 2011); *Emergency Contraception*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS PRACTICE BULLETIN NO. 152 (Sept. 2015), https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2015/09/emergency-contraception#:~:text=Emergency%20contraception%20can%20prevent%20pregnancy,to%20a%20developing%20embryo%2038.

24. Massachusetts, for example; for a state-by-state map of laws prohibiting or protecting gender affirming care, *see Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_youth_medical_care_bans (last updated May 16, 2024).

25. *See id.*

26. *Compare* Brandt v. Rutledge, 47 F. 4th 661, 667 (8th Cir. 2022) (affirming lower court preliminary injunction against Arkansas's ban) *with* Williams v. Skrmetti, 83 F. 4th 460, 491 (6th Cir. 2023) (reversing lower court preliminary injunction against Kentucky and Tennessee laws).

27. *See Skrmetti*, 83 F. 4th at 473, 479, 481–484, 484, 486, 489.

eventually reach the Supreme Court.[28] Three justices disagreed with the Supreme Court's denial of certiorari in a licensed family therapist's unsuccessful challenge to Washington's ban on conversion therapy.[29] In his dissent from denying the petition, Justice Thomas cited a famous First Amendment compelled speech precedent[30] (*West Virginia Board of Education v. Barnette*[31]) that played a key role in the Court's *303 Creative* decision, which protected, as a matter of freedom from compelled speech, a web designer's refusal to design wedding websites for same-sex marriages.[32] Justice Thomas quoted *Barnette*'s declaration that a "fixed star in our constitutional constellation" is the prohibition on a governmental official prescribing "what shall be orthodox in politics, nationalism, religion or other matters of opinion," or "forc[ing] citizens to confess by word or act their faith therein."[33] Yet, Thomas argued, "under SB 5722 [Washington's law], licensed counselors cannot voice anything other than the state-approved opinion on minors with gender dysphoria without facing punishment."[34] Justice Thomas viewed the issue through the frame of an overweening state silencing "one side" of a "fierce public debate over how best to help minors with gender dysphoria" and compelling counselors to convey a "state-approved message of encouraging minors to explore their gender identities."[35]

Dobbs also upended stare decisis, a doctrine that students learn contributes to stability in rule of law by following precedent when deciding cases that present similar issues.[36] In the wake of *Dobbs,* there has been widespread talk about a "crisis of legitimacy" facing the Supreme Court, stemming from a decline in public trust of the Court after it overturned longstanding precedent without abiding by the usual justifications for doing so.[37] One reason may be the perception that the current composition of the Supreme Court itself is, in a sense,

28. On November 1, 2023, the plaintiffs in *Williams v. Skrmetti* filed a petition for certiorari. Petition for Writ of Certiorari, *Skrmetti*, 83 F. 4th 460.

29. Tingley v. Ferguson, 47 F.4th 1055 (9th Cir. 2022), *reh'g denied*, 57 F. 4th 1072, 1074 (9th Cir. 2023), *cert denied*, 144 S. Ct. 33 (Dec. 11, 2023).

30. Tingley v. Ferguson, 144 S. Ct. 33 (Dec. 11, 2023) (Thomas, J., dissenting). Justice Kavanaugh would have granted the petition but did not write a dissent. *Id.* at 1.

31. W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

32. 303 Creative LLC v. Elenis, 600 U.S. 570, 603 (2023).

33. *Tingley*, 144 S. Ct. 33, slip op. at 5 (Thomas, J., dissenting) (quoting *Barnette,* 319 U.S. at 642).

34. *Id.*

35. *Id.* at 1, 4.

36. James C. Rehnquist, *Historical Background on Stare Decisis Doctrine*, LIBR. OF CONG., https://constitution.congress.gov/browse/essay/artIII-S1-7-2-1/ALDE_00001187/ (last visited Jan. 10, 2024).

37. *See, e.g.*, Adam Liptak, *Critical Moment for* Roe*, and the Supreme Court's Legitimacy*, N.Y. TIMES (Dec. 4, 2021), https://www.nytimes.com/2021/12/04/us/politics/mississippi-supreme-court-abortion-roe-v-wade.html?searchResultPosition=2.

illegitimate due to the "norm-busting appointments politics" engaged in by the Republican Party—with respect to Justices Gorsuch, Kavanaugh, and Barrett—to "produce the Supreme Court that decided the *Dobbs* case."[38] In their respective nomination hearings, Justices Gorsuch and Kavanaugh identified *Roe* as settled precedent, even "precedent on precedent;" while Justice Barrett was more reserved about *Roe*, she committed to "follow the law of stare decisis" in any challenges to such cases.[39] Despite these assertions, all three joined Justice Alito's majority opinion in *Dobbs*, overruling *Roe* and *Casey*.[40]

Disregard for well-settled precedent and reversing a longstanding protection contribute to this perceived lack of legitimacy. At oral argument in *Dobbs*, Justice Sotomayor voiced concern about the impact of overruling *Roe* and *Casey* because there were now enough Justices on the Court who had openly despised those cases, noting that Mississippi legislators were frank about creating new challenges to *Roe* and *Casey* because of the Court's change in personnel.[41] Justice Sotomayor wrote, "will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts? I don't see how it is possible."[42] The joint dissent of Justices Breyer, Sotomayor, and Kagan reiterated this concern, contrasting the approach to "legitimacy" and stare decisis taken by the joint opinion (authored by Justices Kennedy, O'Connor, and Souter) in *Casey*.[43]

38. Siegel, *supra* note 7, at 1176 (describing how *Dobbs* "depends on hardball appointments politics").

39. Mariana Alfaro, *What Conservative Justices Said About* Roe *in Their Confirmation Hearings*, WASH. POST (June 24, 2022, 3:39 PM) (quoting Justice Kavanaugh on "precedent on precedent"), https://www.washingtonpost.com/politics/2022/06/24/justices-roe-confirmation-hearings/.

40. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 222 (2022).

41. Transcript of Oral Argument at 14–15, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392).

42. *Id.* at 15.

43. *Dobbs*, 597 U.S. at 416 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting). The dissent began:

> We fear that today's decision, departing from stare decisis for no legitimate reason, is its own loaded weapon. Weakening *stare decisis* threatens to upend bedrock legal doctrines, far beyond any single decision. Weakening *stare decisis* creates profound legal instability. And as *Casey* recognized, weakening *stare decisis* in a hotly contested case like this one calls into question this Court's commitment to legal principle. It makes the Court appear not restrained but aggressive, not modest but grasping. In all those ways, today's decision takes aim, we fear, at the rule of law."

Id. at 413–14. The dissent continued, contrasting the *Dobbs* majority's approach with that of the *Casey* joint opinion, authored by Justices Kennedy, O'Connor, and Souter: "The American public, they thought, should never conclude that its constitutional protections hung by a thread—that a new majority, adhering to a new "doctrinal school," could "by dint of numbers" alone expunge their rights. It is hard—no, it is impossible—to conclude that anything else has happened here." *Id*. at 417 (citations omitted) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992).

In light of the appointment politics that led to the addition of the three new Justices who joined the *Dobbs* majority's "caustic" opinion,[44] overturning *Roe* and *Casey* contributes not only to concerns about the Court's legitimacy but also about the erosion of liberty interests, the right to privacy, and related individual rights. These concerns complicate teaching constitutional principles because the Court did not follow its own precedent on the value of precedent; consequently, this may lead to classroom conversations that could fuel student jadedness or a sense of futility.

It is important to note that the Court usually does not overturn longstanding precedents, which Chief Justice Roberts once called "superprecedents."[45] Instructors may find it useful to explore whether *Dobbs* represents business as usual. As constitutional law scholar Justin Driver expressed: "One of the primary challenges when one is teaching constitutional law is to impress upon the students that it is not simply politics by other means . . . [a]nd the degree of difficulty of that proposition has never been higher."[46] As discussed above, when students read the *Dobbs* dissent, they see the majority decision squarely raises this law versus politics challenge because the dissent links the majority's disregard for stare decisis to the changed composition of the Court. Instructors may want to devote class time to the politics of judicial appointments and the role of a nominee's judicial philosophy and view of significant precedents in confirmation hearings.[47]

At the same time, it may also be helpful to emphasize that most of the work of federal and state courts is done without fanfare and out of the spotlight, with judges interpreting statutes and regulations, applying higher courts' rulings, and deciding quotidian disputes. *Dobbs* alone could give learners a skewed sense of the work of the whole judiciary. That bigger picture can be hard to imagine without knowledge of the daily workings of courts and a reminder that the judiciary is but one branch of government that shapes law. As the next two Sections elaborate, the post-*Dobbs* legal and political landscape has intensified attention to issues of federalism, the interplay of federal and state governments, and the role of state courts—and state constitutionalism.

44. *See generally* Radhika Rao, *What Would Justice Blackmun Say? A Response to Dobbs*, 51 J. L. MED. & ETHICS 468, 469 (2023) (explaining why the tone and approach of the *Dobbs* majority's opinion is notably "intemperate").

45. Jeffrey Rosen, *So, Do You Believe in 'Superprecedent'?*, N.Y. TIMES (Oct. 30, 2005), https://www.nytimes.com/2005/10/30/weekinreview/so-do-you-believe-in-superprecedent.html?searchResultPosition=11.

46. Wegman, *supra* note 4 (quoting Justin Driver, Yale Law School).

47. For a thorough review of how Republican motivation to overrule *Roe* shaped the appointments process from the Presidency of Ronald Reagan forward, *see* Siegel, *supra* note 7.

B. Federalism on the Rise

Other constitutional questions flowing from *Dobbs* are numerous. They include separation of powers questions,[48] as well as questions surrounding legal protections for related rights, such as the right to life.[49] Some issues are newly significant. For example, the Court's interpretation of federalism is undergoing changes through a series of recent decisions.[50]

When the *Dobbs* majority returned the issue of abortion "to the people and their elected representatives,"[51] this statement could have meant federal or state legislators. However, most advocates, scholars, and policymakers assumed this language meant devolving regulation of abortion to states; this assumption is reflected in a burst of state laws as well as states' assertions in litigation related to reproductive care that the federal government has no business in this policy space.[52] States have indeed run with this newfound authority, but students should be reminded that the United States has both federal and state elected representatives, and Congress can act in this field too.[53] Yet, pushing abortion policy down to the states is consistent with the ideal of limited federal power,

48. *Dobbs*, 597 U.S. at 291 (discussing the role of judges and how their job differs from legislating).

49. HUM. RTS. WATCH, HUMAN RIGHTS CRISIS: ABORTION IN THE UNITED STATES AFTER *DOBBS* 34 (2023), https://www.hrw.org/sites/default/files/media_2023/04/Human%20Rights%20Crisis%20-%20Abortion%20in%20the%20United%20States%20After%20Dobbs.pdf; Human Rights Committee, General Comment Number 36, Art. 6 Right to Life, International Covenant on Civil and Political Rights (2019), available at https://documents.un.org/doc/undoc/gen/g19/261/15/pdf/g1926115.pdf?token=1uECn0HcvPOMRJKkfY&fe=true; B.U. L. REV. ONLINE symposium, Advancing Pregnant Persons' Right to Life (forthcoming 2024).

50. *See generally* Nicole Huberfeld, *High Stakes, Bad Odds: Health Laws and the Revived Federalism Revolution*, 57 U.C. DAVIS L. REV. 977 (2023) (exploring how the "New Roberts Court" is centering a formal, separated powers vision of federalism that favors states' rights).

51. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292, 302 (2022).

52. CONG. RSCH. SERV., LSB 10787, CONGRESSIONAL AUTHORITY TO REGULATE ABORTION 1, 1 (2022); *see e.g.*, Brief of Indiana, Alabama, Alaska, Arkansas, Florida, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming as Amici Curiae in Support of Idaho's Emergency Application for a Stay Pending Appeal, Idaho v. United States, Docket No. 23A470, 1, 4, 12 (filed Nov. 27, 2023) (asserting *Dobbs* supported broad exercises of state police power in the context of regulating abortion); *see also State Abortion Laws: Protections and Restrictions*, NATIONAL CONFERENCE OF STATE LEGISLATURES https://www.ncsl.org/health/state-abortion-laws-protections-and-restrictions (last updated Jan. 29, 2024).

53. For example, Congress enacted the Partial-Birth Abortion Ban Act of 2003, Pub. L. 108–105 (codified at 18 U.S.C. § 1531) to end most late-term abortions, which the Court upheld in *Gonzales v. Carhart*, 550 U.S. 124 (2006), even though *Roe* and *Casey* were still the law of the land. Congress also protected abortion clinics through the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248.

which some Justices have been articulating as a jurisprudential goal for many years.[54]

In a first-year course, students typically learn that federalism is a structural feature of the Constitution involving vertical division of power, dividing responsibility between the federal government and states. However, reading only Supreme Court decisions would give anyone a limited view of this and other doctrines, because federal statutes and regulations complete the picture by accomplishing partnerships that federalism theory does not fully reflect. Students should learn how the federal government and states often work together to achieve national policy goals through federal statutes, but that *Dobbs* has disrupted this "cooperative federalism" in important ways.[55] For example, Medicaid is held out as a classic model of cooperative federalism, offering public health insurance to low-income people through federal funding for states to provide "medical assistance."[56] Medicaid pays for more than forty percent of all births in the U.S.[57] but does not cover abortion except to save the life or health of the pregnant woman, or in cases of rape or incest due to restrictions created by the Hyde Amendment.[58] Counterintuitively, this limitation on Medicaid payments is more protective than some state laws that outlaw abortion from conception, creating a conflict between federal and state law that is emblematic of newly complex questions of preemption and could be interesting to explore in different contexts, such as the indirect regulation of birthing and abortion through the spending power.

The example of the Hyde Amendment leads to considering a related federalism challenge: existing law does not provide a clear path for resolving the horizontal conflicts that now exist between abortion-protective and abortion-restrictive states, which were triggered by *Dobbs* pushing abortion lawmaking back to the states. Federalism is usually taught as a federal/state dynamic; however, its applications must be explored in the classroom more deeply so

54. Nicole Huberfeld, *Epilogue: Health Care, Federalism, and Democratic Values*, 45 AM. J.L. & MED. 247, 247–48 (2019).

55. *See, e.g.*, 42 U.S.C. § 1395dd. One example is the litigation regarding enforcing the Emergency Medical Treatment and Labor Act against hospitals in abortion-restrictive states that do not provide abortions when they are the medical standard of care in an emergency. United States v. Idaho, 82 F.4th 1296, 1296 (9th Cir. 2023) (granting rehearing en banc and vacating the appellate panel's holding that EMTALA does not preempt Idaho state law prohibiting abortion); *cf.* Texas v. Becerra, 623 F. Supp.3d 696, 702, 739 (N.D. Texas 2022) (holding the HHS interpretation of EMTALA to preempt state laws criminalizing abortion to be a violation of the Administrative Procedure Act).

56. 42 U.S.C. 1396-1.

57. CLAUDIA P. VALENZUELA & MICHELLE J.K. OSTERMAN, U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, CHARACTERISTICS OF MOTHERS BY SOURCE OF PAYMENT FOR THE DELIVERY: UNITED STATES 1 (May 2023), https://www.cdc.gov/nchs/data/databriefs/db468.pdf.

58. Pub. L. No. 117-103., §§ 506–507, 136 Stat. 496 (2022) (limiting Department of Health and Human Services funding to pay for abortion in circumstances of rape and incest only).

students can prepare for conflicts on the horizon that lack straightforward answers. Horizontal conflicts, *i.e*., conflicts between states that protect access to abortion and states that outlaw or restrict the procedure, are irreconcilable and surface largely under-explored doctrines such as comity, choice of laws, and the Privileges and Immunities Clause.[59]

Another example of the intricate challenges created by post-*Dobbs* interstate conflict is the right to travel, an underdeveloped canon spotlighted by Justice Kavanaugh's *Dobbs* concurrence.[60] Justice Kavanaugh stated:

> Some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.[61]

Yet, in the wake of *Dobbs*, new state laws, such as those prohibiting "trafficking" for abortion, will test what the right to travel means.[62] Notably, long before *Dobbs*, patients regularly crossed state lines for all kinds of health care, but they are doing so even more after *Dobbs*.[63] Such unanswered questions can invite litigants to test new waters.

C. State Constitutional Law

State constitutional law has fresh significance since *Dobbs* as a "venue in which debates about reproductive freedom and constitutional democracy take place."[64] Many states have more specific constitutional language than the U.S.

59. *See, e.g*., Susan Frelich Appleton, *Out of Bounds?: Abortion, Choice of Law, and a Modest Role for Congress*, 35 J. AM. ACAD. MATRIM. L. 461 (2023). Several articles explored these questions when scholars believed the Court would overturn *Roe* in *Casey v. Planned Parenthood*. *See, e.g*., Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992).

60. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring).

61. *Id*.

62. Rebecca Boone, *Federal Judge Puts Idaho's 'Abortion Trafficking' Law on Hold During Lawsuit*, ASSOC. PRESS (Nov. 9, 2023), https://apnews.com/article/idaho-abortion-trafficking-travel-ban-270a403d7b4a5e99e566433556614728; *see also* Yellowhammer Fund v. Att'y Gen. of Alabama Steve Marshall, No. 2:23CV450-MHT, 2024 WL 1999546 at *24 (M.D. Ala., May 6, 2024) (permitting a lawsuit to progress against AG Marshall for threatening to prosecute doctors and organizations that help patients to travel out of Alabama for abortions).

63. Another example is the common characterization of the U.S. Constitution as protecting negative rights, which protects people from governmental interference but does not provide help in realizing rights. Discussing the negative rights regime could lead a class to exploring Justice Thomas's *Dobbs* concurrence, which argued that the doctrine of substantive due process should be eliminated. The teaching point is even when a Justice's opinion stands alone and seems to be an outlier, it can stir conversation and may invite litigation. *Dobbs*, 597 U.S. at 330–32 (Thomas, J., concurring).

64. *See* Serena Mayeri, *The Critical Role of History After* Dobbs, 2 J. AM. CON. HIST. 171, 227–269 (2024) (giving an overview of state constitutional law as such a "venue"); *see* Symposium,

Constitution does, with many protecting autonomy, liberty, privacy, equality, and some expressly including (unlike the U.S. Constitution) an Equal Rights Amendment protecting against sex discrimination.[65] The commonplace observation that state constitutions are an independent source of jurisprudence and rights, and that those rights may offer more robust protection than their federal counterparts, has become even more important since *Dobbs.* Some states also protect health care decision-making.[66] Ironically, some states previously adopted these constitutional amendments as anti-Affordable Care Act (ACA) measures that protect health care decisions, which now have different relevance after *Dobbs*.[67]

As one example of the potential of state constitutionalism to protect reproductive rights and advance reproductive justice, consider the recent decision from the Supreme Court of Pennsylvania, *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*.[68] In a 219 page opinion, the majority overruled a nearly forty-year-old case, *Fischer v. Department of Public Welfare,*[69] which held that excluding most abortions from a Pennsylvania medical insurance program while covering (1) all other medically necessary pregnancy-related care (the "Coverage Exclusion") and (2) all medically necessary care for men, including for reproductive health, did not violate the equal protection principles of the Pennsylvania Constitution or its Equal Rights Amendment ("ERA").[70] *Fischer* followed closely the U.S. Supreme Court precedents *Maher v. Roe* and *Harris v. McRae*, which upheld restrictions on state and federal Medicaid funding of abortions based on the logic that such restrictions did not impinge upon the liberty interest recognized in *Roe v. Wade*—since "it simply does not follow that a woman's freedom of choice

Advancing Pregnant Persons' Right to Life, 104 B.U.L. REV. ONLINE 19–209 (2024), https://www.bu.edu/bulawreview/2024/05/13/advancing-pregnant-persons-right-to-life-symposium/. For a video of the panels from the live Symposium, *see* School of Law, Boston University, *BUPRJ Symposium 2024: Advancing Pregnant Persons' Right to Life*, YOUTUBE (Feb. 14, 2024), https://www.youtube.com/watch?v=fKTN26qWlEk.

65. Martha Davis, *Annotated Bibliography: "Persons Born" and the Jurisprudence of "Life"*, 104 B.U.L. REV. ONLINE 161 (2024), https://www.bu.edu/bulawreview/files/2024/05/DAVIS.pdf; Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 191 YALE L. J. FORUM 191 (2023).

66. Tracy Thomas, *Protecting Abortion with State Health Care Freedom of Choice*, 51 J. L. MED., & ETHICS 601, 601 (2023).

67. *Id.* at 601–02.

68. Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs., 309 A.3d 808 (Pa. 2024). This analysis draws on a working paper by one of this Article's co-authors: Linda C. McClain, *Gender Stereotypes, Governmental Orthodoxy, and Denying Abortion Rights: Constitutional Arguments and Activism After* Dobbs.

69. Fischer v. Dept. of Pub. Welfare, 502 A.2d 114 (Pa. 1985), *overruled by Allegheny*, 309 A.3d 808.

70. *Id.* at 126.; *Allegheny*, 309 A.3d at 850–61.

carries with it a constitutional entitlement to the financial resources to avail herself to the full range of protected choices."[71] As *Harris* infamously put it, in upholding the Hyde Amendment, the government had no obligation to remove "obstacles in the path of a woman's exercise of her freedom of choice" that it did not create; a woman's "[i]ndigency" fell into that "category."[72] These decisions have long been criticized by reproductive justice advocates. *Fischer* also rejected the claim that the Coverage Exclusion violated Pennsylvania's ERA on the grounds that (1) the Exclusion used "abortion," not "sex"," as the basis for the distinction in coverage and (2) the fact that "only woman are affected" by the Coverage Exclusion did "not necessarily mean that women are being discriminated against on the basis of sex."[73]

In overruling *Fischer*, the Pennsylvania Supreme Court explained the "environment" in which Pennsylvania adopted the ERA, namely, "[c]enturies of inequality" that shaped "the legal systems and principles that served as the foundation for all of Great Britain's American colonies, including, of course, Pennsylvania."[74] In part because of the ERA, the majority took a strikingly different approach to history and tradition than did the *Dobbs* majority.

The concurring opinion by Justice Wecht went further. Although the case did not hinge on federal constitutional law, he offered a critique of the *Dobbs* approach:

> Generally speaking, relying upon particular points of history during which women expressly were precluded from political participation effectively enshrines and perpetuates the legal subjugation of women . . . there is no opportunity for the status of women to advance and no chance to repudiate the nation's discriminatory history. The nation is locked into the gendered hierarchies of our past.[75]

Further, though the "federal constitutional underpinnings of reproductive freedom" did not govern the Pennsylvania decision, Justice Wecht spoke directly to advocates to detail a host of possible new federal constitutional arguments they could try, urging them "not [to] be dissuaded by the uphill battle that awaits [them]."[76] Finally, Justice Wecht and Justice Donahue (author of the majority opinion) decided another argument advanced by appellants (providers) but not reached by the majority: the Coverage Exclusion also violates the Pennsylvania Constitution because it burdens the exercise of the "fundamental right to reproductive autonomy"—as part of the right to privacy—in a non-

71. *Allegheny*, 309 A.3d at 852–54 (citing Maher v. Roe, 432 U.S. 464, 473–76 (1977)); *Fischer*, 504 A.2d at 119 (citing Harris v. McRae, 448 U.S. 297, 315–18 (1980)).

72. *Id.* at 853 (citing *Fischer*, 502 A.2d at 119 (citing *Harris*, 448 U.S. at 316–17)).

73. *Id.* at 860 (citing *Fischer*, 502 A.2d at 125).

74. *Id.* at 870.

75. *Id.* at 981 (Wecht, J., concurring).

76. *Allegheny*, 309 A.3d at 958, 960.

neutral and discriminatory way."[77] *Allegheny Reproductive Health Center* demonstrates the vitality of state constitutionalism and how state courts can participate in a dialogue that furthers popular constitutionalism.[78]

State ballot initiatives have renewed importance, building on the strong grassroots movement during the first decade of the ACA because such ballot initiatives facilitated Medicaid expansion.[79] In the 2022 and 2023 elections, the results of ballot initiatives all protected access to care, with voters either supporting specific state constitutional amendments and/or laws protecting reproductive care, or refusing to support restrictions on abortion.[80] As of May 2024, four abortion-related ballot initiatives were certified for the 2024 election (Colorado, Florida, Maryland, and South Dakota, with New York's paused for a procedural question), with nearly a dozen more that may advance including Arizona, which had enough signatures three months before the deadline for filing.[81] Constitutional law teachers could incorporate examples of these state law materials into their classes, putting them in conversation—or tension—with *Dobbs* and other federal constitutional law materials.

In sum, *Dobbs* impacts the teaching of both old and new constitutional doctrines, as well as their accompanying theories and implications, thus elevating the importance of applied constitutional law. As we discuss in greater detail below, teaching *Dobbs* solely as constitutional theory or doctrine would be a mistake, and not just because of the interpretive and political battles it reflects. Many other fields involve applied constitutional law, critical legal theories, and related common law doctrines, all of which are either in flux because of *Dobbs* or are newly relevant in its wake.

III. REPRODUCTIVE RIGHTS AND JUSTICE

There is no standard reproductive rights and justice curriculum. It is not possible in one article to cover the many topics that could be covered in a

77. *Id.* at 946–47.

78. *See also* Mayeri, *supra* note 64, at 244.

79. Akeiisa Coleman & Sara Federman, *Where Do the States Stand on Medicaid Expansion?*, COMMONWEALTH FUND (Oct. 27, 2022, map updated June 20, 2023), https://www.commonwealthfund.org/blog/2022/where-do-states-stand-medicaid-expansion.

80. *See, e.g.,* Julie Carr Smyth, *Ohio Voters Enshrine Abortion Access in Constitution in Latest Statewide Win for Reproductive Rights*, ASSOC. PRESS (Nov. 7, 2023), https://apnews.com/article/ohio-abortion-amendment-election-2023-fe3e06747b616507d8ca21ea26485270; *see also* Nicole Huberfeld & Linda C. McClain, *Abortion Rights Victories Show This Issue is Unlikely to Fade in 2024 Elections − 3 Things to Know*, THE CONVERSATION (Nov. 9, 2023), https://theconversation.com/abortion-rights-victories-show-this-issue-is-unlikely-to-fade-in-2024-elections-3-things-to-know-217249 (explaining how every ballot initiative in 2022 and 2023 supported access to abortion).

81. *See 2023 and 2024 Abortion-Related Ballot Measures and State Context*, BALLOTPEDIA, https://ballotpedia.org/2024_abortion-related_ballot_measures_and_state_context (last updated May 18, 2024).

Reproductive Rights and Justice course, from abortion and violence against women to sex and sexuality. In addition to the variety of topics, a reproductive rights and justice course might focus on several themes: doctrine, the role of race and class in shaping abortion access, social movement organizing, and contestations around science and abortion.[82] This Section provides one roadmap for teaching *Dobbs* with an eye toward helping students understand the social and political shifts that led to *Roe* and its dismantling fifty years later in *Dobbs*.[83]

A. State Control Over Reproduction

I begin each class discussing the pre-*Roe* era cases prompting students to explore how the state manages populations and reproduction. Two critical cases, *Buck v. Bell*[84] and *Skinner v. Oklahoma*,[85] offer examples of how the state manages reproduction. *Buck* is a short but powerful case that emphasizes the power of the state to regulate reproduction.[86] Justice Holmes' infamous quote in the *Buck* opinion, "three generations of imbeciles are enough," provides an opportunity to discuss both how the Supreme Court and state governments imagine an ideal population, from race, class, and disability, as well as the rise of eugenics and racial science.[87] Similarly, *Skinner v. Oklahoma* offers students an opportunity to observe how, well into the twentieth century, ideas about the presumed inheritability of certain traits, like criminality, influenced lawmakers perceptions of who should have the right to reproduce.[88] The Supreme Court's discussion in *Skinner* helps to highlight a shifting sensibility regarding the science of inheritable traits and eugenics, as the Court questions the idea of genetic inheritance of criminal tendencies.[89] The Court's skepticism tracked the growing illegitimacy of eugenics at the time.[90]

Presenting and discussing the history of eugenics, reproduction, and the state allows an instructor to illustrate how the idea of reproductive choice is cramped—the state structures people's ability to reproduce. Our society never loses the impulse to control both who should reproduce and how. The Hyde Amendment provides a contemporary example of the state's power to regulate access to abortion, by limiting funding for family planning services (thereby

82. The class that I teach also covers other topics including violence against women, feminist debates on sex work and trafficking, HIV and AIDS, social movements and the law, and the legal regulation of sex and gender. For the purposes of this Article, I am writing about the portions of the class that address abortion law and policy.

83. Aziza Ahmed is the primary author of this part of the Article.

84. Buck v. Bell, 274 U.S. 200 (1927).

85. Skinner v Oklahoma, 316 U.S. 535 (1942).

86. *Buck,* 274 U.S. at 205–06.

87. *Id*. at 207.

88. *Skinner*, 316 U.S. at 539.

89. *Id*. at 541.

90. *Id*. at 543.

encouraging pregnancy by denying payment for abortions) or by implementing family cap policies in the context of Temporary Aid for Needy Families (TANF) (thereby aiming to deter further pregnancies by TANF recipients).[91] Highlighting this context can frame a discussion of pro and anti-natalist policies at both the federal and state levels, as well as a discussion about how the state structures reproductive decision-making.[92]

An alternative frame of reference—reproductive justice—helps students understand the limitations of a choice-oriented model. The reproductive justice frame, situated within the context of racial justice, allows students to see how a broad set of laws—from immigration and criminal law to environmental law—shape an individual's reproductive decisions.[93] Broadening the frame by which to understand reproduction allows students to connect the dots between past and present abortion regulations and to tease out the role abortion plays in state management of reproduction.[94]

B. Social Context and Social Movements Leading to Dobbs

Following the *Dobbs* decision, it is important to remind students that *Roe* was not only the product of feminist social movement organizing but also catalyzed new and growing movements against abortion rights.[95] In other words, it is essential to not only see *Roe* as a critical case deepening the canon of substantive due process cases, as described in the sections on constitutional law (above) and family law (below), but also as a case with profound social meaning for people on both sides.

Tracing politics from the 1970-90s provides an opportunity to see political and cultural shifts in the United States that would set the agenda for abortion law and politics after *Roe* and leading to *Dobbs*.[96] Despite his early support for liberalizing abortion as Governor of California, Ronald Reagan's presidency marked a shift in Republican Party politics around abortion.[97] Seeking to broaden their base, Republicans appealed to the strong anti-abortion sentiments

91. KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 185–87 (2017).

92. *Id.* at 187.

93. *See generally,* LORETTA ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE (2017).

94. Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade*,* 134 HARV. L. REV. 2025, 2030 (2021).

95. The decision also inspired many feminists around the world to push for the decriminalization of abortion in their own jurisdictions. *See, e.g.,* Amanda Taub, Roe *Inspired Activists Worldwide, Who May be Rethinking Strategy*, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/world/americas/abortion-activists-movements.html.

96. *See generally* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME (2016) (offering an extended analysis connecting Lyndon B. Johnson's war on poverty to the growing war on crime).

97. Fred Barnes, *Ronald Reagan, Father of the Pro-Life Movement,* WSJ (Nov. 6, 2003), https://www.wsj.com/articles/SB106808204063174300.

of religious conservatives.[98] Reagan also notably trafficked in racist notions about African-American dependency on welfare, often through reference to the "welfare queen" trope.[99] Together, these shifts coalesced in an anti-social welfare, anti-choice political environment that undermined the possibility of a robust social safety net that could aid women during pregnancy and after birth.

The war on crime and drugs launched by Reagan also contributed to the rise of a carceral approach to social justice issues.[100] The "war on drugs" resulted in many prosecutions of pregnant women using drugs.[101] Most of these women were poor and African-American.[102] These prosecutions, which continue today and include women who use opioids in pregnancy,[103] would set the stage—and the legal environment—for prosecutions after *Dobbs*.

Next, I lay the groundwork for discussing the factual claims in abortion and pregnancy lawmaking. I begin by describing how anti-abortion groups began to develop strategies to undermine a fundamental right to abortion after *Roe*.[104] Part of this strategy was to attack the notion that abortion was a safe procedure.[105] One push by conservatives, for example, paved the way for the idea that abortion has negative mental health consequences.[106] I teach this anti-abortion strategy by beginning with a contemporary case, the 2007 Supreme Court decision, *Gonzales v. Carhart.*[107] In *Carhart*, the Court found that the challenged ban on late-in-pregnancy abortion did not require a health exception for the pregnant woman to be constitutional.[108] In the decision, Justice Kennedy, relying on an amicus brief filed by women who alleged they had been harmed by abortion,[109] asserted that it was "unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and

98. Julilly Kohler-Hausmann, *Welfare Crises, Penal Solutions, and the Origins of the "Welfare Queen"*, 41 J. URB. HIST. 756, 758–63 (2015).

99. *Id.* at 757.

100. *Id*. at 758.

101. Wendy K. Mariner, Leonard H. Glantz & George J. Annas, *Pregnancy, Drugs, and the Perils of Prosecution*, 9 CRIMINAL JUST. ETHICS 30, 30 (1990).

102. *See* MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD (2020); DOROTHY ROBERTS, KILLING THE BLACK BODY 19 (1997).

103. *See* e.g. WENDY BACH, PROSECUTING POVERTY, CRIMINALIZING CARE (2022) (documenting and describing the ongoing entanglement of pregnant women in the criminal justice system in the context of the opioid epidemic).

104. *See generally* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008).

105. *Id.* at 1672.

106. Gonzalez v. Carhart, 550 U.S. 124, 159 (2007).

107. *Id.* at 124.

108. *Id.* at 165.

109. Brief of Cano et al. as Amici Curiae Supporting Petitioner at 1, 23, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-308).

sustained."[110] This idea was contrary to what Justice Blackmun noted in *Roe*—that a woman might suffer mental health issues from continuing an unwanted pregnancy.[111]

To understand how Justice Kennedy was able to make this claim, I walk students through the activism and political leadership of the 1980s and 1990s that produced a struggle on the question of mental health consequences of abortion. One place to begin the story is with President Reagan's desire to win the vote of the "moral majority."[112] To push the idea that abortion causes mental health consequences, Reagan called on Surgeon General C. Everett Koop to provide proof that abortion has negative mental health consequences.[113] In a now-famous letter, Koop wrote to President Reagan that "the available scientific evidence about the psychological sequelae of abortion simply cannot support either the preconceived beliefs of those pro-life or of those pro-choice."[114] This back and forth signaled an opportunity for anti-choice advocates to remake the mental health claims about abortion. Anti-abortion researchers did so by publishing studies, many which came under attack for their methods.[115]

Contestation around medical, scientific facts was not isolated to questions about the mental health consequences of abortion. During this period, faulty medical evidence about a threatened "crack baby epidemic" also served to justify the prosecutions of poor, primarily African American, women who used drugs during pregnancy.[116]

These two examples—contestation around the mental health consequences of abortion and the supposed "crack baby epidemic"—provide ample resources to show students how evidence and expertise are mobilized for and against liberalizing abortion laws as well as criminal laws that regulate pregnancy.

110. *Carhart*, 550 U.S. at 159; *see* Aziza Ahmed, *Abortion Experts*, U. CHI. LEGAL F. 2022 at 1, 17; Aziza Ahmed, *Abortion in a Post-Truth Moment*, 95 TEX. L. REV. 198, 201 (2017); Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J. L. & MED. 85, 108 (2015); Linda C. McClain, *Equality, Oppression, and Abortion: Women Who Oppose Abortion Rights in the Name of Feminism*, *in* FEMINIST NIGHTMARES: WOMEN AT ODDS 159, 160–61 (Susan Ostrow Weisser & Jennifer Fleischner eds., 1994).

111. Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

112. Siegel, *supra* note 104, at 1662.

113. Ahmed, *Medical Evidence*, *supra* note 110, at 98.

114. *See* Letter from C. Everett Koop, U.S. Surgeon Gen., reprinted in *The US Surgeon General on the Health Effects of Abortion*, 15 POPULATION AND DEV. REV. 15, 172–75 (1989); Ahmed, *Medical Evidence*, *supra* note 110, at 98.

115. Susan Cohen, *Still True: Abortion Does Not Increase Women's Risk of Mental Health Problems*, GUTTMACHER (June 25, 2013), https://www.guttmacher.org/gpr/2013/06/still-true-abortion-does-not-increase-womens-risk-mental-health-problems.

116. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1420–22 (1991). Susan Okie, *The Epidemic That Wasn't*, N.Y. TIMES (Jan. 26, 2009), https://www.nytimes.com/2009/01/27/health/27coca.html.

C. Undue Burden

In the 1990s, conservative advocates reached a jurisprudential high point in *Planned Parenthood v. Casey.* The *Casey* decision created the undue burden standard for assessing state regulation of abortion, weakening *Roe.*[117] The undue burden standard provided that if a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion, the regulation is unconstitutional.[118] At the time of the *Casey* decision, the undue burden standard justified upholding a series of regulations enacted under the Pennsylvania Abortion Control Act, including an informed consent requirement mandating that women receive misleading information about the consequences of abortion.[119] In the years following *Casey*, the undue burden standard allowed many courts to uphold similar abortion restrictions.[120] In most instances, courts deferred to state legislatures that claimed the purpose of the restrictive law was to improve women's health care by regulating abortion.[121] Legal scholar Reva Siegel named this strategy "woman-protective"—a shift from the focus on protecting the fetus to purported support for protecting women.[122] States continued to pass restrictive abortion laws that were acceptable under the undue burden standard, thus, the woman-protective strategy proved successful.[123]

It took over twenty years, but the undue burden analysis evolved to allow an interrogation of pretextual state claims by the Supreme Court. *Whole Women's Health* involved a challenge to Texas law that required all abortion clinics to perform abortions in facilities that were equivalent to ambulatory surgical centers, and that all physicians performing abortions must have admitting privileges at a hospital within thirty miles of the clinic.[124] Writing for the majority, Justice Breyer changed the emphasis of the undue burden analysis, focusing not on the stated legislative purpose of the law, but rather on the law's effect.[125] The impact of the Texas law was clear: a direct, immediate, and negative impact on women having access to abortion by having the effect of closing most clinics in the state.[126] In her concurrence, Justice Ginsburg noted

117. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 876 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

118. *Id*. at 877.

119. *Id*. at 902–904.

120. Siegel, *supra* note 104, at 1642–43.

121. *Id.* at 1656, 1686.

122. *Id.* at 1648–49.

123. Ahmed*, Medical Evidence*, *supra* note 110, at 98–99.

124. Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 590–91 (2016), as revised (June 27, 2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

125. *Id*. at 607.

126. *Id*. at 613.

that such laws were also known as TRAP laws—targeted regulation of abortion providers.[127]

Reproductive rights advocates saw potential in the analytical shift to strike down laws having the effect of blocking abortion despite claims that the laws aided patients. With an undue burden standard emphasizing the effects of the legislation, reproductive rights advocates were hopeful that other laws would be struck down. Advocates held their breath in 2018 when the Court heard *June Medical Services v. Russo*, a case pertaining to a Louisiana law requiring hospital admitting privileges.[128] The Louisiana law was identical to the Texas law that was just held unconstitutional.[129] When the Court took the case, advocates worried this was an opportunity to scale back reproductive rights. In fact, the majority, with Chief Justice Roberts concurring, found the law unconstitutional.[130] Chief Justice Roberts justified siding with the more progressive Justices by reasoning that the Court was bound by stare decisis with an eye toward the Court's long-term legitimacy.[131] This recent history is important because it offers students another path that the Court could have taken in *Dobbs*.

A few years later, in 2020, the COVID-19 pandemic changed the landscape. Early in the pandemic, state governments shuttered all non-essential healthcare. States were divided on whether abortion was an essential service.[132] Given that in-person services were limited and access impeded by requirements forcing patients to obtain abortion medication in person, self-induced abortion became increasingly central to the conversation on abortion access.[133] During the fight to make abortion services essential, several groups, including the American College of Obstetrics and Gynecologists and SisterSong, filed suit in 2021. Their goal was to stop the Food and Drug Administration's (FDA) enforcement of protocols mandating that individuals using Mifepristone must sign a waiver in person to obtain the first dose of the medication.[134] The District Court of Maryland offered a clear view of the possibility of a substantial effects-centered undue burden standard.[135] The Maryland court used the impact of the regulatory

127. *Id*. at 628; Aziza Ahmed, *Will the Supreme Court Legitimate Pretext?*, SCOTUSBLOG (Jan. 31, 2020), https://www.scotusblog.com/2020/01/symposium-will-the-supreme-court-legitimate-pretext/.

128. Ahmed, *supra* note 127.

129. June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2133 (2020), *abrogated by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

130. *Id.*

131. *Id.* at 2134, 2139.

132. Aziza Ahmed, *How the COVID-19 Response Is Altering the Legal and Regulatory Landscape on Abortion*, 7 J. L. & BIOSCIENCES, Jan.-June 2020, at 2.

133. *Id*. at 4.

134. Am. Coll. Of Obstetricians and Gynecologists v. FDA, 472 F. Supp. 3d 183, 189 (D. Md. 2020).

135. *Id.* at 206.

oversight to show how the protocol was a barrier to access.[136] While the undue burden standard was overturned by *Dobbs*, I emphasize to students the importance of holding onto the possibility that a more pragmatic constitutional analysis, seen in *Whole Women's Health* and *June Medical,* provides a possible pathway to overturn *Dobbs*.

There is much to say about how to teach *Dobbs*. In 2022, *Dobbs* not only overturned both *Roe* and *Casey*,[137] but also is symptomatic of a set of broader democratic and institutional challenges rooted in the question of the Court's legitimacy, as discussed above. Second, the *Dobbs* dissent offers a view that is, according to consistent polling, more aligned with the majority of Americans' beliefs, raising questions about the role of the Court in upholding longstanding rights.[138] The *Dobbs* dissent highlights the need for a pragmatic approach to pregnancy and legal reasoning that is not based in a history and tradition analysis benefitting only those that reaped legal protection in the eighteenth century. A pragmatic approach is especially necessary given that abortion is not only a moral and political issue, but also a health issue benefitting from technological innovations. Third, there are numerous ways in which the *Dobbs* decision has led to the unraveling of legal protections for abortion, coupled with chaos between states' newly varying laws.[139] This dynamic raises questions about the regulation of abortion through many intersecting areas of law. This includes, at minimum, the interactions between state laws as well as between state and federal laws including the Emergency Medical Treatment and Active Labor Act (EMTALA), and the Health Insurance Portability and Accountability Act (HIPAA) (discussed below in Part V, on Health Law). Finally, it is necessary to emphasize the impact of the decision on everyone, but particularly on marginalized communities.

In the wake of *Dobbs*, numerous issues are being litigated on the question of abortion access. A key issue has been self-induced abortion with the drug mifepristone. These cases range from questions about regulation of the drug,[140] the initial approval of the drug,[141] and whether or how state regulations can contradict federal FDA regulations on mifepristone.[142] Each of these questions

136. *Id.* at 200–01.

137. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022).

138. *Id.* at 364.

139. David Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 11 (2023).

140. *Am. Coll. Of Obstetricians and Gynecologists*, 472 F. Supp. 3d at 189.

141. All. for Hippocratic Med. v. Food and Drug Administration, No. 2:22-cv-00223-Z, 2023 WL 2825871, at *1 (N. D. Tx. Apr. 7, 2023), *aff'd in part, vacated in part,* 78 F.4th 210 (5th Cir. 2023), *cert. granted sub nom*. Danco Laboratories, L.L.C. v. All. for Hippocratic Med., No. 23-236, 2023 WL 8605744 (U.S. Dec. 13, 2023), and *cert. granted sub nom.* Food and Drug Administration v. All. for Hippocratic Med., No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023).

142. GenBioPro v. Saraisa, No. 3:23-cv-00058, 2023 WL 5490179, at *3 (S.D.W. Va. Aug, 24, 2023).

call upon separate understandings of constitutional law, administrative laws, the FDA's drug approval processes, and federalism. In the current term, the Supreme Court granted certiorari in a case challenging the FDA's 2016 and 2021 revised protocols making it easier to obtain Mifepristone.[143] Oral arguments took place March 26, 2024.[144]

Dobbs also opened the door for increased criminal regulation of abortion through the possibility of prosecuting providers.[145] This has impacted care and the ability to train physicians.[146] In teaching *Dobbs,* it is possible to connect the prior moments of extreme criminalization and prosecution of abortion and pregnancy with our contemporary moment in which states once again turn to criminal law rather than provide a robust set of reproductive health services. Legislators' reliance on criminal law, along with the ability of the state to coerce women into pregnancy and deny necessary medical services, connect back to that first introductory class and the questions that are foundational to understanding reproductive rights: when and how should the state intervene in fertility and reproduction?

IV. FAMILY LAW

Dobbs is likely to have significant impact on teaching Family Law and related courses because family law is a dynamic field where basic competency requires knowledge of numerous landmark Supreme Court opinions.[147] Many of these cases concern reproductive liberty. While the sources of "family law" are numerous—and include federal and state statutes, ever-evolving state common law, and even international law—U.S. constitutional law importantly shapes the parameters of the field.[148] The phrase "the constitutionalization of family law"[149] captures this dynamic well with respect to due process liberty interests

143. Danco Laboratories, L.L.C. v. All. for Hippocratic Med., No. 23-236, 2023 WL 8605744 (U.S. Dec. 13, 2023); Food and Drug Administration v. All. for Hippocratic Med., No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023).

144. U.S. Food and Drug Admin. v. Alliance for Hippocratic Med., 144 S. Ct. 537 (Dec. 13, 2023) (granting the petition for writ of certiorari from the Fifth Circuit; oral arguments heard on March 26, 2024).

145. Cohen et al., *supra* note 139, at 9.

146. *See, e.g.,* Helen Kang Morgan & Dee E. Fenner, *When Abortion Is Illegal—Profound Effects on Resident Health and Well-being*, JAMA HEALTH FORUM (Apr. 7, 2023).

147. Linda McClain is the primary author of this section of the Article.

148. I use the term "family law" here to refer to the body of law that "creates categories of legal relationships, governs entry and exit from those relationships, and regulates behavior during them." Naomi Cahn et al., *Family Law for the One Hundred-Year Life*, 132 YALE L.J. 1691, 1697 n.14 (2023). However, "family law" also includes, in its "broad sense," all "the ways related areas of law shape and influence family life," such as poverty, criminal, tax, corporate, and real estate laws, as well as immigration and naturalization. *Id*.

149. For this term, *see* David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L. Q. 529 (2008).

and equal protection, as seen in foundational cases like *Loving v. Virginia*. In *Loving*, the Court struck down Virginia's Racial Integrity Act with twin holdings rooted in equal protection and due process, affirming the fundamental right to marry.[150] This body of constitutional family law traces back not simply to foundational "right of privacy" cases involving contraception (*Griswold v. Connecticut*;[151] *Eisenstadt v. Baird*[152]) and abortion (*Roe,* overruled by *Dobbs*[153]), but back even further to early twentieth century recognition of parental (and family) liberty (*Meyer v. Nebraska*,[154] *Pierce v. Society of Sisters*,[155] and *Prince v. Massachusetts*[156]). The casebook that I coauthor (*Contemporary Family Law*) directs students back further still, highlighting that the Fourteenth Amendment was one of the Reconstruction Amendments. For example, the text introduces Professor Peggy Davis's argument that, although words like "marriage," "parenting," "contraception," and "abortion" appear nowhere in the Constitution, the denial of the rights to marry, to reproductive autonomy, and to maintain ties to children and extended kin to people who were enslaved in the United States were "Motivating Stories" that shaped the "constitutional doctrine of family liberty" under the Fourteenth Amendment.[157]

The full implications of *Dobbs* for "constitutional family law" are not yet known. Part of teaching family law post-*Dobbs* is helping students grapple with this uncertainty. On one hand, Justice Alito's majority opinion in *Dobbs* attempted to isolate *Roe* and *Casey* from the Court's other due process liberty cases by arguing there is a sharp distinction between "the abortion right" and both the rights recognized in cases on which *Roe* and *Casey* rely and the rights discussed in post-*Casey* cases like *Lawrence v. Texas*[158] and *Obergefell v. Hodges*.[159] "Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.'"[160] Justice Alito contends that none of these cases "support the right to obtain an

150. *See* Loving v. Virginia, 388 U.S. 1, 2 (1967).

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

152. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

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

154. *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

155. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

156. *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

157. ABRAMS ET AL., *supra* note 3, at 11 (quoting PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 5 (1997)); *see also* DAVIS, *supra* note 157, at 8–9 (explaining idea of "Motivating Stories" and their constitutional relevance).

158. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down Texas's criminal punishment of same-sex sodomy as violating the constitutional liberty to engage in private, intimate same-sex conduct free from governmental intervention).

159. Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding that the fundamental right to marry includes same-sex couples).

160. *Dobbs*, 597 U.S. at 257.

abortion;"[161] thus, "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[162] Justice Thomas's concurring opinion, however, casts doubt on that disclaimer. Justice Thomas asserted that "all of this Court's substantive due process precedents"—including *Griswold*, *Lawrence*, and *Obergefell*—are "demonstrably erroneous" since the Due Process Clause secures no substantive rights.[163] He urged the Court to "reconsider" all such cases and "eliminate" substantive due process "from our jurisprudence at the earliest opportunity."[164]

The joint dissent by Justices Breyer, Sotomayor, and Kagan warned that "no one should be confident that [the Court] is done with its work."[165] The joint dissent challenged both Justice Alito's isolation of *Roe* and *Casey* as outliers—"aberrations" that "came from nowhere" and "went nowhere"—and his contention that overruling them had no implications for a large body of substantive due process liberty cases.[166] The dissenting Justices countered that *Roe* and *Casey* were "part of the same constitutional fabric" as other cases protecting "autonomous decision making over the most personal life decisions"—about "family matters, child rearing, intimate relationship[s], and procreation" from governmental intrusion.[167] *Roe* and *Casey* built upon earlier precedents, just as later cases, including *Lawrence* and *Obergefell*, built on *Roe* and *Casey*.[168]

A. Dobbs *as a Window into Conflicts over Constitutional Interpretation*

To understand the conflicting positions in the majority, concurring, and dissenting opinions in *Dobbs* on *Roe, Casey*, and the larger body of substantive liberty cases affecting intimate and family life, students need to understand how the Justices' stark disagreements in *Dobbs* reflect competing approaches to constitutional interpretation.[169] While there are plausible arguments for several different ways to introduce *Dobbs* into a family law course, *Contemporary Family Law* places it after *Obergefell*, in a new section, "What is the Scope of Due Process Liberty After *Dobbs*?"[170] The introduction to that section explains *Dobbs*' "full import" for "rights to constitutional liberty and equality with respect to decision making about intimate association, sexuality, family,

161. *Id*.

162. *Id*. at 290.

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

164. *Id*. at 332, 336.

165. *Dobbs*, 597 U.S. at 362 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting).

166. *Id.* at 364.

167. *Id*. at 363, 380.

168. *Id*.

169. *Id*. While this section focuses on family law courses, its analysis of how to guide students in considering the history and future of substantive due process is relevant to many other parts of the law school curriculum as well in which constitutional interpretation plays a salient role.

170. ABRAMS ET AL., *supra* note 3, at 130. Full disclosure: McClain was the primary author of this new section of the casebook.

parenthood, marriage, contraception, and reproduction (including the use of assisted reproductive technology and collaborative reproduction) remains to be seen."[171] Students are invited to consider the different approaches that the various Supreme Court justices take to "the proper approach to determining the scope of Due Process liberty" as well as *Dobbs*' "implications for other significant cases recognizing such liberty"—including ones they have already read in the casebook.[172]

Reading *Dobbs* right after *Obergefell* allows students to identify and evaluate two different interpretive approaches to history and tradition, which might be called, schematically, "the party of Harlan or *Casey*" and "the party of *Glucksberg*" (that is, *Washington v. Glucksberg*).[173] This schematic is explained below, but the basic contrast is between a broader and narrower approach to the role of history and tradition in interpreting the scope of Due Process "liberty." Examples of the Harlan or *Casey* approach are the *Obergefell* majority opinion by Justice Kennedy and the *Dobbs* joint dissent.[174] Examples of the *Glucksberg* approach are the *Dobbs* majority opinion and the *Obergefell* dissent (particularly the dissent by Chief Justice Roberts).[175] Family law students encounter the first approach in *Moore v. City of East Cleveland* (the opening case in *Contemporary Family Law*).[176] In *Moore*, Justice Powell's majority opinion favorably enlisted Justice Harlan's articulation, from his dissent in *Poe v. Ullmann,*[177] of the scope of "liberty" under the Due Process Clause of the Fourteenth Amendment to explain why the definition of "family" in East Cleveland's zoning ordinance unconstitutionally sliced too deeply into the family.[178]

Justice Harlan explained, "[d]ue process has not been reduced to any formula," and its content "cannot be determined by reference to any code."[179] Justice Harlan argued that the Court's decisions about due process liberty represent "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of

171. *Id*.

172. *Id*.

173. *See* Linda C. McClain & James E. Fleming, *Ordered Liberty after* Dobbs, 35 J. AM. ACAD. MATRIM. L. 623, 624 (2023).

174. *Id.* at 625.

175. *Id.* at 625–26.

176. *See* ABRAMS ET AL., *supra* note 3, at 13–23 (using edit of Moore v. City of E. Cleveland, Ohio, 431 U.S. 494 (1977) to introduce topic of "defining the family" and pointing out Justice Powell's use of Justice Harlan's approach).

177. Poe v. Ullman, 367 U.S. 497, 508–09 (1961) (dismissing a challenge to Connecticut's birth control prohibition for lack of "standing" and "ripeness," because, given Connecticut's long history of not enforcing the statute, the plaintiffs did not face an immediate harm or threat of harm from the statute).

178. *Moore*, 431 U.S. at 503; McClain & Fleming, *supra* note 173, at 625.

179. *Poe,* 367 U.S. at 542 (Harlan, J., dissenting).

organized society."[180] Examining "history" and "tradition" was important in determining that balance of ordered liberty, but Justice Harlan elaborated that the "rational continuum" of ordered liberty had "regard to what history teaches are the traditions from which [this country] developed *as well as the traditions from which it broke.*"[181] In short, "tradition is a living thing."[182] In effect, Justice Harlan "conceived tradition as a 'living thing' or evolving consensus, not historical practices as of the time the Due Process Clause was ratified (in 1868)."[183]

Moore sets the stage for later battles on the Court about the proper methodology for recognizing unenumerated rights. In 1992, the *Casey* joint opinion drew on Justice Harlan's approach. It wrote of the due process inquiry as requiring "reasoned judgment," of the Constitution's "promise of liberty," and of the Constitution as a "covenant" with "written terms" that "embody ideas and aspirations that must survive more ages than one."[184] As constitutional theorist and professor James Fleming has explained, the *Casey* joint opinion, like Justice Harlan's *Poe* dissent, viewed "liberty as an abstract aspirational principle to be built out over time through common law constitutional interpretation, not a concrete historical practice whose meaning was settled in the past."[185]

Lawrence v. Texas relied on *Casey* in overruling *Bowers v. Hardwick,* striking down Texas's sodomy statute targeting same-sex partners. *Lawrence* spoke of new insight over time about how "laws once thought necessary and proper only serve to oppress," and concluded that, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[186] The notion that tradition is a "living thing" resonates in *Obergefell*'s language about evolving understandings of the Constitution's "promise" of "liberty."[187]

Obergefell held that the right to marry is a "fundamental right inherent in the liberty of the person" and that, under both the Due Process Clause and Equal Protection Clause, same-sex couples "may not be deprived of that right and that liberty."[188] Justice Kennedy expressly cited Justice Harlan in stating that the responsibility for identifying and protecting fundamental rights "has not been

180. *Id*.

181. *Id.* at 542–43 (emphasis added).

182. *Id.* at 542.

183. FLEMING, *supra* note 6, at 31.

184. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 849, 901 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

185. FLEMING, *supra* note 6, at 31.

186. Lawrence v. Texas, 539 U.S. 558, 579 (2003).

187. Obergefell v. Hodges, 576 U.S. 644, 675 (2015); *id.* at 651 ("The Constitution promises liberty to all within its reach….").

188. *Id.* at 675.

reduced to any formula."[189] The *Obergefell* majority opinion wove together numerous cases that are a part of "constitutional family law" to make the point that history and tradition "guide and discipline" the inquiry but do not set its limits.[190] Cases such as *Loving* and *Lawrence* illustrate that "the nature of injustice is that we may not always see it in our own times."[191] Constitutional interpretation must account for "new insight" about the gap between constitutional protections and certain legal restrictions.[192] Justice Kennedy emphasized the "synergy" between the Due Process and Equal Protection Clauses concerning the role of "new insights and societal understandings" concerning "unjustified inequality within our most fundamental institutions."[193] As these passages illustrate, this approach to constitutional interpretation is not frozen in time, but rather reflects a "moral reading" of the Constitution: over time, "abstract aspirational ideals" like liberty and equality are "realized" through "judgments about the best understanding of our constitutional commitments."[194]

By comparison, a narrower historical approach to the scope of due process liberty appeared in *Washington v. Glucksberg,* a 1997 case in which the Court held Washington's prohibition of "physician-assisted suicide" did not violate the Fourteenth Amendment because no "specially protected" liberty interest existed under the Due Process Clause to "commit suicide" or have assistance in doing so.[195] Writing for the majority, Chief Justice Rehnquist rejected Justice Souter's appeal (in dissent) to Justice Harlan's methodology. Instead, Chief Justice Rehnquist stated that the Court's "established method" of substantive due process analysis had two "primary features": (1) the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty;'" and (2) the Court has required "a 'careful description' of the asserted fundamental liberty interest."[196] Subsequently, the *Glucksberg* approach appeared in Justice Scalia's dissent in *Lawrence*.[197]

189. *Id.* at 663–64.

190. *Id.* at 664.

191. *Obergefell*, 576 U.S. at 664 (quoting Poe v. Ullmann, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

192. *Id.*

193. *Id.* at 673.

194. FLEMING, *supra* note 6, at 5.

195. Washington v. Glucksberg*,* 521 U.S. 702, 723, 735 (1997).

196. *Id.* at 720–21. Notably, Chief Justice Rehnquist includes the right to abortion (citing *Casey*) as part of the Court's "long line" of substantive due process cases, even as he rejects Justice Harlan's methodology as the correct test. *Id.* at 720–22. In the family law canon, an earlier version of *Glucksberg*'s narrow due process inquiry focused on concrete historical practices appears in Justice Scalia's plurality opinion in Michael H. v. Gerald D*,* 491 U.S. 110 (1989).

197. Lawrence v. Texas, 539 U.S. 558, 588 (2003).

In *Obergefell,* Justice Kennedy expressly rejected *Glucksberg* as the proper test when fundamental rights concerning "marriage and intimacy" were at stake.[198] This led Chief Justice Roberts, in dissent, to argue that the *Obergefell* majority's approach "effectively overrule[d]" *Glucksberg*, the "leading modern case setting the bounds of substantive due process."[199] Justice Scalia's dissent shows the *Glucksberg* approach's narrow focus on history. Justice Scalia argued that "[w]hen the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so;" thus, this should be enough to resolve the challenge to state marriage laws.[200]

The Justices' positions in *Obergefell* flipped in *Dobbs*, when Justice Alito repeatedly cited *Glucksberg* as the proper approach to determine what rights are protected under the Due Process Clause.[201] Under that test, the right to abortion is not within the scope of "the Nation's 'scheme of ordered liberty.'"[202] In 1868, the *Dobbs* majority repeatedly declared, there was no such right, and that should settle the matter.[203]

The *Dobbs* joint dissent strenuously criticized the majority's reliance on *Glucksberg,* pointing out that *Obergefell* had just rejected *Glucksberg*'s analytical framework.[204] Instead, the *Dobbs* dissenters exemplify Justice Harlan's approach when they explain that, rather than freezing the understanding of liberty to whether "those living in 1868"—when the Fourteenth Amendment was ratified—would recognize the claim, "the sphere of protected liberty has expanded, bringing in individuals formerly excluded."[205] The dissenters invoke Justice Harlan's language about striking the "right balance," and further emphasize that "applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents."[206]

Family law students may assess these contrasting approaches to history and tradition by considering how various protected liberties within the body of constitutional family law would fare if measured by a test of whether they were recognized in 1868. For example, the *Dobbs* dissenters observed that if the correct test is whether the framers of the Fourteenth Amendment recognized a particular right in 1868, many cherished liberties would fail the test.[207] The

198. *Obergefell*, 576 U.S. at 671.
199. *Id.* at 702–03 (Roberts, C.J., dissenting).
200. *Id.* at 715 (Scalia, J., dissenting).
201. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 238–39 (2022).
202. *Id.* at 237.
203. *Id.* at 248–49, 260.
204. *Id.* at 374–75 (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting).
205. *Id.* at 380.
206. *Dobbs,* 597 U.S. at 376.
207. *Id.* at 376–78.

Glucksberg/Dobbs test would find that contraception, same-sex intimacy, and same-sex marriage—not to mention interracial marriage, which Justice Thomas conspicuously fails to mention in his list of suspect due process cases—are not protected liberties for the same reason that abortion is not: none of those rights are protected explicitly in the concrete historical practices as of 1868.[208] As I have written, with Professor James Fleming, elsewhere:

> [T]o put it bluntly: every decision in the past century that has protected a basic personal liberty under the Due Process Clause is inconsistent with *Glucksberg*. None would have come out as it did had the Court applied *Glucksberg*'s framework. In short, none of the protected rights as a matter of vindicating longstanding, concrete historical practices as the *Glucksberg* framework conceives them. Instead, the decisions stemmed from judgments that our commitment to liberty, as an abstract principle, requires protecting rights to make certain decisions fundamentally affecting one's identity, destiny, or way of life (the *Casey* framework).[209]

B. Dobbs *and Inequality*

Teaching *Dobbs* also provides the chance to consider the relevance of the relationship between constitutional liberty and equality,[210] as well as to assess the Court's brief, dismissive treatment of the equal protection argument for abortion rights.[211]

Using not only the year 1868—but sources from earlier centuries—as a guide to the existence of reproductive rights has troubling, broader implications for a field like family law, where there has been a transformation away from once-entrenched racial and gender hierarchies. A core theme in contemporary family law courses is the so-called gender revolution in family law, including the dismantling of coverture marriage (the English common-law model of marriage under which a wife's legal existence was "suspended" and she was under various "disabilities") and the Supreme Court's more skeptical look at how sex-based family law reflected gender stereotyping and archaic notions about men and women.[212] Other forms of transformation include recognizing the intimate and family rights of formerly enslaved persons (as mentioned above) and the erosion of sharp lines between marital and nonmarital children, and between marital and nonmarital partners.[213]

208. *Id*. at 377.

209. McClain & Fleming, *supra* note 173, at 631.

210. *Dobbs*, 597 U.S. at 370, 374. This discussion may also be useful for classes in feminist legal theory and gender and law.

211. *Id*. at 235–36.

212. *See* ABRAMS ET AL., *supra* note 3, at 253–56 (describing "coverture" as elaborated by William Blackstone); *id.* at 256–65 (detailing the Court's more skeptical look at gender-based classifications in family law and other parts of the law).

213. *See, e.g., id.* at 70–78; 321–41; 393–423.

In *Casey*, Justice Blackmun (author of *Roe*)—drawing on feminist legal scholarship—argued that restrictions on abortion "implicate guarantees of gender equality."[214] The joint opinion gestured toward equality arguments in stating, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[215] This passage, along with the Court's anti-stereotyping jurisprudence, featured in the robust equal protection arguments made in the *Dobbs* amicus brief by legal scholars Serena Mayeri, Reva Siegel, and Melissa Murray, which was so briskly dismissed by Justice Alito.[216] The Notes and Questions following the *Contemporary Family Law* casebook's edit of *Dobbs*, for example, ask whether what Blackstone's Commentaries state about abortion should matter in the present-day, "given that…contemporary family law no longer adheres to the Commentaries' once-definitive, gender hierarchical account of marriage (or 'coverture')."[217] The query about history and tradition also invites students to consider, "what approach does the dissent take regarding what was left out of the majority's historical account? Given that the Fourteenth Amendment was adopted after the Civil War to provide citizenship and equality to formerly enslaved persons, what other history should be considered?" [218] The casebook directs students to the arguments by Peggy Davis about the need to consider the "Motivating Stories" about the denial of reproductive autonomy to enslaved persons when interpreting the Reconstruction Amendments.[219]

Family law teachers can amplify this point about which history and whose voices are missing by drawing on some of the rich body of post-*Dobbs* writing challenging the Court's narrow reading of history and of historical "authorities."[220] For example, the *Dobbs* majority opinion found the relevant history about abortion regulation to include English scholars dating back to the thirteenth century, including Henry de Bracton, Sir Matthew Hale, and William Blackstone, while mentioning none of the "Framers or ratifiers of the Reconstruction Amendments."[221] As Michele Goodwin pointedly observes of the Court's "opportunistic originalism":

214. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part and dissenting in part).

215. *Id.* at 856 (joint opinion).

216. *Dobbs,* 597 U.S. at 236 (mentioning Brief for Equal Protection Constitutional Law Scholars as *Amici Curiae*).

217. ABRAMS ET AL, *supra* note 3, at 153–54.

218. *Id*. at 154.

219. *Id*. *See also* Peggy Cooper Davis, *The Reconstruction Amendments Matter When Considering Abortion Rights*, WASH. POST (May 3, 2022) (arguing about the "radical transformation" that the Constitution underwent after the Civil War and why the Reconstruction amendments matter when considering abortion rights).

220. Goodwin, *supra* note 7, at 189.

221. *Id.* at 188–189.

> as informative as the Court might perceive Blackstone, Hale, Coke, and Bracton to be as guides to contemporary matters of women's reproductive health, no one would agree that these lauded theorists played an active part in the debates involving nineteenth-century American slavery, American Reconstruction, and the ratification of the Reconstruction Amendments. Simply put, Hale and Blackstone were both dead at the time, buried on English soil, unable to speak to the ills of nineteenth-century American slavery, the threats to Black girls' and women's bodily autonomy, and the brutal discipline inflicted on those who resisted.[222]

The *Dobbs* dissent pointed out the problems with the majority's repeated reference to "the people," and how, in 1868, it left out women.[223] This omission, they argue, is one of the limits of the majority's "pinched view" of how to read the Constitution and the Fourteenth Amendment:[224]

> Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.[225]

Notably, as the *Dobbs* dissent mentions, the joint opinion in *Casey* recognized that "there was a time" the Constitution "did not protect" men and women equally.[226] *Casey* rejected Pennsylvania's spousal notification requirement as unconstitutional and characterized the requirement as "embody[ing] a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."[227] By contrast, Chief Justice Rehnquist (joined by Justices White, Scalia, and Thomas) would have upheld the provision under a rational basis test because of the State's legitimate interest in the husband's procreative rights and in "promoting 'the integrity of the marital relationship,'" through "truthful communication" and "collaborative decisionmaking."[228]

Family law instructors might wonder whether there is any reason, post-*Dobbs,* to continue to teach *Casey*, including the aspects of it that touch on marriage and equality. For example, *Contemporary Family Law* includes a shortened excerpt from *Casey* striking down the spousal notification requirement in a section on medical decision-making within marriage, and adds

222. *Id.* at 188.

223. *Dobbs*, 597 U.S. at 372–73.

224. *Id.* at 373–74.

225. *Id*. at 373.

226. *Id*.

227. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 898 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

228. *Id*. at 944, 975 (Rehnquist, C.J., dissenting).

a "problem" asking whether *Dobbs* would permit legislation requiring written notice of a pregnant person's abortion decision to marital *and nonmarital* partners.[229] Following the *Casey* excerpt are Notes and Questions that provide an opening for instructors to address a range of issues concerning a pregnant person's right to make medical decisions after *Dobbs*, including the problem of "significant uncertainty" in the medical community in the wake of *Dobbs* as health care providers struggle to interpret the scope of exceptions in restrictive abortion laws.[230]

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As discussed in Part VI, in teaching Family Law, and many other subjects to which reproductive rights and justice are relevant, professors will benefit from a growing body of legal scholarship tackling the Court's analysis of "history" in *Dobbs* and its approach to the role of history and tradition in constitutional interpretation.

V. HEALTH LAW

Reproductive rights issues always have been fundamental to health care and public health law.[231] *Roe* and *Casey* created constitutional guardrails that made pre-viability abortion a more predictable aspect of reproductive and other kinds of medical care.[232] However, students must understand how these decisions led to many kinds of state and federal regulation that directly and indirectly impacted health care broadly, not just abortions, and that *Dobbs* is writing new chapters in medical care by the day. Students must also learn that, even with constitutional protection for abortion, consistent access to reproductive health care did not exist nationwide, whether for abortion or prenatal or maternity care.[233] A patchwork of different state laws existed for many decades, reflecting the United States' fragmented health care (non)system, and facilitating reproductive, medical, public health, and other inequities.[234]

Students need to understand the bigger picture in order to discern what is or is not unusual about current laws regulating abortion, pregnancy, assisted reproductive technology, and post-partum care, and why many health care providers are finding it difficult to practice all kinds of medicine in the wake of

229. ABRAMS ET AL., *supra* note 3, at 289 (Problem 3-3).

230. *Id.* at 288 (Note 3).

231. Nicole Huberfeld is the primary author of this section of the Article.

232. Aziza Ahmed et al., *Introduction: Securing Reproductive Justice After* Dobbs, 51 J. L. MED. & ETHICS 463, 463 (2023).

233. Aziza Ahmed et al., Dobbs v. Jackson Women's Health*: Undermining Public Health, Facilitating Reproductive Coercion*, 51 J. L. MED. & ETHICS 485, 487-88 (2023).

234. HUBERFELD ET AL., *supra* note 3, at 1 (explaining that the U.S. does not have a system but rather a "non-system").

Dobbs.[235] These troubles range from the more obvious, like obstetrician/gynecologists not being able to practice to the medical standard of care in every state while risking their licensure under state law if they provide the standard of care, to less obvious, like hospital risk managers confronting abortion-related questions across all medical specialties in states with new abortion bans and having no answers for their providers or patients.[236] The news provides a regular stream of these stories, which can be useful teaching tools when they come from reliable sources (another teaching point on media literacy).

A. State Regulation of Medicine and Public Health

States historically have regulated public health and medicine as part of the police power to protect public health, safety, and welfare. Accordingly, states have crafted all kinds of statutes and regulations affecting public health and medicine, including: licensure of professions and institutions; informed consent rules for protecting patients both in medical practice and in clinical research; medical privacy and confidentiality rules; regulation of markets for private health insurance; mechanisms of finance such as public health insurance and hospital charity care funds; and the list goes on.[237] This history made it so the Court in *Roe* could hold both that providing an abortion was protected from criminal prosecution and that states continued to have authority to regulate medicine as it related to abortion: "the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there…."[238] Justice Blackmun was famously sensitive to physicians' perspectives after working for Mayo Clinic.[239] But this approval for state regulation of "health" also opened the door to progressively more restrictive state regulations that were blessed by a different set of Justices in *Casey*, as described in the Reproductive Rights and Justice section above. Many of the laws created in the likeness of Pennsylvania's Abortion Control Act after *Casey*, such as twenty-four-hour waiting periods between physicians delivering state-scripted information and providing the abortion, remain on the

235. For instructive coverage of these issues, *see* the essays in *Symposium: Seeking Reproductive Justice in the Next 50 Years*, *supra* note 2.

236. BRITTNI FREDERIKSEN ET AL., A NATIONAL SURVEY OF OBGYNS' EXPERIENCES AFTER *DOBBS* 24 (Kaiser Fam. Found. ed., 2023), https://www.kff.org/report-section/a-national-survey-of-obgyns-experiences-after-dobbs-report/.

237. HUBERFELD ET AL., *supra* note 3, at 635.

238. Roe v. Wade, 410 U.S. 113, 162 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

239. Harold Hongju Koh, *Rebalancing the Medical Triad: Justice Blackmun's Contributions to Law and Medicine*, 13 AM. J. L. & MED. 315, 319 (1987).

books today.[240] Students will quickly discover the confusion caused by a palimpsest of laws in this area, which are complicated by all of the many ways that states regulate health care.

States regulate health care providers in the reproductive care context in many ways, directly and indirectly.[241] For example, most states require that a physician be the licensee to provide an abortion, rather than other kinds of providers like nurse practitioners or pharmacists, who are otherwise often deemed to be knowledgeable enough to act as physician-extenders for many services.[242] Additionally, states use their police power indirectly to support or prevent abortions, such as paying for low-income residents' abortion care, or requiring specially-built facilities and extra record-keeping under TRAP laws.[243] These direct and indirect regulations pre-date *Dobbs* and still exist, even in states that have outlawed abortion. Students must understand that these laws continue to affect how health care providers are able to interact with and provide care for patients of reproductive age.

In my course called Health Law, Bioethics, and Human Rights, as well as my Public Health Law course, I emphasize that the vast majority of health care providers see abortion as a regular and necessary part of providing care to people of reproductive age—a point made by both domestic and international physician organizations before and in the wake of *Dobbs*.[244] Further, ample evidence exists to show that outlawing abortion does not stop abortions, but rather drives the procedure and those who seek it underground where they are less safe and outcomes far less predictable.[245] Some states now regulate abortion and other reproductive care in ways that contradict the standard of care, causing confusion for all kinds of health care providers.[246] For example, in Texas, where abortion

240. Abortion Control Act, 18 PA. CONS. STAT. §§ 3202(B)(5), 3205 (1982).

241. *See* HUBERFELD ET AL., *supra* note 3, at 615, 633, 648 (chapter on regulating the beginning and end of life).

242. *Id.* at 635.

243. *Id.* at 635, 674.

244. *See, e.g.*, *Facts Are Important: Abortion Is Healthcare*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, https://www.acog.org/advocacy/facts-are-important/abortion (last visited Jan. 12, 2024); *Abortion Policy*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (May 2022), https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2022/abortion-policy; Kevin B. O'Reilly, *AMA Holds Fast to Principle: Reproductive Care is Health Care*, AM. MED. ASS'N (Nov. 17, 2022), https://www.ama-assn.org/delivering-care/public-health/ama-holds-fast-principle-reproductive-care-health-care; *Abortion is Healthcare*, AM. COLL. OF NURSE MIDWIVES, https://www.midwife.org/abortion-is-healthcare (last visited Jan. 12, 2024); *Safe Abortion Care*, DOCTORS WITHOUT BORDERS, MSF, https://www.msf.org/safe-abortion-care (last visited Jan. 12, 2024); *Official Position Statement: Access to Abortion Services*, SOC'Y FOR MATERNAL-FETAL MED. 1, 1 (June 2020), https://s3.amazonaws.com/cdn.smfm.org/media/2418/Access_to_Abortion_Services_(2020).pdf.

245. *Facts Are Important: Abortion Is Healthcare*, *supra* note 244.

246. O'Reilly, *supra* note 244.

is outlawed after six weeks, except to save the life of a pregnant person, a pregnant woman tried to access an abortion for fatal fetal anomalies, and the state Attorney General intervened to stop her doctors from performing the abortion.[247] This kind of legislation and litigation can provide real-time fodder for classroom conversation that highlights how law is a determinant of health.

In *The Law of American Health Care*, we emphasize that students should learn hot-button issues are not theoretical—these issues involve real-world care that carries risk and has complex legal dimensions. After *Dobbs*, a wider gap exists between the law and the health professionals who put law into practice every day. A newly practicing lawyer will quickly realize that doctors, hospitals, and other professionals and institutions struggle to understand the constitutional law, statutes, and regulations governing patient care.[248] Knowing the status of the law helps students learn how to represent clients' daily medical and operational concerns.

Instructors should strive to provide a baseline of understanding not only as to how governments regulate health care at the beginning of life but also how to analyze the shifting balance between individual reproductive care needs, now sometimes protected by state laws, state constitutions, or federal laws, and certain states' aim of ending all abortions. Currently, the bans on abortions target providers and those who "aid and abet" abortion but not patients.[249] These laws typically criminalize abortion and/or threaten provider licensure, and they increase conflicts between federal and state laws, and between states' laws. Such bans contribute to confusion and moral distress for health care providers, who in turn are changing where they choose to learn and practice medicine.[250]

Relatedly, in *Public Health Law*, chapters addressing reproductive health, privacy, screening, and government authority broadly also drive home themes regarding government regulation of intimate relationships and reproductive rights in the name of "public health."[251] As the section on Reproductive Rights and Justice noted above, evidence has been misused to regulate reproductive care and birthing in many ways. Likewise, the common policy goal of "public

247. Eleanor Klibanoff, *Texas Supreme Court Blocks Order Allowing Abortion; Woman Who Sought it Leaves State*, TEX. TRIBUNE (Dec. 11, 2023), https://www.texastribune.org/2023/12/11/texas-abortion-lawsuit-kate-cox/.

248. HUBERFELD ET AL., *supra* note 3, at 609.

249. Christopher Rowland, *Groups that Aid Abortion Patients Pull Back, Fearing Legal Liability*, WASH. POST (July 15, 2022), https://www.washingtonpost.com/business/2022/07/15/abortion-aid-drying-up/.

250. Rebecca Chen et. al., *Addressing Moral Distress After* Dobbs v. Jackson Women's Health Organization*: A Professional Virtues-Based Approach*, 99 ACADEMIC MED. 12, 13 (Jan. 2024); Adrianna Rodriguez, *Abortion Restrictions Repel Graduating OB-GYNs from Conservative States, Report Shows*, U.S.A. TODAY (Sept. 29, 2023), https://www.usatoday.com/story/news/health/2023/09/29/abortion-new-doctors-avoid-conservative-states-survey-shows/70980770007/.

251. WENDY MARINER ET AL., PUBLIC HEALTH LAW (3rd ed. 2019) (see chapter 6 on reproductive health).

health" gets used for many reasons that are not actually in service of public health, such as keeping more explicit records on abortion, which officials sometimes use for criminal purposes that are unrelated to public or individual health.[252] These are recurring patterns that I discuss with my Public Health Law class, emphasizing the need for constitutional, historical, and data literacy to provide context for states regulation of intimate decisions and relationships in the realm of medicine and public health (discussed below, in Part VI).

B. Broader Themes, and Offering Conceptual Anchors

In *The Law of American Health Care*, we provide themes that aim to help students learn health law as it exists now and to help students pivot when laws change in the future. These themes include federalism; individual rights (including protections under the U.S. Constitution, state constitutions, statutes, and common law); fiduciary relationships; the administrative state; market regulation; and equity.[253] The last point of the prior Section emphasizes how federal and state law conflicts, and therefore federalism's applications to health care, have become central as this Court revisits federal and state balances in power and regulation. Across courses such as Public Health Law and Health Systems, Law and Policy, I discuss with my students how the Court's ongoing re-balancing is especially critical in health law because, throughout the twentieth century, the federal presence in regulating medicine increased such that almost every topic within the broad umbrella of health law involves layers of federal and state law.[254] Yet, federal laws answer few of the questions that are arising after *Dobbs*.

History shows states have not regulated medicine alone for many decades—the federal government pays for around sixty percent of all national health expenditures, largely through spending programs like Medicare, Medicaid, the Indian Health Service, and TRICARE (for active military), as well as through tax policies that forego revenue and encourage employer-sponsored health insurance.[255] The spending power enables the federal government to wield indirect authority in medicine and public health, as noted above regarding the Hyde Amendment in Medicaid, by offering money and federal policy goals to states.[256] When HHS funds the Centers for Disease Control and Prevention, designates medically underserved areas, enforces EMTALA for emergency medical treatment, interprets HIPAA health information privacy rules, seeks

252. *Id.* at 385.

253. HUBERFELD ET AL., *supra* note 3, at 6.

254. *See generally* Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism In Health Care For?*, 70 STAN. L. REV. 1689, 1703–19 (2018) (analyzing the complex and interconnected scheme of federal and state regulation of healthcare).

255. *Id.* at 1718–19.

256. Lawrence O. Gostin, *Public Health Law in a New Century Part II; Public Health Powers and Limits*, 283 JAMA 2279, 2279–80 (2000).

state data, and regulates the sale of prescription drugs in interstate commerce, HHS often does so with state partnership.[257] Students must be able to recognize these partnerships, as many will not have considered how the wheels of government turn to make health care and public health happen. In addition, exploring where new conflicts are arising is critical. Already Idaho and Texas challenged EMTALA's application to their abortion bans, which could imperil the lives of all people of reproductive age seeking emergency medical care, and many other conflicts are arising within the standard federal and state partnerships in health care and public health.[258]

The ripple effects of the *Dobbs* decision have made it so the legal landscape is nothing short of chaotic, practically changing by the day. After *Roe* was decided, physicians went from hiding abortion services and hospital wards full of people suffering illness and injury from illegal or self-induced abortions to legal safety and saving lives. Almost immediately after *Roe*, deaths and injuries declined for pregnant people because abortions were legalized.[259] The reverse is now happening—patient lives are jeopardized, and doctors are fearful again. Even though the number of abortions did not decrease in the first year after *Dobbs*, the news has published a constant barrage of the harms resulting from *Dobbs* returning abortion policymaking to "the people and their elected representatives."[260] We discuss further below how to make use of such evidence and data in the classroom.

VI. HISTORICAL CONTEXT, INTERDISCIPLINARITY, AND APPLICATIONS OF DATA

In her recent article, *The Critical Role of History After* Dobbs, legal historian Serena Mayeri argues that, despite the "flawed" history in the *Dobbs* majority opinion, "*Dobbs* should not lead us to reject history's relevance to constitutional law or to political discourse about reproductive rights and justice."[261] Instead, the past "provides resources for thinking about constitutional principles and values;" taking a "critical orientation" to history instead of treating history as a "command" to defer to and preserve "historical practices," Mayeri argues that "we can look to the past to find injustices to be resisted and overcome."[262] Law students can learn about these resources. As Nancy Cott once observed, "history really matters" in such efforts, as does the question of "which history" the Court

257. Gluck & Huberfeld, *supra* note 254, at 1715, 1730–31.

258. Shefali Luthra, *The 19th Explains: Could an Emergency Medicine Law Give Pregnant People Access to Life-Saving Abortions?*, THE 19TH (Jan. 5, 2024), https://19thnews.org/2024/01/emtala-law-texas-abortion-access-life-saving-cases/.

259. Willard Cates, Jr. et al., *The Public Health Impact of Legal Abortion: 30 Years Later*, 35 PERSPS. ON SEXUAL AND REPROD. HEALTH 25, 27 (2003).

260. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022).

261. Mayeri, *supra* note 64, at 174–75.

262. *Id*. at 196–97.

adopts.[263] While Cott was writing about an encouraging example–Justice Kennedy's reliance on amicus briefs by historians in *Obergefell*–and noting the sharp differences between Justice Kennedy and Chief Justice Roberts on "which history" of marriage matters, the point is translatable to *Dobbs* and future struggles over constitutional meaning.[264]

There may be pedagogical value in inviting students to study not only the role of "history" in majority, concurring, and dissenting opinions, but also the contrasting accounts of history, and the sources of that history, including party and amicus briefs. To aid in this process, there is a growing body of post-*Dobbs* scholarly writing examining not only *Dobbs*' flawed approach to history and tradition,[265] but also what Reva Siegel calls "the politics of constitutional memory."[266] Siegel draws a distinction between "constitutional *history*," or what happened in the past, and "constitutional *memory*," or "the ways that Americans make claims on the past as they argue about the Constitution's meaning."[267] As Serena Mayeri illustrates, sometimes history may serve as "negative precedent": courts and other constitutional actors may invoke history not as binding but instead as a "reason to depart from rather than embrace deeply rooted traditions."[268] State constitutional decisions such as the Supreme Court of Pennsylvania's discussed in Part II, *Allegheny Reproductive Health Center,* offer a powerful illustration of this approach to history. As discussed in Part IV, the approach taken by the *Dobbs* dissenters and, before them, the *Obergefell* majority, offer other examples.

Although *Dobbs* overruled *Roe* and *Casey,* teaching in the post-*Dobbs* era requires covering those overruled cases for historical and regulatory context. It is very hard to understand Justice Alito's lengthy history of regulating abortions without reading Justice Blackmun's majority opinion in *Roe*, which searched medical, legal, and other disciplines' sources to understand how abortion was treated historically by the state and within physician/patient relationships.[269] Of course, Justice Blackmun and his colleagues came out differently. However, these warring accounts demonstrate the importance of not only reading *Dobbs* but also parts of the *Roe* and *Casey* decisions for a baseline understanding of the

263. Nancy F. Cott, *Which History in* Obergefell v. Hodges*?,* PERSPECTIVES ON HISTORY (July 1, 2015), https://www.historians.org/research-and-publications/perspectives-on-history/summer-2015/which-history-in-obergefell-v-hodges.

264. *Id.*

265. Mayeri, *supra* note 64, at 175 (referring to *Dobbs'* "flawed approach to history").

266. *See, e.g.,* Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J. L & PUB. POL'Y 19 (2022).

267. *Id*. at 31.

268. Mayeri, *supra* note 64, at 229.

269. Roe v. Wade, 410 U.S. 113, 116–17 (1973*), modified by* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

law as it exists today. Legal historians and others have written extensively about this history,[270] and it can be a useful counterpoint to the *Dobbs* majority's slanted interpretation of history (many have observed that lawyers are not good at history, but they should still learn it, not to provide rules but to provide context).[271]

In addition to historical literacy, understanding how to read and interpret data from other disciplines—especially data that shows how laws impact the health of populations and individuals—are critical skills for students to develop. The aftershocks of *Dobbs* are felt across disciplines as professionals in medicine, public health, social work, human rights, and related fields grapple with the ongoing legal chaos. Teaching students to read qualitative data and understand evidence will help them critically evaluate when evidence is being used correctly and when the moniker of science is a sham or cover for social movement goals, as discussed in Part III. Students should come away from any course mentioned in this Article with an appreciation for the role of law in creating access or barriers to reproductive health care and medical care for people of reproductive age. In this regard, students might study *Dobbs* with a close view to the majority's inattention to the likely on-the-ground impact of *Dobbs*; students could then compare the joint dissent's extensive and sobering warning of the multiple and devastating impacts of overruling *Roe* and *Casey* in Mississippi and elsewhere. Instructors might augment such a study with on-the-ground impact arguments made in some of the amicus briefs filed in *Dobbs*, including those authored by reproductive justice organizations and public health scholars.

Another aim of these courses is that students should be able to draw on evidence provided by other disciplines to understand how the law applies to those governed by its rules.[272] Law is a determinant of health that can facilitate or prevent access to care. As discussed above, even before *Dobbs*, many pregnant persons did not have meaningful access to reproductive health care, even if they had a formal legal right guaranteeing such access.[273] Decisions like *Dobbs* have foregrounded these issues of access and the need for more robust, affirmative provision of health care.

270. *See, e.g.,* Mayeri, *supra* note 64.

271. *See generally Dobbs*, 597 U.S. at 250.

272. For a range of articles on the use of scientific and medical evidence in abortion law *see, e.g.,* Aziza Ahmed, *Feminist Legal Theory and Praxis after* Dobbs*: Science, Politics, and Expertise*, 34 YALE J.L. & FEMINISM 48 (2023); Ahmed*, Medical Evidence*, *supra* note 110; Aziza Ahmed, *Floating Lungs: Forensic Science in Self-Induced Abortion Prosecutions*, 100 B.U. L. REV. 1111 (2020).

273. Shanoor Seervai et al., *Limiting Abortion Access for American Women Impacts Health, Economic Security: An International Comparison,* COMMONWEALTH FUND (Jan. 12, 2023), https://www.commonwealthfund.org/blog/2023/limiting-abortion-access-american-women-impacts-health-economic-security.

VII. CONCLUSION

This Article draws on our respective areas of scholarly expertise and teaching experiences to offer multidisciplinary ideas about teaching a variety of courses relevant to reproductive rights and justice after *Dobbs*. The subject matter of reproductive rights and justice poses extensive challenges but teaching historical and theoretical context as well as interweaving relevant subjects, such as Constitutional Law, Family Law, and Health Law, will aid understanding. Likewise, developing historical and data literacy will help students understand doctrinal shifts over time and provide grounding for contextualization and application. We hope this Article offers a resource that may aid in meeting the challenges ahead.