HISTORY AND TRADITION IN CONSTITUTIONAL INTERPRETATION: RESISTANCE IN THE STATES

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In *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court applied a narrow historical methodology to conclude that abortion was not sufficiently "deeply rooted in the Nation's history and tradition" to be protected by substantive due process. But the past need not be a constraint on Americans' constitutional rights: Critical histories can provide valuable resources for debates about reproductive rights and justice. Before and after *Dobbs*, many state courts have interpreted state constitutions in ways that diverge sharply from *Dobbs*'s narrow version of history-and-tradition analysis. Their decisions, and the advocacy that produced them, illustrate a rich array of alternative approaches that ask different questions of the past and consult a much broader range of voices in seeking answers about our constitutional present and future. Other states have followed *Dobbs* or otherwise retrenched. The devastating impact of abortion bans on the lives and health of women and pregnant people in the years since *Dobbs* heighten the stakes of these arguments about the role of history in constitutional interpretation.

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https://doi.org/10.59015/wlr.VEXL7915

INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*,[1] the U.S. Supreme Court applied a narrow historical methodology to conclude that abortion was not sufficiently "deeply rooted in the Nation's history and tradition" to be protected as a fundamental substantive due process right.[2] The majority disregarded the opinions of professional historians to posit an "unbroken tradition" of abortion criminalization that reached back into the early days of Anglo-American common law.[3] Justice Alito's opinion credited authorities such as Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone, and discredited evidence that, until a nineteenth-century campaign by physicians to criminalize abortion, terminations of pregnancy before "quickening" were common and very rarely prosecuted unless they resulted in the death of the pregnant person.[4] And the majority counted states that banned abortion in 1868, using the purportedly widespread criminalization of abortion at the time of the Fourteenth Amendment's enactment and ratification to circumscribe twenty-first-century Americans' constitutional rights.[5]

Critics have eviscerated both the Court's factual historical account and its cramped history-and-tradition methodology. Instead, scholars and advocates have advanced critical approaches to history in constitutional interpretation.[6] These approaches ask different questions of the past when seeking to ascertain constitutional meaning. They consider the past as "negative" as well as "positive" precedent, question the democratic pedigree of laws enacted when women and people of color were excluded from the polity, care about evolving social mores and dissenting social movements, and value the voices of marginalized individuals and groups as well as elite framers and lawmaking authorities. They attempt to bridge the gap between constitutional history (what happened in the past) and constitutional memory (what is remembered and considered relevant to our interpretation of the constitution today).[7]

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1. 142 S. Ct. 2228 (2022).
2. *Id.* at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).
3. *Id.* at 2253.
4. *Id.* at 2249–52; *see infra* notes 13–17 and accompanying text.
5. *Id.* at 2252–53.
6. I have explored these critical approaches at length in Serena Mayeri, *The Critical Role of History after* Dobbs, 2 J. AM. CONST. HIST. 171 (2024) [hereinafter Mayeri, *Critical Role*]. This Essay relies and expands on that treatment, as well as on a shorter essay: Serena Mayeri, *Reproductive Injustice, Feminist Resistance, and the Uses of History in Constitutional Interpretation*, 33 WM. & MARY BILL RTS. J. 519, 520 (2024).
7. *See, e.g.*, Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 31 (2022) [hereinafter Siegel, *The Politics of Constitutional Memory*].

This critical approach to the past is especially fruitful in efforts to vindicate reproductive rights and justice, as I have explored elsewhere.[8] Scholars such as Peggy Cooper Davis and Reva Siegel pioneered interpretive methods that excavate the ideas and experiences of enslaved and freedpeople, women's rights advocates, and others whose lives and intellectual contributions sometimes informed lawmakers' efforts but rarely appear in legislative histories or constitutional convention records.[9] Thanks to them and to many other legal scholars and historians, we now have rich histories—including constitutional histories—from which to draw cautionary tales as well as stories of resistance and of affirmative constitutional theorizing.[10]

Much of this critical historical work has understandably and productively focused on the Federal Constitution, especially the Reconstruction Amendments and the Nineteenth Amendment. State constitutional law also has much to offer in the way of critical historical approaches, especially as the U.S. Supreme Court's approach to "history and tradition" constricts. In earlier work, I canvassed state litigation about reproductive rights to identify advocates' various approaches to historical methodology and argumentation in state constitutional interpretation.[11] This Essay provides a preliminary assessment of how these methods and arguments have fared since *Dobbs*, in state courts and beyond. Part I briefly summarizes critiques of *Dobbs*'s historical account and methodology. Part II surveys state courts' departures from *Dobbs*'s treatment of history and tradition. Part III catalogues counter-resistance: state court decisions that retrench abortion rights post-*Dobbs*. A brief conclusion identifies patterns in how state courts considering these cases reason about the role of history in constitutional interpretation and suggests how historical memory can inflect the work of state courts more generally.

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8. *See generally* Mayeri, *Critical Role*, *supra* note 6 (exploring history's role in informing constitutional and political arguments about reproductive justice).

9. *See, e.g.*, PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 4, 9–10 (1997); Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 455 (2020), https://yalelawjournal.org/pdf/Siegel_TheNineteenthAmendmentandtheDemocratizationoftheFamily_kwjdphtp.pdf [https://perma.cc/5ZTN-2X98].

10. For examples of these rich histories, see generally DAVIS, *supra* note 9; Siegel, *supra* note 9; Michele Goodwin, *Distorting the Reconstruction: A Reflection on* Dobbs, 34 YALE J.L. & FEMINISM 30 (2023); MARTHA S. JONES, VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL (2020); JULIE C. SUK, WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT (2020).

11. Mayeri, *Critical Role*, *supra* note 6, at 227–59.

I. CRITIQUES: *DOBBS* AND CRITICAL APPROACHES TO HISTORY

Scholars have exposed myriad flaws in *Dobbs*'s approach to history-and-tradition. The majority invokes inaccurate, distorted, selective and partial, results-oriented accounts of historical fact. Its methodology freezes constitutional meaning in a time when most Americans were disenfranchised, in the name of a neutral interpretive mode that is anything but. Critical historical methods, by contrast, ask very different questions of the past, consult different sources, and draw different conclusions from the answers they find.

A. Dobbs*'s Flaws: History and Methodology*

Historians and legal scholars have exposed the flaws in *Dobbs*'s account of the past—from Justice Alito's blanket assertion that "an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973" to his claim that constitutionally suspect motives are separable from a putatively more dominant purpose of nineteenth-century anti-abortion physicians and lawmakers to protect fetal life.[12] A half-century of historical scholarship suggests otherwise.[13] Historians have concluded that abortions pre-quickening (before a pregnant person feels fetal movement) were common in the colonial and early republic periods, and newspapers routinely advertised abortifacients.[14] Publicity about the deaths of women—often sympathetically portrayed as the victims of unscrupulous men—from attempted abortions seems to have spurred applications of criminal law to abortion in the early nineteenth century.[15] The available evidence suggests that few cases went to trial, and even fewer resulted in convictions; when imposed, sentences usually were short.[16] Not only concern for fetal life but

12. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2252–55 (2022).

13. *See, e.g.*, JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 148, 160 (1979); Cornelia Hughes Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, 48 WM. & MARY Q. 19, 23 (1991); LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 20 (1997); SIMONE M. CARON, WHO CHOOSES? AMERICAN REPRODUCTIVE HISTORY SINCE 1830, at 3–4 (2008); Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents at 5–7, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) [hereinafter AHA/OAH Brief].

14. Mayeri, *Critical Role*, *supra* note 6, at 180.

15. AHA/OAH Brief, *supra* note 13, at 14; Patricia Cline Cohen, *Induced Abortion in the Early Republic*, PANORAMA, https://thepanorama.shear.org/2022/10/24/induced-abortion-in-the-early-republic/ [https://perma.cc/2Y6J-AN2V] (last visited Oct. 12, 2025).

16. *See* AHA/OAH Brief, *supra* note 13, at 17–19.

also nativism, anti-Catholicism, and ideas about women's divinely ordained roles as wives and mothers, as well as a desire to increase the status of regular male doctors at the expense of midwives, powered the abortion criminalization campaign launched by physician Horatio Storer in the 1850s.[17] The *Dobbs* majority's state-counting math also has been called into question, as has the assertion that the "right to abortion" was "entirely unknown in American law."[18]

Critics have assailed *Dobbs*'s interpretive methodology, too, showing how the majority engages in partial, selective, and distortive historical inquiries that all but guarantee reactionary results while claiming neutrality. Justice Alito's opinion not only disregards a half-century of substantive due process and equal protection jurisprudence, but also departs from dynamic conceptions of history and tradition that consider evolving understandings and more. Counting state laws as of 1868, a method developed by segregationists to defend *Plessy v. Ferguson*,[19] entrenches the views of lawmakers who had fought a war to preserve the enslavement of human beings and ratified the Reconstruction Amendments as a condition of readmission to the Union.[20] The *Dobbs* majority does not even bother to canvass the views of the Fourteenth Amendment's framers, much less those excluded from lawmaking authority and whose emancipation and equality the Reconstruction Amendments sought to guarantee. And the Roberts Court applies the *Dobbs*ian approach to history and tradition selectively and inconsistently across constitutional fields and cases.[21]

The *Dobbs* approach to history masquerades as objective and impartial but is in fact opportunistic and antidemocratic, freezing constitutional meaning in a time when a majority of American adults had no political voice. It also is a sharp departure from the Supreme Court's

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17. MOHR, *supra* note 13, at 161–67; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 293 (1992).

18. *See* Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1099 (2023); Aaron Tang, *The Supreme Court Flunks Abortion History*, L.A. TIMES (May 5, 2022, at 03:00 PT), https://www.latimes.com/opinion/story/2022-05-05/abortion-draft-opinion-14th-amendment-american-history-quickening [https://perma.cc/38ZD-94AF]; Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J.F. 65, 87 (2023), https://www.yalelawjournal.org/pdf/F10.TangFinalDraftforWeb_z74p449z.pdf [https://perma.cc/NQW2-MR2Y].

19. 163 U.S. 537 (1896).

20. *See* Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 111 (2024), https://yalelawjournal.org/forum/the-history-of-history-and-tradition-the-roots-of-dobbss-method-and-originalism-in-the-defense-of-segregation [https://perma.cc/5AGJ-87EN].

21. *See* Mayeri, *Critical Role*, *supra* note 6, at 191.

recent due process and equal protection jurisprudence. In *Lawrence v. Texas*[22] and *Obergefell v. Hodges*,[23] a majority of the Court rejected narrow definitions of the right in question (a right to homosexual sodomy; a right to marry persons of the same sex) in favor of broader principles (a right to make autonomous decisions about sexuality and intimate relationships; a right to marry) and embraced evolving understandings and values as relevant to determining the scope of those fundamental constitutional rights.[24] In *United States v. Virginia*[25]—one of many equal protection precedents ignored by Justice Alito in *Dobbs*—the Court cited the "long and unfortunate history of sex discrimination" as cause to apply "skeptical scrutiny" to a sex-based classification that disadvantaged women based upon stereotypes about sex differences.[26] Constitutional sex equality law, and equal protection more generally, often relies on a view of the past as "negative precedent"[27]—after all, historical discrimination is a key factor in determining which classifications are subject to heightened scrutiny under the Equal Protection Clause.[28]

B. Critical Approaches to History in Constitutional Interpretation

A rich vein of scholarship understands the past not as a blueprint for the present but as a "resource" to inform how we think of our political community and envision our constitutional future. Almost three decades ago, Peggy Cooper Davis invited us to consider the ideas and lived experiences of enslaved and freedpeople as "motivating stories" to enrich our understanding of the Fourteenth Amendment's promise of emancipation.[29] Davis invoked an "antislavery history and tradition" born of a struggle against bondage and its legacies, including reproductive control, sexual violence, and family separation.[30] In sharp contrast to *Dobbs*, Davis would ask not "whether the [challenged] *state action* was traditional or traditionally tolerated, but whether toleration of it is

22. 539 U.S. 558 (2003).

23. 576 U.S. 644 (2015).

24. *Lawrence*, 539 U.S. at 560; *Obergefell*, 576 U.S. at 672.

25. 518 U.S. 515 (1996).

26. *Id.* at 531 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)); Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167, 206 (2020); Siegel, *The Politics of Constitutional Memory*, *supra* note 7, at 55.

27. *See* Mayeri, *Critical Role*, *supra* note 6, at 189–90 (citing, *inter alia*, Deborah Widiss, *Re-viewing History: The Use of the Past as Negative Precedent in* United States v. Virginia, 108 YALE L.J. 237 (1998)).

28. *See, e.g.*, *United States v. Skrmetti*, No. 23–477, slip op. at 8–9 (U.S. June 18, 2025).

29. DAVIS, *supra* note 9, at 4.

30. *Id.* at 214.

consistent with the history that produced, and the traditions that support, the relevant constitutional provisions."[31]

Instead of taking a deferential approach to the past, critical approaches look to history and find wrongs to be righted, lessons to be learned, injustices to be overcome, and stories of resistance to inspire. As Reva Siegel explains, the past can be "*positive precedent*, identifying constitution makers who model constitutional virtues" and it can also be "*negative precedent*, . . . a record of past wrongs that the nation strives to remedy and against which the nation defines itself."[32] Dorothy Roberts underscores the power of "historical resemblance"—understanding parallels between past and present injustices can help to counter narratives that place reproductive rights outside the ambit of racial injustices that the Reconstruction Amendments should combat.[33] Critical histories can debunk spurious associations of abortion with eugenic policies and instead locate abortion restrictions in a long history of reproductive control.[34]

Critical approaches to history ask very different questions of the past. For example, instead of asking how many states criminalized abortion at the time a constitutional provision was ratified, they ask what harms its framers sought to combat and what principles it enshrines. Rather than inquiring only about how lawmakers thought and what they said about abortion, they also investigate what ordinary Americans believed and how they navigated their reproductive lives. Rather than assuming a static constitutional meaning, they consider constitutions as documents that evolve as conditions and values change. These approaches look to a wider range of sources, credit a wider range of voices, and draw a very different set of conclusions from the historical evidence they find.[35]

II. RESISTANCE: STATE COURTS' DEPARTURES FROM *DOBBS*

State courts have unlimited leeway to interpret their constitutions expansively and dynamically, untethered as they are to the reigning federal constitutional regime. As Jessica Bulman-Pozen and Miriam Seifter argue, "methodological lockstepping"—in which state courts' modes of interpretation mimic federal courts' implementation of the federal constitution—makes little sense given the stark differences between

31. *Id.* at 215 (emphasis added).

32. Siegel, *The Politics of Constitutional Memory*, *supra* note 7, at 54.

33. Dorothy E. Roberts, *Racism, Abolition, and Historical Resemblance*, 136 HARV. L. REV. F. 37, 39 (2022), https://harvardlawreview.org/wp-content/uploads/2022/11/136-Harv.-L.-Rev.-F.-37.pdf [https://perma.cc/69VL-5ERQ].

34. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 6, 56 (1997); Melissa Murray, *Race-ing* Roe: *Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2028, 2038 (2021).

35. *See* Mayeri, *Critical Role*, *supra* note 6, at 178, 196–97.

federal and state constitutionalism.[36] State constitutions, they observe, are more voluminous, amendable, dynamic, rights-protective, synthetic, and majoritarian, among other differences.[37] Those divergences mean not only that substantive lockstepping makes little sense, but also that state courts have no reason to follow interpretive methods employed by their federal counterparts.[38]

To varying degrees, many state courts post-*Dobbs* have eschewed lockstepping with respect to historical methodology and adopted their own approaches to the relevance of history in state constitutional interpretation. In the wake of *Dobbs*, advocates have marshalled historical evidence to support more expansive interpretations of state constitutions, even where state courts are less willing explicitly to embrace a dynamic interpretive approach. In states with constitutional provisions designed to protect additional rights or to combat historical injustices, advocates invoke history as negative precedent—a reason to break from, rather than follow, deeply rooted traditions.[39] In cases involving more limited challenges to state abortion bans, plaintiffs and their allies have argued for a history and tradition of protecting women's lives and health, even at the height of abortion restriction and women's subordination.[40] The devastating impact of abortion bans on the lives and health of women and pregnant people in the years since *Dobbs* intensify the stakes of these arguments.

A. Older State Constitutional Provisions as a Source of Fundamental Rights

Many states already take a critical approach to history in interpreting their own constitutions. The pre-*Dobbs* gold standard for state constitutional interpretation in reproductive rights cases involving older constitutional provisions was the Kansas Supreme Court's 2019 decision in *Hodes & Nauser, MDs, P.A. v. Schmidt*.[41] *Hodes*'s treatment of history's role in constitutional interpretation is diametrically opposed to Justice Alito's approach three years later in *Dobbs*. First, *Hodes* defined the right at stake at a high level of generality.[42] The court asked whether the Kansas constitution's inalienable natural rights provision guarantees a

36. Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1858, 1881–83 (2023).

37. *Id.* at 1874, 1883.

38. *Id.* at 1858, 1881, 1883.

39. Mayeri, *Critical Role*, *supra* note 6, at 229.

40. *See* CTR. FOR REPROD. RTS., STATE CONSTITUTIONS AND ABORTION RIGHTS: BUILDING PROTECTIONS FOR REPRODUCTIVE AUTONOMY 2, 5 (July 2022), https://reproductiverights.org/wp-content/uploads/2022/07/State-Constitutions-Report-July-2022.pdf [https://perma.cc/5SK9-T52H].

41. 440 P.3d 461 (Kan. 2019).

42. *Id.* at 493, 497–98.

fundamental right to personal autonomy.[43] In so doing, the court followed the interpretive mode of cases such as *Lawrence* and *Obergefell*, which asked not whether a right to same-sex sexual relations or same-sex marriage was deeply rooted in the nation's history and traditions, but rather whether rights to individual autonomy in matters relating to intimacy, marriage, and family life are fundamental to ordered liberty.[44]

Second, the *Hodes* court saw the history of restrictions on women's rights as a reason to reject, rather than to embrace, constitutional rights today. "The Kansas Constitution initially denied women the right to vote in most elections, to serve on juries, and to exercise other rights that we now consider fundamental to all citizens of our state," the court said.[45] The justices rejected the framers' "paternalistic attitude" and failure to recognize women as natural rights-holders.[46] "True equality of opportunity in the full range of human endeavor is a Kansas constitutional value," the court declared, "and it cannot be met if the ability to seize and maximize opportunity is tethered to prejudices from two centuries ago."[47] Instead of "rely[ing] on historical prejudices," the court "look[ed] to natural rights and appl[ied] them equally to protect all individuals."[48] Here, too, *Hodes* emulated interpretive traditions that incorporate evolving understandings and values, rather than freezing constitutional meaning at a fixed point in the past.

Hodes rejected outright the notion that "the existence of 19th century criminal abortion statutes" dictates a narrow interpretation of state constitutional protections.[49] Those laws did not "reflect[] the will of the people," were "never tested for constitutionality," and were enacted by lawmakers who, "while willing to recognize some rights for women, refused to recognized women as having all the rights that men had."[50] Like the U.S. Supreme Court in *Brown v. Board of Education*,[51] the Kansas Supreme Court eschewed the approach promoted by defenders of segregation, which defined the rights protected by the Federal Constitution as circumscribed by nineteenth-century attitudes about race and civil rights.[52]

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43. *Id.* at 480.
44. *See supra* Section I.A.
45. *Hodes & Nauser, MDs, P.A.*, 440 P.3d at 490.
46. *Id.* at 491.
47. *Id.*
48. *Id.*
49. *Id.* at 486.
50. *Id.*
51. 347 U.S. 483 (1954).
52. *Cf.* Siegel, *supra* note 20, at 116–17 ("*Brown* rejected the argument that the Court should base its decision on expectations and intentions at the time of the Fourteenth Amendment's ratification.").

Notably, *Hodes* considered the views of common law authorities such as William Blackstone—honored by the *Dobbs* majority as authoritative—as indicative not of a deeply-rooted history and tradition worthy of respect and fidelity, but rather as a reason for skepticism.[53] To the Kansas court, Blackstone's association with coverture discounted the value of his observations as a guide for twenty-first century constitutional interpretation.

Further, the court credited the work of scholars James Mohr and Reva Siegel, who revealed the unsavory origins of nineteenth-century abortion restrictions in archaic views about women and nativist fears that the fecundity of immigrants and Catholics would outpace elite, white, Protestant, native-born Americans. Whereas the *Dobbs* majority later scoffed at the idea that anti-Catholic sentiment and outdated attitudes about women's divinely ordained roles as wives and mothers should taint the historical pedigree of anti-abortion legislation, *Hodes* considered this evidence pertinent and damning. Ultimately, the *Hodes* court concluded that the right to personal autonomy enshrined in the Kansas constitution encompasses the decision to terminate a pregnancy, and subjected restrictions on that right to strict scrutiny.[54] Shortly after *Dobbs*, Kansas voters rejected a ballot measure that would effectively have reversed *Hodes*.[55] In July 2024, the state supreme court reaffirmed *Hodes* and applied strict scrutiny to invalidate a ban on dilation and evacuation (D&E) procedures.[56]

Hodes modeled an argument for a broad set of individual rights and personal liberties protected by the state constitution, even if those rights had not always applied to all citizens. In Oklahoma, for instance, those who challenged the state's 1910 and 2022 abortion bans contended that the state's 1906 constitutional convention enshrined "natural and inalienable rights" beyond the Federal Constitution's protections and noted the endorsement of populist leader William Jennings Bryan, who called Oklahoma's "the best constitution in the United States."[57] The state constitution's framers, the challengers noted, held outdated views about the rights of women and people of color. In the early 1900s, Oklahoma

53. *Hodes*, 440 P.3d at 490–91.

54. *Id.* at 488, 502.

55. Dylan Lysen, Laura Ziegler & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022, at 02:18 ET), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment [https://perma.cc/4NSA-GFJ5].

56. *Hodes & Nauser, MDs, P.A. v. Kobach*, 551 P.3d 37, 44, 46 (Kan. 2024).

57. Mayeri, *Critical Role*, *supra* note 6, at 232 (quoting Petitioners' Corrected Brief in Chief at 13, *Okla. Call for Reprod. Just. v. O'Connor*, PR-120,543 (Okla. Sep. 2, 2022)).

women had limited suffrage, and marital rape remained legal.[58] The same state legislature that adopted the new constitution also banned interracial marriage.[59] But those archaic attitudes could no longer constitutionally be imposed on Oklahoma women; rather, the expansive individual rights framers embraced for white men must, in light of contemporary equality principles, extend to women and people of color.[60]

Advocates have used historical evidence to argue that framers intended state constitutions to be interpreted dynamically—to evolve meaning over time in response to changing social mores and new circumstances. For example, ACLU lawyers challenging Indiana's abortion ban used an 1856 state supreme court decision explaining that the state constitution's framers understood the rights protected therein to be "necessarily general."[61] The framers could not anticipate future exercises of state power or "attempts that might be made to invade [individuals'] rights."[62] In Utah, advocates challenging the state's abortion restrictions pointed to precedents holding that "the meaning of a particular right in the Utah constitution may evolve over time if, at the time that the Constitution was enacted, the public would have understood the scope of a particular right to be 'expanding in use and purpose.'"[63] Amici cited the state constitution's grant of women's suffrage despite a provision preventing women from voting for or against the document's ratification as evidence that "women's rights as citizens and equal participants in civil society would be 'expanding' after statehood."[64]

In some states, advocates can point to the early embrace of rights for women as evidence supporting an inclusive application of constitutional liberty and autonomy.[65] State exceptionalism infuses arguments against abortion restrictions in states such as Utah and Wyoming, which pioneered women's suffrage and other equal rights. The challenge to Wyoming's

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58. Petitioners' Corrected Brief in Chief, *supra* note 57 at 4.

59. Mayeri, *Critical Role*, *supra* note 6, at 232.

60. Petitioners' Corrected Brief in Chief, *supra* note 58, at 20.

61. Brief of Appellees-Plaintiffs at 38, *Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc.*, 211 N.E.3d 957 (Ind. 2023) (No. 22S-PL-00338) (quoting *Madison & Indianapolis R.R. v. Whiteneck*, 8 Ind. 217, 227–28 (Ind. 1856)).

62. Brief of Appellees-Plaintiffs, *supra* note 61, at 38 (quoting *Madison & Indianapolis R.R. v. Whiteneck*, 8 Ind. 217, 227–28 (Ind. 1856)).

63. *See* Mayeri, *Critical Role*, *supra* note 6, at 234 (quoting Motion for Preliminary Injunction and Supporting Memorandum at 18, *Planned Parenthood Ass'n of Utah v. Utah*, No. 220903886 (3d Jud. Dist. Ct., Salt Lake Cnty., Utah June 29, 2022)).

64. Brief of League of Women Voters of Utah and Fifty Business Leaders as Amici Curiae in Support of Planned Parenthood and Affirmance at 10, *Utah v. Planned Parenthood Ass'n.*, 2024 UT 28, 554 P.3d 998 (Utah 2024) (No. 20220696-SC).

65. Mayeri, *Critical Role*, *supra* note 6, at 232; *cf.* Fred O. Smith, Jr., *Invocations of Memory in State Constitutional Law*, 33 WM. & MARY BILL RTS. J. 503, 509–10 (2024) (discussing "ethos").

abortion ban prominently features references to its status as the first state to authorize women's suffrage, and its grant of "expansive civil rights" during the territorial and statehood periods, including the right to hold public office.[66] Plaintiffs also depict Wyoming as exceptional in its protection for abortions necessary to preserve not only women's lives but also their health.[67] Planned Parenthood challengers and an amicus brief from the League of Women Voters detailed Utah's pre- and post-statehood history of granting women the right to vote and allowing women as delegates to its 1882 constitutional convention.[68] A provision in the state's 1896 constitution guaranteed equal "civil, political and religious rights and privileges" to all "male and female citizens" and granted women equal rights to vote and hold office.[69] Advocates cited statements from Utah lawmakers and constitution-framers "expressing progressive views about women's capabilities, roles, and rights in the 1880s and 1890s."[70]

In an August 2024 decision, the Utah Supreme Court declined to follow the *Dobbs* majority's methodology and articulated a different approach to state constitutional interpretation.[71] The court's interpretive methodology departed from *Dobbs* in several respects. First, the court described its task as discerning the "original public meaning" of the relevant constitutional provisions, with "history and tradition as part of the inquiry into what statehood-era Utahns would have understood the constitution's text to mean."[72] The majority made clear that the relevant question was *not* whether Utahns in 1890 would have understood their state constitution to protect a right to abortion. Rather, the court asked "what *principles* the people of Utah enshrined in the constitution."[73]

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66. Mayeri, *Critical Role*, *supra* note 6, at 232 (quoting Amended Complaint for Declaratory and Injunctive Relief at 3, *Johnson v. Wyoming*, No. 18853 (Dist. Ct. 9th Jud. Cir. Teton Cnty., Wyo. Mar. 21, 2023)).

67. *See* Brief of Appellees/Plaintiffs at 3, *Wyoming v. Johnson*, No. S-24-0326 (Wyo. Feb. 28, 2025) ("Nearly alone among the states, Wyoming took a more permissive approach. Under Wyoming's first abortion statute, adopted in 1869, a woman was permitted to undergo an abortion at any stage of pregnancy where, based on the 'advice of a physician or surgeon,' the abortion was intended 'to save the life of such woman, or to prevent serious and permanent bodily injury to her'" (cleaned up)).

68. Brief of League of Women Voters of Utah and Fifty Business Leaders as Amici Curiae in Support of Planned Parenthood and Affirmance, *supra* note 64, at 7.

69. Mayeri, *Critical Role*, *supra* note 6, at 233 (quoting UTAH CONST. art. VI, § 1).

70. Mayeri, *Critical Role*, *supra* note 6, at 233.

71. *Planned Parenthood Ass'n of Utah v. State*, 2024 UT 28, ¶ 109, 554 P.3d 998, 1025. The court declined to stay a preliminary injunction entered by the district court, which credited PPAU's demonstration that there were "at least serious issues on the merits that should be the subject of further litigation." Order Granting Plaintiff's Motion for a Preliminary Injunction at 3, *Planned Parenthood Ass'n of Utah v. Utah*, No. 220903886 (3d Jud. Dist. Ct., Salt Lake Cnty., Utah July 19, 2022).

72. *Planned Parenthood Ass'n of Utah*, 2024 UT 28, ¶ 109.

73. *Id.* ¶ 127 (emphasis added).

Relatedly, the court declined to adopt a trans-substantive rule about the level of generality at which a constitutional principle should be identified, asserting that the framers' own understanding of abstraction or specificity would govern.[74]

The justices disavowed an approach that would freeze constitutional rights in the nineteenth century. "Failure to distinguish between principles and application of those principles would hold constitutional protections hostage to the prejudices of the 1890s."[75] If the court relied upon 1890 Utahns' views, the court pointed out, then interracial marriage—banned in the state around the same time—would be constitutional.[76] Associate Chief Justice John Pearce wrote: "[W]e are not required to apply [constitutional principles] in the same way the founding generation would have."[77] Utah precedents "sometimes define constitutional rights as broad principles that 'necessarily encompass[] the more specific right.'"[78] And significantly, the court had "not required parties to show precise historical antecedents for the application of the constitutional principle to a specific right."[79] This, too, marked a departure from *Dobbs*.

Further, the court said, the fact that Utah criminalized abortion at statehood was not dispositive. Instead, "we need to understand *why* Utah banned abortion . . . and *what* that can tell us about how [the framers] understood the relationship between them and their government."[80] The court then critiqued the state's contention that criminal abortion in 1895 was understood to include pre-quickening pregnancy terminations.[81] Significantly, the court considered not only contemporaneous dictionary definitions but also evidence about nineteenth-century women's understandings about the prevalence and lawfulness of abortion before a pregnant person could detect fetal movement.[82]

Second, the Utah court took up advocates' invitation to consider views and voices beyond those of the state constitution's framers. The opinion cited an (anti-abortion) Latter-day Saint female physician who wrote in the 1890s of Utah women who routinely practiced pre-quickening abortion and surveyed evidence from other states that earlier criminalization efforts primarily targeted abortions that endangered

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74. *See* Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" In the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563, 608–09 (2024).

75. *Planned Parenthood Ass'n of Utah*, 2024 UT 28, ¶ 127.

76. *Id.* ¶ 128.

77. *Id.* ¶ 131.

78. *Id.* ¶ 166 (alteration in original) (quoting *Jensen ex rel Jensen v. Cunningham*, 2011 UT 17, ¶ 73, 250 P.3d 465, 484).

79. *Id.* ¶ 166.

80. *Id.* ¶ 135.

81. *Id.* ¶ 139–40.

82. *Id.* ¶¶ 136–40.

women's health and lives.[83] The Utah justices credited the accounts of scholars such as Mohr and Siegel, who describe the nineteenth-century physicians' anti-abortion campaign as in part an effort to boost the status of regular physicians and eject women and midwives from an increasingly professionalized practice of medicine.[84]

Though the Utah decision did not rely solely upon the state constitution's equal rights provision, the justices rejected the state's argument that this clause applies only to the rights to vote and hold public office. The court cited constitutional convention proceedings that "suggest that both proponents and opponents . . . were aware" that the amendment extended beyond "equal voting rights," noting "ample examples of delegates" advocating for a broader interpretation.[85] Significantly, the court also reiterated that "the relevant inquiry encompasses more than just what the delegates to the convention thought the language meant."[86] The voices of ordinary citizens—including women—also mattered to the constitutional inquiry.

B. Modern Constitutional Provisions

Many states have more recently adopted constitutional protections for equality, privacy, bodily integrity, and other rights. In challenges to abortion restrictions, advocates have used historical evidence to support "both framers' intent to create capacious rights and a critical approach to the past that sees overcoming historical injustice as part of the provisions' mandate."[87] For example, under state Equal Rights Amendments (ERAs), advocates arguing for abortion rights protections "often emphasize dramatic changes over time in the recognition of women's right to equal treatment under law; of how sex-based stereotypes constrict women's opportunities; and of how constraints on reproductive freedom and discrimination based on reproductive capacity historically have been central to women's oppression."[88] As Peggy Cooper Davis wrote in the context of the federal Reconstructions Amendments, "[l]aws and practices consistent with a challenged state action" serve in these arguments not as "manifestations of a constitutional ideal" but rather as "manifestations of the mischief against which the Constitution protects us."[89]

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83. *Id.* ¶¶ 142, 145.
84. *Id.* ¶¶ 147–48.
85. *Id.* ¶¶ 189–90.
86. *Id.* ¶ 190.
87. Mayeri, *Critical Role*, *supra* note 6, at 234.
88. *Id.* at 236.
89. DAVIS, *supra* note 9, at 215.

The Pennsylvania Supreme Court's decision in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*,[90] a challenge to the state's ban on Medicaid funding for the termination of non-life-threatening pregnancies, provides the most extensive discussion and vindication of historical equality arguments to date.[91] Several features are worthy of note. First, the opinions reject the *Dobbs* majority's historical methodology and instead embrace critical historical arguments advanced by advocates and scholars. Justice Wecht's concurrence includes the most detailed critique of *Dobbs*. What purports to be "a neutral survey of history," he writes, privileges "patriarchal notions of eminent authorities of old English common law" instead of "examining the history of the Fourteenth Amendment as . . . aimed at transforming the formerly enslaved into citizens."[92] By "relying upon particular points in history during which women expressly were precluded from political participation," *Dobbs* "effectively enshrines and perpetuates the legal subjugation of women."[93] Indeed, Justice Alito's interpretive method "seems designed to perpetuate the wrongs of our past," including "centuries of misogyny and oppression that our society has since rejected."[94]

Allegheny's approach to history, instead, buttresses advocates' arguments that the state equal rights amendment, adopted in 1971, protects abortion rights. Rather than using women's historical subordination to rationalize unequal treatment today, the Pennsylvania court sees an unjust past as a negative precedent to be overcome. Justice Christine Donohue's majority opinion describes "[c]enturies of inequality" including coverture and women's exclusion from the professions.[95] She emphasizes how women's "inferior legal status" rested largely on "biological differences between men and women."[96] Well into the twentieth century, state "laws continued to reflect the common-law view that women were incapable of functioning independently from men, thereby forcing them into their predetermined societal roles as wives and mothers."[97] Pennsylvania's ERA, with its scant legislative history, should be understood "within this

90. 309 A.3d 808 (Pa. 2024).

91. *See id.* at 870–72; *see also id.* at 961–80 (Wecht, J., concurring) (discussing historical equality arguments for abortion rights). For a detailed discussion of these opinions, see Mayeri, *Critical Role*, *supra* note 6, at 237–44.

92. *Allegheny*, 309 A.3d at 982–83 (Wecht, J., concurring).

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

94. *Id.* at 983, 986 (Wecht, J. concurring).

95. *Id.* at 870–71. Two justices also identify in the historical record a right to "decision making on certain important issue[s] and security in one's bodily integrity" that predates the 1776 state constitution. *Id.* at 910.

96. *Id.* at 870.

97. *Id.* at 871.

context of persistent relegation of women to subservient and dependent roles."[98]

Second, the *Allegheny* opinions, especially Justice David Wecht's, rely not only on scholars' historical account of the facts of abortion criminalization and on the suspect origins of nineteenth-century abortion restrictions but also on the work of reproductive justice scholars. Justice Wecht writes, for example, that because "[w]omen's reproductive capacity and their ability to become mothers traditionally has long been used as a justification" for discrimination, "[t]he provision of unequal health care and the coercion of women to give birth against their will would seem to serve archaic and stereotypical notions about women . . . ."[99] He echoes reproductive justice theorists in observing that when "the legislature uses the law to coerce but not to support women in bearing children, its purported interest in potential life rings hollow."[100] And he cites the work of Reva Siegel, Melissa Murray, Khiara Bridges, and others, who have elaborated on historical and contemporary reproductive injustices and their connection to present-day restrictions on reproductive freedom.[101]

C. A History and Tradition of Protecting Women's Lives and Health

Since *Dobbs*, advocates have argued—often successfully—that even under the *Dobbs*ian history-and-tradition analysis, abortion bans that criminalize health care providers and deter the provision of care violate state constitutions because they fail to protect the lives and health of pregnant persons.[102] Reva Siegel and Mary Ziegler have uncovered voluminous evidence of a robust history and tradition of protecting women's lives and health even during the era of pervasive abortion restrictions.[103] Using a diverse array of primary sources, they show that physicians exercised wide discretion to make decisions about how to treat patients experiencing medical emergencies and other threats to their short- and long-term well-being.[104]

Even some courts that adhere to a version of *Dobbs*'s historical methodology have been receptive to these arguments.[105] A 3–2 majority

98. *Id.* at 871–72.

99. *Id.* at 955 (Wecht, J., concurring).

100. *Id.* (Wecht, J., concurring).

101. *Id.* at 960 n.92, 961 n.94, 970 & n.153 (Wecht, J., concurring).

102. *See* Mayeri, *Critical Role*, *supra* note 6, at 229–34 (detailing how advocates present such evidence in state abortion litigation).

103. Reva B. Siegel & Mary Ziegler, *Abortion's New Criminalization—A History-and-Tradition Right to Health-Care Access After* Dobbs, 111 VA. L. REV. 413, 439–52 (2025).

104. *Id.*

105. Bulman-Pozen and Seifter use Idaho's abortion decision as a prime example of "methodological lockstepping." Bulman-Pozen & Seifter, *supra* note 36, at 1858.

on Idaho's Supreme Court, for example, described the state's constitution as "an instrument whose meaning is fixed at its creation" and scrutinized "Idaho's history, traditions, common law, and statutes" to assess whether the document protects abortion rights.[106] The court's survey of primary sources—legislative history, newspapers, medical journals, and court decisions—led the majority to conclude that there was "no support in *Idaho*'s deeply rooted traditions or history" of a right to abortion "at the time [relevant provisions] were framed and adopted."[107] The majority found that "all of the evidence indicates that . . . the people of Idaho, the framers of its constitution, the territorial assembly, the state legislature, and the physicians of Idaho widely viewed abortion as a criminal offense and as grounds for medical discipline except when necessary to preserve the life of the mother."[108] Notably, however, the Idaho majority recognized that abortion bans historically excepted life-threatening situations.[109]

Similarly, while upholding a challenged abortion ban, Indiana Supreme Court held in 2023 that the state constitution's "inalienable rights" clause includes a "right to protect one's own life [that] extends beyond just protecting against imminent death . . . [to] include[] protecting against 'great bodily harm.'"[110] The court noted that "all of Indiana's abortion statutes since 1851 have recognized an exception for abortions that are required to protect a woman's life."[111] Accordingly:

> Because this fundamental right of self-protection—whether considered as an exercise of the right to life, an exercise of the right to liberty, a limitation on the scope of the police power, or as a matter of equal treatment—is so firmly rooted in Indiana's history and traditions, it is a relatively uncontroversial legal proposition that the [legislature] cannot prohibit an abortion procedure that is necessary to protect a woman's life *or to protect her from a serious health risk*.[112]

Elsewhere, too, advocates have successfully argued that state constitutions mandate protections for women's lives and health. The Oklahoma Supreme Court held in 2023 that the state constitution "protects

106. *Planned Parenthood of Greater Nw. v. State*, 522 P.3d 1132, 1163, 1173 (Idaho 2023).

107. *Id.* at 1161–62.

108. *Id.* at 1184.

109. *Id.* at 1177.

110. *Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc.*, 211 N.E.3d 957, 971, 976 (Ind. 2023) (quoting *Larkin v. State*, 173 N.E.3d 662, 670 (Ind. 2021)).

111. *Id.* at 976.

112. *Id.* (emphasis added).

a limited right to abortion."[113] The unbroken criminalization of abortion described in *Dobbs* was "only half the story in Oklahoma": The abortion bans in effect since the territorial period "always acknowledged a limited exception."[114] The court concluded that Oklahoma's "history and tradition have . . . recognized a right to an abortion when it was necessary to preserve the life of the pregnant woman" lodged in the state constitution's due process provision, and in a clause guaranteeing to "all persons" the "inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry."[115]

The North Dakota Supreme Court went further than Oklahoma's. The court upheld a preliminary injunction against an abortion ban under an 1889 state constitutional guarantee that "[a]ll individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty."[116] The court described its task as "to give effect to the intent and purpose of the people adopting the constitutional statement," by "construe[ing] the constitution in light of the contemporaneous history existing at and prior to the adoption of the constitutional provision."[117] Chief Justice Jon Jenson's opinion quoted from medical journals from the statehood period, which "indicate it was common knowledge that an abortion could be performed to preserve the life or health of the woman."[118] Until the enactment of a trigger ban in 2007, North Dakota law had always "provided an abortion was not a criminal act if the treatment was done to preserve the life of the woman."[119] Justice Jensen concluded that "North Dakota's history and traditions . . . establish that the right of a woman to

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113. *Okla. Call for Reprod. Just. v. Drummond*, 2023 OK 24, ¶ 3, 526 P.3d 1123, 1128–29.

114. *Id.* at 1130.

115. *Id.* (quoting OKLA. CONST. art. II, § 2). The narrow exception under Oklahoma law "to save the life of a pregnant woman in a medical emergency," the court found, "require[d] a woman to be in actual and present danger in order for her to obtain a medically necessary abortion." *Id.* at 1131 (quoting OKLA. STAT. tit. 63 § 1-731.4(B)(1) (2022)). Instead, a pregnant woman possessed:

> an inherent right to choose to terminate her pregnancy if at any point in the pregnancy, the woman's physician has determined to a reasonable degree of medical certainty or probability that the continuation of the pregnancy will endanger the woman's life due to the pregnancy itself or due to a medical condition that the woman is either currently suffering from or likely to suffer from during the pregnancy.

Id. at 1130.

116. *Wrigley v. Romanick*, 2023 ND 50, ¶ 22, 988 N.W.2d. 231, 240 (alteration in original) (quoting N.D. CONST. art. I, § 1).

117. *Id.* ¶ 21 (quoting *State v. Hagerty*, 1998 ND 122, ¶ 13, 580 N.W.2d 139, 143).

118. *Id.* ¶ 25.

119. *Id.* ¶¶ 23, 26.

receive an abortion to preserve her life or health was implicit in North Dakota's concept of ordered liberty before, during, and at the time of statehood."[120]

The North Dakota court later relied on this holding when it declined to stay a trial court decision enjoining a law that "criminalizes abortions performed to treat psychological disorders that will cause a woman to engage 'in conduct that will result in her death' or conduct that will result in 'substantial physical impairment of a major bodily function.'"[121] This recognition of a mental health rationale for providing abortion care is a significant victory for those whose conditions may require, for example, treatment that is dangerous to fetal life if pursued, and dangerous to the pregnant person if discontinued.

III. COUNTER-RESISTANCE IN THE STATES

While several state courts have maintained or extended constitutional guarantees for abortion rights or interpreted their own state's history and traditions to require exceptions protecting pregnant patients' lives and health, others have retrenched. A handful of states have backtracked from strong protections for abortion rights and from critical approaches to history in state constitutional interpretation; some have interpreted or reinterpreted modern constitutional protections to exclude abortion, and some have declined even to find a history and tradition of allowing life- and health-saving abortions.

The plaintiffs in *Zurawski v. Texas*,[122] seeking clarification of the state's medical exceptions, presented extensive evidence of a history and tradition of protecting the lives and health of pregnant patients.[123] A historians' amicus brief detailed legislative history, medical literature and practice, and the law as enforced in practice to bolster a "deeply rooted constitutional right to abortion" in cases of life- or health-threatening pregnancy.[124] The plaintiffs showed that, when Texas enacted its 1845 constitution, the "common law explicitly permitted abortion before 'quickening' . . . and abortions were provided routinely for pregnancy

120. *Id.* ¶ 27. He wrote: "[I]t is clear the citizens of North Dakota have a right to enjoy and defend life and a right to pursue and obtain safety, which necessarily includes a pregnant woman has a fundamental right to obtain an abortion to preserve her life or her health." *Id.*

121. *Access Indep. Health Servs., Inc. v. Wrigley*, 2025 ND 26, ¶ 36, 16 N.W.2d 902, 916 (quoting N.D. CENT. CODE § 12.1-19.1-01(5)).

122. 690 S.W.3d 644 (Tex. 2024).

123. Plaintiffs-Appellees' Response Brief at xiii, 47–54, *State v. Zurawski*, 690 S.W.3d 644 (Tex. 2024) (No. 23-0629).

124. Brief for Amici Curiae Historians with Expertise in the History of Abortion Medicine, Law, and Regulation in Support of Appellees at 3, *Zurawski*, 690 S.W.3d 644 (No. 23-0629) [hereinafter Historian's Brief].

complications even after 'quickening.'"[125] State law expressly exempted "abortions procured by 'medical advice' to save the pregnant person's 'life'" after Texas passed an abortion ban in 1856.[126] The briefs cited medical literature from Texas and beyond in which "physicians recommended and performed abortions for a range of pregnancy-related health conditions and exercised wide discretion in determining when those conditions necessitated abortion."[127] Even the most vehement nineteenth-century opponents of abortion endorsed the "practice of discretionary therapeutic abortions," a position that endured well into the twentieth century.[128] Though their lawsuit focused primarily on clarifying the statute's medical exceptions, advocates from the Center for Reproductive Rights also invoked the state's 1972 ERA and used the past as negative precedent to argue that "the State's history of discrimination against Texas women is no justification for treating people differently based on their capacity for childbearing; *it is precisely why that discrimination is suspect*."[129]

Nevertheless, the Texas Supreme Court rejected the *Zurawski* plaintiffs' argument that a physician's "good-faith" rather than "reasonable" medical judgment should be adequate to justify invocation of the law's exception for life-threatening pregnancies.[130] The court ruled unanimously that, consistent with Texas law, the statute's language was sufficiently clear and that a physician could not provide an abortion when a fetus had a fatal anomaly or a medical condition "incompatible with life."[131] The justices rejected the Center's state constitutional challenges to the ban, relying upon the state's historically consistent, "unmistakable commitment to protecting the lives of pregnant women experiencing life-threatening complications while also valuing and protecting unborn life."[132] Justice Jane Bland's opinion for the court noted that "no settled formulation of the scope of that protection existed" and "no court [had] declared any historical law regulating abortion unconstitutional."[133] Justice Debra Lehrmann wrote separately to clarify her belief, consistent with the conclusion of the Oklahoma, North Dakota, and Indiana supreme

125. Plaintiffs-Appellees' Response Brief, *supra* note 123, at 47–48.

126. *Id.* (cleaned up).

127. *Id.* at 50–51.

128. Historian's Brief, *supra* note 124, at 19 (citing primary and secondary sources).

129. Plaintiffs-Appellees' Response Brief, *supra* note 123, at 43–46 (emphasis added) (citing *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 491 (Kan. 2019)).

130. *State v. Zurawski*, 690 S.W.3d 644, 662–64, 671 (Tex. 2024).

131. *Id.* at 665 & n.55 (quoting W. VA. CODE §§ 16-2R-2, -3(a)(1)).

132. *Id.* at 668.

133. *Id.* The court did not foreclose the possibility that a particular application of the abortion ban might later be found to violate the constitution, but ruled that the physician plaintiff had not presented evidence of such a situation. *Id.* at 669.

courts, that Texas's constitution—and the Federal Constitution—"similarly 'creates an inherent right of a pregnant woman to terminate a pregnancy when necessary to preserve her life.'"[134]

Since *Dobbs*, several states have overturned earlier rulings that protected abortion rights under state constitutional provisions. As recently as 2018, Iowa protected abortion rights under its state constitution, but in 2022—a week before *Dobbs* was decided—the state supreme court reversed course, holding that abortion no longer was a fundamental right under Iowa's due process clause.[135] The court observed that Iowa criminalized abortion in March 1858, six months after the state constitution went into effect.[136] It rejected Planned Parenthood's contention that Iowa maintained the common law distinction between pre- and post-quickening terminations, pointing to an 1878 court decision purportedly interpreting state law to outlaw abortion at all stages of pregnancy.[137] The court acknowledged "the valid point that women's rights were quite limited in 1857 and have expanded since then. But even as women's rights expanded, the ban on abortion remained in place until *Roe* superseded it."[138] In 2022, the Iowa Supreme Court declined to rule on the appropriate standard of review for abortion restrictions, but two years later, the court settled on rational basis review and remanded to the district court for reconsideration.[139]

Other courts backed away from longstanding interpretations of modern privacy protections in their state constitutions. South Carolina's about-face was especially abrupt. In January 2023, an opinion by Justice Kaye Hearn underscored the undemocratic process that led to the state's adoption of a constitutional privacy protection in the late 1960s to discredit the government's argument that the provision did not protect abortion rights.[140] The state relied on notes from a committee convened in 1966, "initially composed of nine men and not a single woman."[141] The committee commenced its deliberations at a time when South Carolina lawmakers "had neither permitted women to serve on juries . . . nor ratified

134. *Id.* at 673 (Lehrmann, J., concurring) (quoting *Okla. Call for Reprod. Just. v. Drummond*, 2023 OK 24, ¶ 9, 526 P.3d 1123, 1130).

135. *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 741 (Iowa 2022).

136. *Id.* at 740.

137. *Id.* at 741.

138. *Id*.

139. *Id.* at 716; *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 9 N.W.3d 37, 44 (Iowa 2024). The court declined to decide whether the Iowa constitution's inalienable rights or equality provisions might protect a right to abortion, citing Planned Parenthood's decision not to raise them on appeal after the district court enjoined the ban based on the due process clause. *Id.* at 52–53.

140. *Planned Parenthood S. Atl. v. State*, 882 S.E.2d 770, 778–79 (S.C. 2023).

141. *Id.* at 779.

the Nineteenth Amendment."[142] Hearn wrote: "Given this historical backdrop" of South Carolina's long-delayed acceptance of women's equal legal status, though "abortion was not mentioned in the [privacy] amendment nor was including a woman's right to bodily autonomy uppermost in the minds of the [framers], those facts neither guide nor end our inquiry."[143] She continued: "We cannot relegate our role of declaring whether a legislative act is constitutional by blinding ourselves to everything that has transpired since the amendment was adopted."[144] A divided court invalidated the state's six-week abortion ban.[145]

Only seven months later, however, Justice Hearn's retirement and state legislators' appointment of a conservative justice to replace her resulted in the (now all-male) court upholding a substantially similar law.[146] The court acknowledged that the ban "infringes on a woman's right of privacy and bodily autonomy," but not "unreasonably," and credited the legislature's "policy determination that, at a certain point in the pregnancy, a woman's interest in autonomy and privacy does not outweigh the interest of the unborn child to live."[147]

In 2024, Florida also overturned its earlier precedent holding that the right to privacy enshrined by a state constitutional amendment from 1980 protected abortion rights.[148] Parties and amici in Planned Parenthood's challenge to Florida's fifteen-week abortion ban vigorously debated the legislative history and original public meaning of the privacy amendment.[149] Defenders of abortion rights described the origins of the privacy amendment in the post-*Roe* period when "many states [sought] to pass their own explicit rights to privacy that would withstand any potential changing of the federal constitutional tides and would remedy the lack of privacy protections occurring in their own courts."[150] The amendment's

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 785–86.

146. Jennifer Berry Hawes, *How South Carolina Ended Up with an All-Male Supreme Court*, PROPUBLICA (Apr. 28, 2023, at 05:00 ET), https://www.propublica.org/article/how-south-carolina-ended-up-with-all-male-supreme-court [https://perma.cc/EX33-NBYX]. The court considered the 2023 ban significantly different from the 2021 ban. *Planned Parenthood of S. Atl. v. State*, 892 S.E.2d 121, 128–29 (S.C. 2023) (noting, *inter alia*, a "new balance struck in the 2023 Act between the competing interests of the mother and unborn child").

147. *Planned Parenthood S. Atl.*, 892 S.E.2d at 131.

148. *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 87–89 (Fla. 2024).

149. Brief of Amicus Curiae Law Professors in Support of Petitioners at 6–8, *Planned Parenthood of Sw. & Cent. Fla*, 384 So. 3d 67 (No. SC2022-1050).

150. *Id.* at 9 (citing Major B. Harding, Mark J. Criser & Michael R. Ufferman, *Right to Be Let Alone?—Has the Adoption of Article I, Section 23 in the Florida Constitutions, Which Explicitly Provides for a State Right of Privacy, Resulted in Greater*

legislative history cited secondary materials that "made it very clear that the right to privacy . . . encompassed a right to abortion."[151]

Law review articles supporting the ban's challengers amassed a trove of contemporaneous newspaper sources that associated constitutional rights of privacy with abortion.[152] Abortion rights advocates also argued that post-enactment Florida court decisions confirmed that the "state constitutional right to privacy is much broader in scope, embraces more privacy interests, and extends more protection to those interests than its federal counterpart."[153] And the Florida electorate's behavior also supported an interpretation of the privacy protection that included abortion: Voters approved a ballot measure allowing for parental notification in 2004 and then rejected an amendment in 2012 that would have overruled court decisions holding that the state constitutional right of privacy was "broader in scope" than that of the Federal Constitution.[154]

The Florida Supreme Court, however, held that abortion is not encompassed by the right to privacy protected under the state constitution.[155] In November 2024, a majority of Florida voters endorsed a state constitutional amendment defending reproductive rights, but the ballot measure fell just short of the sixty percent threshold required for adoption.[156]

Florida's experience reflects the reality that some state courts and constitutions are more democratically responsive than others. Judicial selection methods, the availability of ballot initiatives, rules governing the composition of state legislatures, and state constitutional amendment procedures are among the variables that affect how quickly and easily the constitutional winds can shift and in what direction. And of course,

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Privacy Protection for Florida Citizens?, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 945, 952 (2000)).

151. Brief of Amicus Curiae Law Professors in Support of Petitioners, *supra* note 149, at 11–12 (citing James W. Fox, Jr., *A Historical and Originalist Defense of Abortion in Florida*, 75 RUTGERS L. REV. 393 (2023); and then citing Gerald B. Cope Jr., Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 631 (1977)).

152. *See, e.g.*, Fox, *supra* note 151, at 428–30.

153. Brief of Amicus Curiae Law Professors in Support of Petitioners, *supra* note 149, at 14 (quoting *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998)).

154. *Id.* at 15–16. Amici supporting Florida interpreted these events differently. *See, e.g.*, Brief of Scholars on Original Meaning in State Constitutional Law as Amici Curiae in Support of Respondents at 7–10, *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67 (No. SC2022-1050).

155. *Planned Parenthood of Sw. & Cent. Fla.*, 384 So. 3d 67, 78–89 (Fla. 2024).

156. Regan McCarthy, *Florida's Amendment to Protect Abortion Rights Fell Short of Passing by Just 3% Votes*, NPR (Nov. 9, 2024, 07:58 ET), https://www.npr.org/2024/11/09/nx-s1-5183891/floridas-amendment-to-protect-abortion-rights-fell-short-of-passing-by-just-3-votes [https://perma.cc/4XNH-9W55].

democratic responsiveness is a double-edged sword for individual rights, whose value derives in part from their inviolability in the face of majority encroachments.

CONCLUSION

State courts that have departed from *Dobbs*'s approach to history and tradition vary in how they have engaged with the past and with the U.S. Supreme Court's reasoning. At one end of the spectrum, Justice Wecht's concurrence in the Pennsylvania case explicitly criticizes and rejects *Dobbs*.[157] More commonly, courts mention that they are not bound by *Dobbs*'s interpretation of the federal constitution nor by its treatment of history and tradition, and then apply their own state's mode of constitutional interpretation. State exceptionalism sometimes plays a role—explicitly or not—in rights-protective decisions, though courts often cite both state-specific and more general national evidence to support their assertions about history and its relevance. For challengers concerned about validating abortion bans elsewhere, state exceptionalism cuts both ways: emphasizing how unique one state's commitment to liberty or equality or privacy has been redound to the detriment of challenges elsewhere.

Some common methodological approaches unite many of the rulings that uphold abortion rights. Courts that find rights in older state constitutional provisions often discern principles at a higher level of generality than *Dobbs*.[158] Some explain why it would be wrong to "freeze" constitutional rights in time by only recognizing applications of principle that a constitutional provision's framers would have countenanced. Others reference their own precedents supporting evolving interpretations of constitutional text across time, or cite state-specific historical evidence that framers intended the constitutional provisions they created to be adaptable to future developments and changing conditions.

Dobbs did not explore the framers' views on the scope of Fourteenth Amendment protection, but even courts that have ultimately declined to find protections for abortion rights in state constitutions usually consider legislative history at least to some degree. Most courts that find abortion rights protections—and some that do not—also look to other sources, including medical literature, newspapers, and scholarship about the history of reproductive health care and its regulation. Those who take a broader approach to history and tradition often discuss scholarship about the history of abortion law—not just law on the books, but also law in practice and law reform movements. They often regard social practices regarding

157. *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs.*, 309 A.3d 808, 981 (Pa. 2024) (Wecht, J., concurring).

158. *Cf.* Siegel, *supra* note 74, at 584–89 (describing how the level of generality often is determinative in constitutional interpretation).

reproductive decision making and health care as relevant to the question of how and to what extent the law permitted or prohibited pregnancy termination. Significantly, these courts often democratize voice, in Reva Siegel's terminology: They consider the views and lived experiences of disenfranchised individuals and groups as well as the attitudes and expressed opinions of framers and lawmakers.[159]

The *Dobbs* majority discounted evidence that constitutionally suspect ideas about immigrants, Catholics, and women animated nineteenth-century abortion restrictions. But for state courts that take a different approach to the relevance of history, the roots of abortion restrictions in nativism, racism, anti-Catholicism, and sex-stereotyping or misogyny undermine their constitutionality.[160] This critical orientation toward history makes pertinent a world of reproductive justice scholarship and advocacy that rarely has penetrated abortion rights jurisprudence until now.

The value of critical histories told in state courts is not confined to cases in which reproductive rights advocates ultimately prevail. Concurring and dissenting opinions can provide powerful counter-narratives about the past; air alternative accounts of how history might—or might not—be relevant to the legal or constitutional questions presented; and expose the injustice of old and new abortion bans. For example, Justice Colleen Zahn's dissent from Idaho's ruling reads abortion law and practice in Idaho to include a history and tradition of protecting women's health as well as their lives, providing a rejoinder to the majority's historical account.[161] Justice John Stegner's dissent laments that because of the majority's decision:

> Idahoans are thrust backward in time, forced to live their twenty-first century lives by nineteenth century standards and mores. Despite the great strides for equality women have made in the decades since the constitutional convention, they are once again relegated to their traditional (and outdated) roles as only child-bearers and mothers.[162]

Judges also can use history to suggest that contemporary abortion restrictions are anomalous in their severity, or to expose the incongruity of enforcing laws more restrictive than those that governed in the days of coverture. Concurring in the Oklahoma case, Justice Yvonne Kauger

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159. *See* Reva B. Siegel, *Democratizing Constitutional Memory*, 123 MICH. L. REV. 1011, 1012 (2025).

160. *See* Mayeri, *Critical Role*, *supra* note 6, at 244–51.

161. *Planned Parenthood of Great Nw. v. State*, 522 P.3d 1132, 1218–19 (Idaho 2023) (Zahn, J., dissenting).

162. *Id.* at 1235 (Zahn, J., dissenting).

highlighted how the right to terminate a life-endangering pregnancy persisted through the darkest days of women's legal subordination.[163] "Th[is] right of termination existed even at times when the woman had no control over her own body," Kauger wrote.[164] She described how, under Anglo-American common law, coverture subsumed wives' legal identity and subjected them to husbands' "complete authority."[165] Women could not hold property or make contracts in their own name, could be raped and beaten by their husbands with impunity, could not obtain a credit card, had no right to vote, could not hold office, could not serve on juries, did not receive equal pay, could not enter many occupations including the practice of law, or even wear trousers. Women had overcome this history of oppression to gain formally equal legal rights, Kauger emphasized—and yet the challenged Oklahoma law deprived them of a prerogative they possessed even at their nadir of powerlessness.

Constitutional cases are not the only opportunity to invoke historical memory. In a Wisconsin decision nullifying the state's 1849 abortion law as superseded or impliedly repealed by subsequent abortion regulations, Chief Justice Jill Karofsky's concurrence illuminated the stakes by situating the court's ruling in historical context. "When courts are called upon to arbitrate significant issues in turbulent times such as these," she wrote, "it is incumbent that we pause to reflect on the import of our decisions in the arc of history."[166] Karofsky offered an account of abortion history that contradicted the *Dobbs* majority and embraced the professional historical consensus: Abortion was legal at common law prior to quickening, and only in the mid-nineteenth century did a physicians' anti-abortion campaign grounded in nativism, misogyny, and status anxiety criminalize abortion at all stages in pregnancy.[167] *Roe* ended an era in which abortion was "secretive and deadly."[168] And now, *Dobbs* threatened its return.

Karofsky then recounted the stories of four women who lost their lives to abortion bans: three post-*Dobbs*, because health care workers could not lawfully intervene to save them, and one—her own great-grandmother—from an attempt at self-abortion before *Roe*.[169] The Chief Justice wrote:

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163. *Okla. Call for Reprod. Just. v. Drummond*, 2023 OK 24, ¶ 5, 526 P.3d 1123, 1135 (Kauger, J., concurring).

164. *Id.* (Kauger, J., concurring).

165. *Id.* ¶ 15 (Kauger, J., concurring).

166. *Kaul v. Urmanski*, 2025 WI 32, ¶ 37, 22 N.W.3d 740, 753 (Karofsky, J., concurring).

167. *Id.* ¶¶ 39–48 (Karofsky, J., concurring).

168. *Id.* ¶ 47 (Karofsky, J., concurring).

169. *Id.* ¶¶ 54–59 (Karofsky, J., concurring).

> [S]evere abortion restrictions operate like death warrants. Under such restrictions women, children, and pregnant people are denied life-saving medical care while medical professionals are forced to sit idly at their bedsides, unable to do their jobs. Extreme abortion restrictions revive a time in our history driven by misogyny and racism, divorced from medical science; it is a world that must be left behind.[170]

Advocates are making these arguments in federal courts, too. But for now, state courts provide a crucial, albeit limited, backstop against invocations of history that would turn back the clock.

170. *Id.* ¶ 59 (Karofsky, J., concurring).

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