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NOTE

Abortion at the Margins

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Abstract. In the wake of *Dobbs v. Jackson Women's Health Organization*, legal scholars have proposed countless innovative strategies to secure reproductive autonomy, largely by circumventing the holding in *Dobbs*. This Note, however, takes a different approach. Rather than concluding that *Dobbs* has entirely foreclosed the pathway to constitutional abortion access, this Note considers the marginal case of severe fetal abnormality. It argues that, even under *Dobbs*'s framework, there exists a robust constitutional right to abortion of severely abnormal fetuses, defined as fetuses whose congenital malformations make their death inevitable in utero or shortly after birth.

Part I of this Note explains modern reproductive technology's emergence over the past century and defines severe fetal anomalies. Part II explains the substantive holding of *Dobbs* and identifies the question left open in *Dobbs* regarding abortion on the basis of severe fetal anomaly. Part III argues that an originalist-informed understanding of the Constitution demands the right to abortion on the basis of severe fetal anomaly because such abortion decisions uniquely implicate two deeply rooted, fundamental rights: the right to protect one's health and the right to parental autonomy. Each year, more than 100,000 people become pregnant with severely abnormal fetuses, and the constitutional rationales for a right to abortion on the basis of severe fetal abnormality are particularly compelling. By considering severe fetal anomaly, a marginal case that *Dobbs* entirely overlooked, this Note serves both short- and long-term ambitions. It contends that the Constitution affords an abortion right to hundreds of thousands of pregnant people currently experiencing dire medical emergencies, and it strives to limit *Dobbs*'s central holding—that states can freely regulate abortion—by paving a pathway to abortion access rooted in rights other than privacy.

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Introduction

On June 24, 2022, the United States Supreme Court departed from nearly fifty years of precedent by overturning *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, returning the ability to regulate abortions to "the people and their elected representatives."[1] Since this landmark decision, how have the people and their elected representatives responded? Elected representatives have outright banned abortion in fourteen states and restricted abortion to twenty weeks or earlier in seven states.[2] Many of these laws contain few exceptions.[3]

The people, however, largely tell a different story. When offered the opportunity to weigh in through ballot measures in the wake of *Dobbs*, citizens have uniformly protected or expanded abortion access.[4] The *Dobbs* decision has proven deeply unpopular with the American people, and new abortion restrictions with minimal exceptions are even less popular.[5] Public discussions of abortion exceptions typically center around those for rape and incest.[6] This Note, on the other hand, explores an exception to abortion restrictions that

1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

2. *See* Allison McCann et al., *Tracking Abortion Bans Across the Country*, N.Y. TIMES, https://perma.cc/2B9S-T9JW (last updated Nov. 7, 2023, 9:15 PM ET). Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia currently have bans on abortion from the point of conception. *Id.* Arizona, Florida, Georgia, Nebraska, North Carolina, South Carolina, and Utah have banned abortion before twenty weeks. *Id.*

3. Of the states with total bans, only Idaho, Mississippi, North Dakota, and West Virginia have exceptions for either rape or incest. Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Servies*, KFF (May 18, 2023), https://perma.cc/3Z6W-3NLU (to locate, select "View the live page," and then select "Rape/Incest" in Figure 1).

4. *See* Allison McCann, Amy Schoenfeld Walker, John-Michael Murphy & Sarah Cahalan, *Where the Midterms Mattered Most for Abortion Access*, N.Y. TIMES (updated Nov. 21, 2022, 4:00 PM ET), https://perma.cc/BH2M-8M9F. This was true in California, Michigan, Vermont, which added abortion protections, as well as in Kansas, Kentucky, and Montana, which rejected new abortion restrictions. *Id.*

5. *See* MELISSA DECKMAN ET AL., PUB. RELIGION RSCH. INST., CHALLENGES IN MOVING TOWARD A MORE INCLUSIVE DEMOCRACY: FINDINGS FROM THE 2022 AMERICAN VALUES SURVEY 10 (2022), https://perma.cc/7Z3U-H7A7. 61% of Americans opposed overturning *Roe v. Wade*. *Id.* 86% of Democrats and 37% of Republicans believe abortion should be legal in most or all cases. *Id.* at 22. Only 3% of Democrats and 11% of Republicans believe abortion should illegal in all cases. *Id.* at 23.

6. *See, e.g.*, Aaron Blake, *Hardline Abortion Laws Are Growing More Unpopular—Even on the Right*, WASH. POST (updated Oct. 27, 2022, 1:01 PM EDT), https://perma.cc/3QXZ-YJSE (discussing lackluster Republican support for laws without exceptions for rape and incest).

receives far less attention—pregnancies diagnosed with severe fetal abnormalities—and contends that the United States Constitution prohibits states from restricting a pregnant person's[7] right to terminate a nonviable fetus.

In the United States, birth defects or genetic disorders complicate approximately 3% to 5% of live pregnancies each year—affecting around 120,000 newborns—and are a leading cause of miscarriage and stillbirth.[8] The most common birth defects that the Centers for Disease Control and Prevention (CDC) tracks, clubfoot and Down syndrome,[9] are typically not life-threatening.[10] Non-life-threatening fetal abnormalities are not the subject of this Note, as *Dobbs* empowers states to regulate such abortions because of their "legitimate interest" in the "potential life" of unborn children.[11] Instead, this Note considers the case of fetuses with severe abnormalities, whose death is inevitable before or shortly after birth.[12] In pregnancies with such abnormalities, which cause hundreds of thousands of miscarriages, stillbirths, and infant deaths each year,[13] potential lives rarely become actual lives, and those that do are brief and riddled with multiple debilitating medical conditions.[14]

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7. A note on nomenclature: I use the term "pregnant person" instead of "woman" to acknowledge the fact that people of many genders become pregnant. For an overview of the debate surrounding "pregnant person" versus "pregnant woman," see Emma Green, *The Culture War Over 'Pregnant People,'* ATLANTIC (Sept. 17, 2021), https://perma.cc/5N2G-H7KR.

8. CDC, Birth Defects are Common, Costly, and Critical (n.d.), https://perma.cc/V5Z2-W2W4; Laura M. Carlson & Neeta L. Vora, *Prenatal Diagnosis: Screening and Diagnostic Tools*, 44 OBSTETRICS & GYNECOLOGY CLINICS N. AM. 245, 245 (2017); *see infra* note 35 and accompanying text.

9. *Data & Statistics on Birth Defects*, CDC, https://perma.cc/KU9C-TF2N (last updated June 28, 2023). Clubfoot and Down syndrome affect 1 in every 593 and 707 births, respectively. *Id.*

10. *Clubfoot*, CLEVELAND CLINIC, https://perma.cc/SND6-XCG8 (last updated July 6, 2023); *Data and Statistics on Down Syndrome*, CDC, https://perma.cc/VRD6-VFGG (last updated June 28, 2023) (finding that about 93% of babies with Down syndrome survived to one year of age between 1983 and 2003 and that about 88% of babies born with Down syndrome survived to twenty years of age in the same time period).

11. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (2022) (explaining that the Court in *Roe v. Wade* "acknowledged that States had a legitimate interest in protecting 'potential life'" (quoting Roe v. Wade, 410 U.S. 113, 163 (1973))).

12. *See infra* Part I.B.

13. *See* CDC, *supra* note 8; *see also infra* note 35 and accompanying text. Accounting for about 20% of infant deaths, fetal abnormality is the leading cause of infant death. *See* CDC, *supra* note 8; Carlson & Vora, *supra* note 8, at 245.

14. For example, anencephaly, a condition in which the fetus lacks a major portion of the skull and brain at birth, has a 100% first-year mortality rate. Holly Dickman, Kyle Fletke & Roberta E. Redfern, *Prolonged Unassisted Survival in an Infant with Anencephaly*, BMJ CASE REPS., Oct. 31, 2016, at 1-2, https://perma.cc/2QRF-4L9L; *see also* Part II.B.

Prior to *Dobbs*, pregnant people generally had the right to terminate fetuses with severe fetal abnormalities.[15] They exercised this right in accord with *Roe v. Wade*, which rooted the right to abortion in the generalized right to privacy, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which reaffirmed *Roe*'s central holding and located the right to abortion in the liberty guaranteed by the Fourteenth Amendment's Due Process Clause.[16] When overturning these cases, as explained in detail in Part II, the *Dobbs* Court interpreted the Fourteenth Amendment differently.[17] Evaluating the Fourteenth Amendment through the lens of *Washington v. Glucksberg*, the Court concluded that the unenumerated right to an abortion was not "deeply rooted in this Nation's history and tradition" when the Fourteenth Amendment was ratified.[18] In overturning *Roe*, the *Dobbs* Court extinguished a constitutional right to abortion based on privacy.[19] Given the current Court's conservative majority, securing reproductive autonomy for pregnant people will likely require innovative legal strategies that promote abortion access based on other fundamental rights *within* the legal framework that *Dobbs* established.[20]

Elected representatives, medical professionals, and legal scholars are exploring new avenues for protecting and expanding reproductive autonomy after *Dobbs*, but most avenues circumvent the law this case set forth. For example, shortly after the *Dobbs* decision, the Biden Administration's Department of Health and Human Services issued guidance to state hospitals around the country reiterating doctors' rights and obligations to perform abortions in emergency rooms under the Emergency Medical Treatment and Labor Act.[21] The Department clarified that the Act preempts state law, placing a legal duty upon doctors to provide abortions as emergency stabilizing

15. Even prior to *Dobbs*, however, some fetal abnormalities could not be diagnosed until after the gestational stage at which state laws banned abortions. Greer Donley, *Parental Autonomy over Prenatal End-of-Life Decisions*, 105 MINN. L. REV. 175, 178 (2020).

16. *Roe*, 410 U.S. at 153; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

17. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259 (2022).

18. *Id.* at 2253, 2260 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

19. *See id.* at 2259; *see also* David S. Cohen, Greer Donley & Rachel Rebouché, Essay, *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1, 2 (2022).

20. *See* Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM ET), https://perma.cc/83HV-BJKA (explaining that the Supreme Court produced more conservative decisions in the 2022 term than any term since 1931).

21. 42 U.S.C. § 1395dd; Letter from Xavier Beccera, U.S. Sec'y of Health & Hum. Servs., to Health Care Providers (July 11, 2022), https://perma.cc/XM88-DMAA; Memorandum from Dirs., Quality, Safety & Oversight Grp. & Surv. & Operations Grp., Ctrs. for Medicare & Medicaid Servs., to State Survey Agency Dirs. 1 (updated Oct. 3, 2022), https://perma.cc/M73P-QYK9.

treatment.[22] Legal scholars have considered encouraging liberal states to expand avenues for abortion access to citizens of states where abortion is illegal,[23] promoting the use of abortion pills,[24] and opening abortion clinics on federal land.[25] Medical professionals have advocated for increased access to contraception and more robust emergency care education and training.[26]

Yet no scholarship has considered how the *Dobbs* decision impacts the right to terminate fetuses with severe abnormalities. This Note seeks to fill this gap using the same legal framework that *Dobbs* establishes; it argues for a positive constitutional right to abortion in cases of severe fetal abnormalities, a practice deeply rooted in common law and historical tradition. In the case of severe fetal abnormality, a state's interests and the pregnant person's historical and traditional rights differ considerably from the abortions that *Dobbs* contemplates. The unique characteristics of abortion on the basis of severe fetal anomaly create a positive constitutional right to abortion at any point during affected pregnancies. As Part I.B clarifies, this Note defines severe fetal anomalies narrowly: Only pregnant people whose fetuses will die before or shortly after birth could exercise this abortion right. But those pregnant people could exercise this right for any reason, whether to mitigate health risks from likely miscarriages and stillbirths or to avoid the emotional toll of giving birth to a child who will die shortly thereafter.

The right to abortion on the basis of severe fetal abnormality stems from the Due Process Clause of the Fourteenth Amendment but not from the same privacy-based right to an abortion that *Dobbs* extinguished. Instead, this Note argues that this right emerges from two other fundamental rights: (1) the due process right of pregnant individuals to protect their own health, and (2) the due process right to parental autonomy. These rights are deeply rooted in common law and this nation's history and tradition, and they were expansive at the time

22. Letter from Xavier Beccera, U.S. Sec'y of Health & Hum. Servs., to Health Care Providers, *supra* note 21, at 1.

23. Cohen et al., *supra* note 19, at 7-8.

24. *See generally* David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. (forthcoming 2024) (detailing the proliferation of abortion pills and the legal challenges abortion pills face).

25. David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 80-87 (2023).

26. *See* Margaret E. Samuels-Kalow et al., *Post-Roe Emergency Medicine: Policy, Clinical, Training, and Individual Implications for Emergency Clinicians*, 29 ACAD. EMERGENCY MED. 1414, 1416 (2022) (describing the need for training and medical expertise in abortion emergency medicine). *See generally* John Coverdale et al., *Access to Abortion After* Dobbs v. Jackson Women's Health Organization*: Advocacy and a Call to Action for the Profession of Psychiatry*, 47 ACAD. PSYCHIATRY 1, 2 (2022), https://perma.cc/YP53-UTB6 (discussing the need to promote contraception access for vulnerable populations like mentally disabled individuals and minors).

of the Fourteenth Amendment's ratification. In the case of severe fetal abnormality, these fundamental rights are at their peak: Nonviable fetuses disproportionately endanger pregnant people, and the rights parents exercise over these fetuses after birth are typically unbounded.[27] Moreover, the state's legitimate interests in obligating pregnant people to birth nonviable fetuses are at a nadir.[28] As such, infringing upon these rights by prohibiting abortion on the basis of severe fetal abnormality represents arbitrary, irrational state action.[29]

This Note does not contend that an abortion right under *Dobbs* should exist *only* in the case of severe fetal anomaly. Rather, the case of severe fetal anomaly offers a compelling starting point to deconstruct the central holding in *Dobbs* by locating the right to abortion within existing fundamental rights that the Court has repeatedly endorsed. In so doing, this Note envisions a pathway to immediate relief for hundreds of thousands of pregnant people facing dangerous miscarriages, risky stillbirths, and inevitable infant deaths.

This Note proceeds in three parts. Part I contextualizes the origins of prenatal testing and defines the scope of the abortion right based on severe fetal anomaly as contemplated in this Note. Part II explains the substantive holding of *Dobbs* in detail, argues that *Dobbs* left open the question of abortion on the basis of severe fetal abnormality, and contemplates the constitutional theories at play in *Dobbs*. Finally, Part III provides two distinct avenues for protecting the right to an abortion on the basis of severe fetal abnormality under the Fourteenth Amendment and explains how states serve no legitimate interest by proscribing such abortions.

I. Defining Severe Fetal Abnormalities

A. Identifying Fetal Anomalies

Fetal anomalies, also known as congenital anomalies or birth defects, are abnormalities in a fetus's structure that arise during pregnancy and are present at birth.[30] In the United States, approximately 120,000 children are born with fetal abnormalities each year.[31] Fetal abnormalities vary markedly in severity,

27. *See infra* Parts III.A-.B.

28. *See infra* Part III.C.

29. *See infra* Part III.C.

30. The literature uses anomaly and abnormality synonymously. *See, e.g.*, Malini DeSilva et al., *Congenital Anomalies: Case Definition and Guidelines for Data Collection, Analysis, and Presentation of Immunization Safety Data*, 34 VACCINE 6015, 6016 (2016), https://perma.cc/8ZN4-TBGP; *Fetal Anomaly (Birth Defect) Information & Resources*, COMPREHENSIVE WOMEN'S HEALTH CTR., https://perma.cc/JF9F-DU8B (archived Nov. 8, 2023).

31. CDC, *supra* note 8.

with some causing little or no detriment to short-term or long-term health and others resulting in the fetus's inevitable death before or shortly after birth.[32]

Fetal abnormalities can occur at any stage of pregnancy, and their causes are wide-ranging.[33] One common cause of fetal anomalies is chromosomal abnormality, which arises in 10% to 30% of fertilized eggs and causes conditions like Down syndrome.[34] Chromosomal abnormalities are the leading cause of miscarriage (fetal death before twenty weeks of gestation) and a leading known cause of stillbirth (fetal death between twenty weeks of gestation and full term).[35] Additionally, certain medications, infectious agents, drugs, alcohol, and environmental toxins can cause fetal anomalies.[36] Some fetal anomalies are genetic or inherited, which means that they are transmitted from one parent or arise through fertilization.[37] For many fetal anomalies, however, the etiology remains undetermined.[38]

While scientists began comprehensively studying and categorizing birth defects in the nineteenth century,[39] identifying fetal abnormalities accurately and safely *before* infants were born did not become possible until the late 1950s.[40] In 1958, scientists first used the ultrasound in medicine, which allowed

32. *See* DeSilva et al., *supra* note 30, at 6016; *supra* note 14 and accompanying text.

33. *Fetal Anomaly (Birth Defect) Information & Resources*, *supra* note 30; DeSilva et al., *supra* note 30, at 6016.

34. Terry Hassold et al., *Human Aneuploidy: Incidence, Origin, and Etiology*, 28 ENV'T. & MOLECULAR MUTAGENESIS 167, 167, 171 (1996).

35. Chromosomal abnormalities cause 50% of miscarriages and 10-20% of stillbirths. *Miscarriage*, CLEVELAND CLINIC, https://perma.cc/4EJR-G264 (last updated July 19, 2022); Kate E. Stanley et al., *Causal Genetic Variants in Stillbirth*, 383 NEW ENG. J. MED. 1107, 1107 (2020). There are approximately one million miscarriages and 24,000 stillbirths in the United States annually. *See* Mandy Oaklander, *Women Now Have As Many Miscarriages As Abortions*, TIME (Dec. 11, 2015, 12:01 AM EST), https://perma.cc/B2P4-KFZC (interpreting data on the prevalence of miscarriage and stating that "in a given year, the number[] of abortions, which is 1.1 million, is about the same as fetal loss" (quoting Sally Curtin, a statistician with the National Center for Health Statistics)); *Pregnancy and Infant Loss*, CDC, https://perma.cc/QTK2-J3EC (last updated Sept. 30, 2022).

36. DeSilva et al., *supra* note 30, at 6016, 6020.

37. *Fetal Anomaly (Birth Defect) Information & Resources*, *supra* note 30. An example of a genetic fetal anomaly is Tay-Sachs disease, a recessive condition that destroys nerve cells in the brain and spinal cord. *Tay-Sachs Disease*, MAYO CLINIC (Jan. 21, 2022), https://perma.cc/S9K3-5WCQ.

38. DeSilva et al., *supra* note 30, at 6016.

39. *See* John M. DeSesso, *The Arrogance of Teratology: A Brief Chronology of Attitudes Throughout History*, 111 BIRTH DEFECTS RSCH. 123, 123, 130-32 (2019), https://perma.cc/K89Q-T6WZ; J. Bruce Beckwith, *Congenital Malformations: From Superstition to Understanding*, 461 VIRCHOWS ARCHIVE 609, 609, 613-17 (2012), https://perma.cc/GG3N-ZACX.

40. *See infra* notes 41-44 and accompanying text.

obstetricians to develop a procedure called amniocentesis.[41] In amniocentesis, doctors use ultrasound technology to safely extract cells from amniotic fluid in the sac surrounding the fetus, then examine those cells' chromosomes and DNA for prenatal abnormalities.[42] Before ultrasound technology, physicians could not see the fetus in utero, so extracting samples of amniotic fluid to identify fetal abnormalities risked puncturing the fetus and causing miscarriage.[43] After its introduction into medicine, ultrasound-guided amniocentesis quickly became the standard practice for safely identifying fetal abnormalities.[44]

Today, a pregnant person has many options for assessing the health and viability of their fetus, and prenatal testing occurs at all stages of pregnancy. In the first-trimester screening, there are several options for assessing the health of a fetus.[45] Cell-free DNA testing, for example, is one tool for early prenatal screening.[46] This screening technology, also known as noninvasive prenatal screening, extracts fragments of the fetus's DNA using only a sample of a pregnant person's blood.[47] Mostly used for detecting chromosomal abnormalities, this screening technology can detect Down syndrome with 99% accuracy, and it can also accurately identify fetal sex and fetal Rh status.[48] In the second trimester, the anatomy scan, also known as the second-trimester ultrasound, allows doctors to evaluate a fetus's physical development, identify many of the fetus's internal organs, appendages, and facial organs, and detect

41. *See* S. Campbell, *A Short History of Sonography in Obstetrics and Gynaecology*, 5 FACTS, VIEWS & VISION OBGYN 213, 213 (2013), https://perma.cc/W3LJ-GTSA; RUTH SCHWARTZ COWAN, HEREDITY AND HOPE: THE CASE FOR GENETIC SCREENING 72-73 (2008) (describing prenatal diagnosis as a "technological system" that included amniocentesis and karyotyping).

42. For more detail about these procedures, see COWAN, note 41 above, at 72.

43. *Id.* at 75, 97-98. Polyhydramnios occurs when excess fluid accumulates in the amniotic sac during the second half of pregnancy. *Id.* at 75. If severe, it can be fatal to the fetus and can endanger the mother's health. *Id.*

44. *See Evolution of Prenatal Testing*, HASTINGS CTR. (Nov. 27, 2017), https://perma.cc/5YZB-7TM2.

45. *See* Carlson & Vora, *supra* note 8, at 247-50. Prenatal screening methods are very technical. Carlson and Vora provide more detailed explanation of various screening and diagnostic tools, like serum analyte screening, early ultrasound, and chorionic villus sampling. *See id.* at 247-54.

46. *Id.* at 248; *see* Rachel Rebouché & Karen Rothenberg, *Mixed Messages: The Intersection of Prenatal Genetic Testing and Abortion*, 55 HOW. L.J. 983, 990-91 (2012).

47. *What Is Noninvasive Prenatal Testing (NIPT) and What Disorders Can It Screen for?*, MEDLINEPLUS, https://perma.cc/Y7Y2-UCGH (last updated July 28, 2021).

48. Carlson & Vora, *supra* note 8, at 249-51. Cell-free DNA testing can also detect trisomy 18 (Edwards syndrome), trisomy 13 (Patau syndrome), and monosomy X (male sex) with more than 90% accuracy. *Id.* at 250.

major anomalies.[49] In the third trimester, ultrasounds are routine for monitoring the health of the fetus.[50]

Prenatal testing can identify genetic mutations associated with at least 400 conditions, and the technology to provide parents with fetal information is continually improving.[51] Typically, routine prenatal testing successfully identifies fetal abnormalities before birth. In a study reviewing 52,000 pregnancies, doctors identified 68% of all fetal anomalies in the first two trimesters of pregnancy.[52] An additional 25% were identified for the first time during the third trimester ultrasound.[53] Doctors identified about 7% of abnormalities for the first time postnatally.[54]

B. Defining Severe Fetal Abnormality

As explained above, this Note only argues for a constitutional right to abortion in cases of severe fetal abnormality. Thus, we must understand how medical professionals define severe fetal anomaly and articulate a framework for determining which fetal abnormalities fall within the scope of this constitutional right under *Dobbs*.

Severe fetal anomaly describes a diverse set of conditions, so creating an exhaustive list of qualifying conditions is impractical.[55] Therefore, some obstetricians and medical ethicists adopt an outcome-based approach, defining severe fetal anomaly as a highly reliable diagnosis of (1) likely fetal death in utero or during birth, (2) short-term postnatal survival (infants unlikely to survive beyond one year), or (3) an irreversible lack of meaningful cognitive development.[56] Under this definition, no matter the fetus's gestational age at

49. *See 20-Week Ultrasound (Anatomy Scan)*, CLEVELAND CLINIC, https://perma.cc/5SBR-HKZN (last updated Apr. 1, 2022).

50. *See Common Tests During Pregnancy*, JOHNS HOPKINS MED., https://perma.cc/8GS4-RTCW (archived Oct. 27, 2023).

51. Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 HARV. J.L. & GENDER 425, 438 (2006); Erik Parens & Adrienne Asch, *The Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, HASTINGS CTR. REP., Sept.-Oct. 1999, at s1.

52. A. Ficara, A. Syngelaki, A. Hammami, R. Akolekar & K. H. Nicolaides, *Value of Routine Ultrasound Examination at 35-37 Weeks' Gestation in Diagnosis of Fetal Abnormalities*, 55 ULTRASOUND OBSTETRICS & GYNECOLOGY 75, 77 (2020).

53. *Id.*

54. *Id.*

55. *See supra* note 51 and accompanying text.

56. *See, e.g.*, LAURENCE B. MCCULLOUGH, JOHN H. COVERDALE & FRANK A. CHERVENAK, PROFESSIONAL ETHICS IN OBSTETRICS AND GYNECOLOGY 125-26 (2020); Frank A. Chervenak, Laurence B. McCullough, Daniel Skupski & Stephen T. Chasen, *Ethical Issues in the Management of Pregnancies Complicated by Fetal Anomalies*, 58 OBSTETRICAL & GYNECOLOGICAL SURV. 473, 477 (2003); *see also Infant Mortality*, CDC, https://perma.cc/

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the time of diagnosis, severe fetal anomaly includes any condition that *will* result in near-inevitable miscarriage, stillbirth, or infant death.[57] For this reason, medical professionals commonly refer to severe fetal anomalies as "lethal" or "fatal" anomalies.[58] This Note argues that pregnant people that qualify under this definition—where there is no reasonable expectation of potential sustained life for the fetus—could procure an abortion at any point in their pregnancy.

In overturning *Roe* and *Casey*, the *Dobbs* Court repeatedly emphasized a state's "legitimate interest in protecting 'potential life.'"[59] For the purposes of creating a constitutional right to abortion, therefore, the "potential life" of a fetus with abnormalities is perhaps the most important factor.[60]

Moreover, the Mississippi law upheld in *Dobbs*—the Mississippi Gestational Age (MGA) Act—contains an exception for severe fetal abnormalities.[61] The Court's approval of that law does not itself indicate that *Dobbs* would guarantee the right to abortion for severe fetal abnormality. But the MGA Act's language could help provide a definition of severe fetal abnormality to which the Court did not object. The MGA Act defines a severe fetal abnormality as "a life-threatening physical condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb."[62] The phrase "reasonable medical judgment" indicates that deference to medical professionals is appropriate.[63] Mississippi's definition thus invokes the aforementioned set of obstetric criteria that define severe fetal anomalies based on the absence of long-term survival prospects.

This Note embraces medical ethicists' definition of severe fetal abnormalities as those incompatible with long-term life or meaningful

F59E-BRYN (last updated Sept. 13, 2023) (explaining that congenital anomalies are the leading cause of infant death).

57. Notably, even third trimester abortions may be ethically justified when any of these conditions are met. *See* Chervenak et al., *supra* note 56, at 475-77.

58. *See, e.g.*, Steven R. Leuthner, *Palliative Care of the Infant with Lethal Anomalies*, 51 PEDIATRIC CLINICS N. AM. 747, 747 (2004). For an explanation of why the terms "lethal" and "fatal" have fallen out of favor in the medical literature, see Donley, note 15 above, at 183-84.

59. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241, 2257-58, 2260-61, 2268, 2277, 2280 (2022). "Potential life" is likely the most important interest that *Dobbs* identifies. *See infra* Part III.C.

60. *See Dobbs*, 142 S. Ct. at 2241.

61. Gestational Age Act, MISS. CODE ANN. § 41-41-191(4) (2023). After *Dobbs* overturned *Roe*, Mississippi passed an additional law that prohibited abortion without exceptions for severe fetal abnormalities. *Id.* § 41-41-45 (2023).

62. *Id.* § 41-41-191(3)(h).

63. *Id.*

cognitive development. This definition closely aligns with the definition Mississippi adopted in the law at issue in *Dobbs*.[64] This framework trusts physicians' reasonable medical judgment in determining viability, but it also insists that physicians have ethical obligations to provide only nondirective information to pregnant individuals.[65] Under this classification system, some conditions that would qualify as severe fetal abnormalities include anencephaly, Patau syndrome, Edwards syndrome, renal agenesis, thanatophoric dysplasia, alobar holoprosencephaly, and hydranencephaly.[66] Adopting this definition and permitting abortion based on severe fetal anomaly would mitigate severe health risks pregnant people face when seeking medically necessary abortions for futile pregnancies, miscarriages, and stillbirths.

II. How *Dobbs* Changed the Legal Landscape for Abortion Based on Severe Fetal Anomaly

Before *Dobbs*, pregnant people enjoyed a constitutional right to abortion first established in *Roe v. Wade*.[67] This right was later reaffirmed more narrowly as a Fourteenth Amendment due process right to liberty in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[68] Under *Casey*, states could not proscribe abortions before the point at which a fetus reached viability outside the womb, typically at twenty-three to twenty-four weeks of gestation.[69] Nevertheless, one-third of states had banned abortion at twenty-two weeks or earlier even before *Dobbs*.[70]

These pre-*Dobbs* abortion restrictions had important consequences for pregnant individuals carrying severely abnormal fetuses because many of these conditions could not be diagnosed until after the stage of gestation when abortion bans took effect. Many fetal anomalies are not identifiable

64. *Id.*; *see Dobbs*, 142 S. Ct. at 2243.

65. *See* MCCULLOUGH ET AL., *supra* note 56, at 127 (recommending that obstetricians "limit[] their role to providing information in a nondirective fashion (offering but not recommending induced abortion)").

66. For an introduction to these fetal conditions, see Chervenak et al., note 56 above, at 477. Extremely premature birth would probably also fall within this definition of severe fetal anomaly: The current rate of survival for children born at 22 weeks of gestation is about 3% to 5%, and it is even lower for children born at 21 weeks. Matthew A. Rysavy et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 NEW ENG. J. MED. 1801, 1804, 1807 (2015).

67. Roe v. Wade, 410 U.S. 113, 153 (1973).

68. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

69. *See Casey*, 505 U.S. at 860.

70. *See* Donley, *supra* note 15, at 217 (citing *Casey*, 505 U.S. at 870) (explaining that seventeen states banned abortion earlier than twenty-three weeks even though "viability cannot be said to begin before twenty-three weeks").

until the anatomy scan in the second trimester, which occurs between eighteen and twenty-two weeks of gestation, and about 25% of fetal anomalies are not identified until the third trimester.[71] Therefore, even before *Dobbs*, pregnant people who received a diagnosis of severe fetal abnormality after their state's abortion ban had taken effect often had few options: They had to either carry the pregnancy to term, await stillbirth, or travel across state lines to obtain an abortion.[72]

A. The Abortion Right After *Dobbs*

In *Dobbs*, the Supreme Court extinguishes the constitutional right to an abortion by overturning both *Roe* and *Casey*.[73] Three parts of the *Dobbs* opinion are essential for the purposes of this Note: (1) Part II, which considers the strength of reasoning in *Roe*; (2) Part III, which considers whether stare decisis "counsels continued acceptance" of *Roe* and *Casey*; and (3) Part VI, which establishes the standard of review for state abortion regulations.[74] I will address each part in turn.

Early in the *Dobbs* opinion, the Court explains that a proper stare decisis analysis must begin by assessing the analytic strength of the decision in question.[75] Because the *Dobbs* Court asserts that *Casey* neglected this foundational analysis when reaffirming *Roe*, the Court itself performs the analysis in Part II of its opinion.[76] *Roe* rooted the right to an abortion within a generalized right to privacy emerging from the penumbras of First, Fourth, Fifth, Ninth, and Fourteenth Amendment guarantees, while the *Casey* Court grounded its decision solely in the Fourteenth Amendment's Due Process Clause.[77]

Casey's central holding created the controlling law at issue in *Dobbs*, so the Court thoroughly evaluates *Casey*'s due process analysis. The *Dobbs* Court uses a test established in *Washington v. Glucksberg* that extends Fourteenth Amendment due process protections to only two categories of substantive rights: (1) those enumerated in the first eight amendments and (2) "a select list of fundamental rights that are not mentioned anywhere in the Constitution."[78]

71. *See* Catharina Rydberg & Katarina Tunón, *Detection of Fetal Abnormalities by Second-Trimester Ultrasound Screening in a Non-Selected Population*, 96 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 176, 181 (2017); Ficara et al., *supra* note 52, at 77.

72. Donley, *supra* note 15, at 178-79.

73. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242, 2261, 2279, 2284-85 (2022).

74. *Id.* at 2244, 2261-62, 2283.

75. *Id.* at 2244.

76. *Id.* at 2244-61.

77. *Id.* at 2245-46.

78. *Id.* at 2246.

Because the Constitution mentions neither abortion nor privacy, these rights fall into the second category.[79] When deciding whether the Due Process Clause protects such unenumerated rights, the Court asks whether the right is "deeply rooted in [our] history and tradition."[80] The Court considers this historical inquiry essential to recognizing a "new component of the 'liberty' protected by the Due Process Clause," because the term "liberty" is capacious and provides little guidance itself.[81]

Next, the Court performs a historical inquiry by surveying common law treatises and statutes operating in 1868, the year of the Fourteenth Amendment's ratification.[82] After consulting several common law authorities—particularly Bracton, Blackstone, Coke, and Hale—the Court concludes that none suggest "a positive *right* to procure an abortion at any stage of pregnancy."[83] The Court then explains that three-quarters of states had criminalized abortion at all stages of pregnancy by 1868.[84] Based on this two-pronged analysis, the *Dobbs* Court concludes that "a right to abortion is not deeply rooted in the Nation's history and traditions."[85]

Crucially, the Court notes that abortion lacks a "sound basis in precedent" and pointedly distinguishes it from many other rights that involve privacy and intimacy, such as the rights to interracial marriage, contraception, and autonomy over a child's education.[86] The Court explains that these other rights do not involve "the critical moral question posed by abortion" because they do not harm a "potential life."[87]

In Part III of *Dobbs*, the Court considers whether to maintain the due process right to abortion under the doctrine of stare decisis.[88] It contemplates "five factors [that] weigh strongly in favor of overruling *Roe* and *Casey*": (1) "the nature of their error," (2) "the quality of their reasoning," (3) "the 'workability' of the rules they imposed on the country," (4) "their disruptive effect on other areas of the law," and (5) "the absence of concrete reliance."[89] Among these, the *Dobbs* Court assigns the nature of the error particular weight, deeming *Roe*

79. *Id.*

80. *Id.* (alteration in original) (quoting Timbs v. Indiana, 139 S. Ct. 682, 687 (2019)).

81. *Id.* at 2247.

82. *See id.* at 2248-53.

83. *Id.* at 2249-51.

84. *Id.* at 2252-53.

85. *Id.* at 2253.

86. *Id.* at 2257 (citing Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); and Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

87. *Id.* at 2258.

88. *See id.* at 2261-78.

89. *Id.* at 2265.

"egregiously wrong and deeply damaging" and "on a collision course with the Constitution from the day it was decided."[90] With regard to workability, the Court dismisses the "undue burden" standard as ambiguous, unworkable, and detrimental to the advancement of consistent legal principles.[91]

Finally, in Part VI of *Dobbs*, the Court decides which standard of review should govern constitutional challenges to state abortion regulations.[92] Because abortion has no basis in the Constitution's text or the nation's history and tradition, the Court explains, rational basis review is the appropriate standard.[93] Under this standard, abortion regulations fall into the same category as other health and welfare laws and are entitled to a "strong presumption of validity."[94] Therefore, such regulations "must be sustained if there is a rational basis on which the legislature could have thought that [they] would serve legitimate state interests."[95] The foremost of these reasons is the preservation of and respect for prenatal life.[96] Additionally, the Court lists the following as legitimate reasons to regulate an abortion: "the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability."[97]

B. The Avenue Left Open for Abortion on the Basis of Severe Fetal Anomaly

In overruling *Casey* and *Roe* and establishing rational basis as the standard of review for abortion restrictions, *Dobbs* appears to leave few avenues open for a constitutionally guaranteed abortion right.[98] As this Note argues, however, there is a clear path forward under *Dobbs* for abortion access in the case of severe fetal anomalies.

The status of abortion in the case of severe fetal anomalies was ripe for adjudication but was never addressed in *Dobbs*. The law that *Dobbs* upheld, the MGA Act, contains exceptions for medical emergencies and for "the case of a

90. *Id.*

91. *See id.* at 2272-75.

92. *See id.* at 2283-84.

93. *See id.*

94. *Id.* at 2284 (quoting Heller v. Doe, 509 U.S. 312, 319 (1993)).

95. *Id.*

96. *See id.*

97. *Id.*

98. *See id.* at 2283-84.

severe fetal abnormality," as explained above in Part I.B.[99] Because the Court neglected to discuss this component of the law altogether, the Court never decided whether Mississippi's legitimate justifications for regulating abortion apply to the case of severe fetal abnormality.[100] The Court's failure to consider this issue directly is by no means an endorsement of abortion in the case of severe fetal abnormality. However, more space undoubtedly remains open after *Dobbs* for a right to this narrow set of abortions than the typical privacy-based abortion right which *Dobbs* extinguished. As explained below in Part III, deeply rooted constitutional rights provide two viable avenues for abortion on the basis of severe fetal anomaly under *Dobbs*.

C. Originalism, Longstanding Practice, and Methodological Uncertainty in *Dobbs*

Considerable academic debate has emerged concerning the theories of constitutional interpretation in *Dobbs*. Some characterize *Dobbs* as originalism's greatest triumph,[101] while others consider the Fourteenth Amendment test *Dobbs* employs to be a quintessential example of the longstanding practice doctrine.[102] Further still, some scholars have deemed *Dobbs*'s approach a "hybrid methodology" because its *Glucksberg* analysis evaluates original meaning to answer questions about nonoriginalist substantive due process doctrine.[103] This Subpart introduces the "hybrid methodology" of constitutional interpretation at play in *Dobbs* and explains how it implicates the specific abortion right contemplated by this Note.[104]

Originalism is a dominant theory within the current Supreme Court.[105] But what exactly is originalism? Even originalists themselves have no simple

99. Gestational Age Act, MISS. CODE. ANN. § 41-41-191(4)(a)-(b) (2023). Mississippi's abortion law now contains no exception for severe fetal anomaly. *Id.* § 41-41-45.

100. *See Dobbs*, 142 S. Ct. at 2284 ("Except 'in a medical emergency or in the case of a severe fetal abnormality,' the statute prohibits abortion 'if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.'" (quoting Gestational Age Act, MISS. CODE ANN. § 41-41-191(4)(b) (2022))).

101. *See, e.g.*, J. Joel Alicea, *An Originalist Victory*, CITY J. (June 24, 2022), https://perma.cc/5NSJ-GLGR.

102. *See, e.g.*, Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1753 & n.31, 1771, 1775 (2015) (explaining that *Glucksberg* rooted its conclusion in longstanding practice doctrine).

103. *See, e.g.*, Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 459-62 (2023).

104. *See id.*

105. *See* Alicea, *supra* note 101 ("[O]riginalism has become the dominant theory at the Court . . . .").

answer.[106] Generally, originalism represents "the idea that the Constitution should be interpreted as it was understood at the time it was written."[107] Disagreements over *whose* understanding controls, however, have fractured originalism into a "family of originalist constitutional theories."[108] Two prominent families of originalism are Original Intentions Originalism, which interprets the Constitution's text based on the intent of those who wrote it, and Original Public Meaning Originalism, which interprets the Constitution's text based on how the public would have understood it when it was ratified.[109] When interpreting the Fourteenth Amendment, the relevant time period for originalist analysis—whether Original Intentions or Original Public Meaning—is between 1866 and 1868.[110]

Because "there may be no single thesis upon which all self-described originalists agree,"[111] it should come as no surprise that originalists have not reached consensus on whether *Dobbs* was an originalist opinion or a longstanding practice opinion. The crux of the disagreement centers around the *Glucksberg* "history and tradition" test utilized by *Dobbs* to evaluate unenumerated substantive due process rights. Steven Calabresi, a prominent originalist scholar, considers the *Glucksberg* test deployed in *Dobbs* decidedly nonoriginalist.[112] He contends that most originalists reject the concept of substantive due process and instead believe that the Privileges or Immunities Clause should house substantive rights.[113] Even though Calabresi believes that *Dobbs* reached the correct conclusion about abortion, he believes the *Glucksberg* test was an analytically inappropriate means of reaching that conclusion.[114] Some originalists instead consider *Dobbs*'s use of the *Glucksberg* test as an instance of longstanding practice doctrine,[115] which counsels interpreting the Constitution based on the historical practices of democratically accountable

106. *See infra* notes 107-11 and accompanying text.

107. McConnell, *supra* note 102, at 1755.

108. Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 15 (Grant Huscroft & Bradley W. Miller eds., 2011).

109. *See* Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1424 n.6 (2021); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU. L. REV. 1621, 1626-27.

110. *See* McConnell, *supra* note 102, at 1755.

111. Solum, *supra* note 108, at 41.

112. *See* Steven G. Calabresi, Opinion, *The True Originalist Answer to* Roe v. Wade, WALL ST. J. (May 8, 2022, 12:38 PM ET), https://perma.cc/5QJP-ZPRN.

113. *See id.* ("No one in legal academia today thinks unenumerated rights are protected by substantive due process, which is an oxymoron anyway.").

114. *See id.*

115. *See* McConnell, *supra* note 102, at 1771, 1775.

bodies like state governments.[116] The fact that most states had longstanding legislation that criminalized abortion in 1868 was central to *Dobbs*'s conclusion that a positive right to abortion was not "deeply rooted" in American history or tradition.[117]

Some originalist scholars acknowledge this tension but nevertheless believe *Dobbs* is an originalist decision because the original public meaning of "the judicial power" in Article III's Vesting Clause typically counsels following stare decisis.[118] *Glucksberg* is "precedent on the reigning interpretation of the Due Process Clause," and neither party in *Dobbs* asked the Court to repudiate substantive due process, which would have overruled a century of precedent.[119] Thus, some originalists argue that the *Dobbs* Court's decision to follow precedent in applying *Glucksberg* accorded with originalism "overall," even though it failed to repudiate nonoriginalist precedent.[120]

Ultimately, the goal of this Note is not to settle longstanding debates about originalism. Whether originalist or not, *Dobbs*'s use of *Glucksberg*'s methodology sets current precedent regarding the permissibility of abortion restrictions under the Constitution, and most originalists agree with its substantive outcome even if they disagree about the method the Court used to reach that outcome.[121] While originalism is the current Supreme Court's dominant mode of constitutional interpretation, this Court does not seem poised to overturn a century of substantive due process precedent.[122] Accordingly, this Note utilizes the same hybrid approach as *Dobbs*, evaluating substantive due process using originalist methodologies—including original intent and original public meaning—even if the Court did not do so directly in *Dobbs*. This Note also relies upon the *Glucksberg* test at various points in its legal analysis. Striving to remain neutral with regard to longstanding fissures among originalists, I refer to the Court's approach in *Dobbs*, as well as this Note's analysis, as "originalist-informed" rather than "originalist."

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116. *See id.*

117. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2252-53 (2022). For a list of state prohibitions on abortion in 1868, see Appendix below.

118. *See* Alicea, *supra* note 101; *see also* Lee J. Strang, *A Three-Step Program for Originalism*, PUB. DISCOURSE (June 12, 2022), https://perma.cc/8VXN-H68Y (arguing that Justice Alito's *Dobbs* opinion "is consistent [with originalism] because the best conception of originalism . . . includes a robust place for *stare decisis*").

119. *See* Alicea, *supra* note 101.

120. *See, e.g., id.*

121. *See* Barnett & Solum, *supra* note 103, at 455-62.

122. *See* Alicea, *supra* note 101. Note that Justice Thomas, citing himself twenty-one times in twelve paragraphs, was joined by no other justices in his concurrence seeking to overturn substantive due process. *Dobbs*, 142 S. Ct. at 2300-04 (Thomas, J., concurring).

III. A Constitutional Right to Abortion for Fetuses with Severe Abnormalities

Under the legal test set forth in *Dobbs*, there are only two valid sources of Fourteenth Amendment substantive due process rights: (1) the first eight amendments of the Constitution, and (2) rights deeply rooted in the nation's history and tradition when the Fourteenth Amendment was ratified in 1868.[123] The right to an abortion rooted in privacy is not explicitly enumerated in the Constitution, and the *Dobbs* Court holds that it is not deeply rooted in the nation's history and tradition either.[124] For a constitutional right to abortion to exist under *Dobbs*, therefore, it must stem from a right other than privacy that is "deeply rooted in this Nation's history and tradition" at the time that the Fourteenth Amendment was ratified.[125]

However, the framers of the Fourteenth Amendment[126] could never have contemplated the right to abortion in the case of severe anomaly because severe fetal abnormalities were not medically detectable in utero in 1868. Ultrasound-guided amniocentesis, which first made fetal abnormalities reliably detectable before birth, was not deployed in medicine until ninety years later.[127]

But technological constraints by no means foreclose an originalist-informed analysis. In other instances, the Supreme Court has drawn on historical analogs to answer questions that the Founders could never have contemplated. Fourth Amendment jurisprudence illustrates this clearly. In *Riley v. California*, the Court unanimously held that police officers could not search arrestees' cell phones without a warrant, exemplifying an originalist-informed approach to novel technology.[128] The Court acknowledged that cell phones were "based on technology nearly inconceivable just a few decades ago," so cell phones were beyond the Founders' contemplation.[129] Nevertheless, the Court reasoned that searching an arrestee's cell phone without a warrant was akin to the colonial era "general warrants" or "writs of assistance" that the Founders reviled.[130] The Court reached similar originalist-informed conclusions in *Kyllo v. United States*, where it held that using a thermal imager

123. *See Dobbs*, 142 S. Ct. at 2246-47.

124. *Id.* at 2242.

125. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

126. Any reference to "the framers" in this Note is to the framers of the Fourteenth Amendment.

127. *See supra* notes 39-42 and accompanying text.

128. 573 U.S. 373, 401 (2014).

129. *Id.* at 385.

130. *Id.* at 403.

to detect heat radiating from a home was a search requiring a warrant, and in *Carpenter v. United States*, where it concluded that law enforcement officers required a warrant to ascertain a cell phone user's location and movement using their cell-site-location information.[131]

In applying an originalist-informed understanding of the Constitution to modern surveillance technology, the Court's approach in these cases has been consistent. The Court's priority was not to mechanically interpret the Fourth Amendment but rather to maintain the same "degree of privacy against government that existed when the Fourth Amendment was adopted."[132]

Modern technology used to detect fetal abnormalities would likely be just as inconceivable to the Fourteenth Amendment's framers as a cell phone, so an originalist-informed analysis similarly requires analogizing to rights these framers would have protected. Adopting a similar approach to the Court's in *Riley*, *Kyllo*, and *Carpenter*, I explain how abortion in the case of severe anomaly is "deeply rooted in this Nation's history and tradition"[133] because it implicates two deeply rooted rights: (1) a pregnant individual's right to protect their own health, and (2) a parent's right to make medical decisions about a severely disabled newborn.

Had the technology for detecting nonviable fetuses existed in 1868, the framers would have afforded the same "degree" of protection to people pregnant with severely abnormal fetuses as they afforded parents exercising these two deeply rooted rights.[134] This results in a fulsome right to abortion in the case of severe fetal anomaly. This right would extend both to the hundreds of thousands of pregnant people who experience miscarriages and stillbirths due to severe fetal abnormalities each year and to the smaller subset of pregnant people obligated to carry nonviable fetuses to term in states with total abortion bans.[135] This right would also supersede state abortion proscriptions, which presently imperil pregnant people's lives by delaying or denying them necessary miscarriage and stillbirth care. As explained below, the dangers and restrictions on autonomy that pregnant people face under these laws are fundamentally at odds with the framers' understanding of the Fourteenth Amendment.

131. Kyllo v. United States, 533 U.S. 27, 34 (2001); Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018).

132. *Kyllo*, 533 U.S. at 34.

133. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

134. *Cf. Kyllo*, 533 U.S. at 34.

135. *See supra* note 35 and accompanying text.

A. Pregnant Individuals' Right to Protect Their Own Health

One of the strongest arguments favoring a constitutional right to abortion in the case of severe fetal abnormalities is that states lack the authority to make pregnant people jeopardize their health in order to carry a nonviable fetus to term, especially when aborting the fetus is safer.

The right of a pregnant person to access an abortion to protect their own health, called a therapeutic abortion, is deeply rooted in both the common law and in abortion laws operating at the time of the Fourteenth Amendment's ratification. The principles underlying nineteenth-century abortion laws were clear: Courts interpreting them generally agreed that they sought to protect *both* pregnant individuals and fetal life.[136] The *Dobbs* Court does not squarely instruct states about what to do when these two interests conflict.[137] In the case of severe fetal abnormality, however, the pregnant individual's substantial health risks do not conflict with fetal life because the fetus, by definition, will not result in an "actual life."[138] Left only with an interest in protecting pregnant individuals, the framers of the Fourteenth Amendment would have allowed abortion on the basis of severe fetal abnormality had modern reproductive technology existed in their era. They would have considered such abortions part of a deeply rooted right to preserve one's own health, as explained below.

1. Health risks associated with abortion versus pregnancy

In general, medical abortion is much safer than pregnancy and childbirth. The mortality rate of childbirth is fourteen times higher than that of abortion.[139] Pregnancy also is more painful than abortion and causes health risks, like nausea, cardiovascular conditions, loss of bone density, various chronic postpartum health and mental health conditions, and a higher lifetime risk of Alzheimer's disease.[140] Legal abortion, on the other hand, is safe and effective in the United States, regardless of the method used, and is less painful than childbirth.[141] Abortion does not have long-term effects on secondary

136. *See infra* Part III.A.2.

137. *See Dobbs*, 142 S. Ct. at 2258-59.

138. *See supra* Part I.B.

139. Elizabeth G. Raymond & David A. Grimes, *The Comparative Study of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 216 (2012).

140. ANITA BERNSTEIN, THE COMMON LAW INSIDE THE FEMALE BODY 143-45 (2019); *Postpartum Depression*, CLEVELAND CLINIC, https://perma.cc/K9H5-V24Z (last updated Apr. 12, 2022).

141. *See* NAT'L ACADS. OF SCIS., ENG'G & MED., THE SAFETY AND QUALITY OF ABORTION CARE IN THE UNITED STATES 9-10 (2018), https://perma.cc/9THG-HTQQ; Daniel Grossman et

footnote continued on next page

infertility or other pregnancy-related disorders, nor does it typically increase the risk of mental health disorders like depression, anxiety, or post-traumatic stress disorder.[142] In fact, pregnant people who are denied an abortion tend to have worse long-term economic and mental health outcomes than those who receive abortions.[143] With regard to severe fetal abnormality, receiving news that a fetus is incompatible with life is difficult whether parents choose to continue or terminate the pregnancy.[144] In these circumstances, access to full information, involvement in the decisionmaking process, and empathetic medical care are most important to parents.[145]

Additionally, post-*Dobbs* abortion proscriptions directly imperil pregnant people's health, especially in the case of severe fetal abnormality. These laws are too recent to systematically study their health impacts, but data emerging in the wake of Texas's 2021 six-week abortion ban portends a grim future for pregnant people in states that severely limit abortion. In a study of two Dallas hospitals, pregnant patients reporting severe complications before twenty-two weeks of gestation had to wait nine days on average before receiving medically necessary abortion care, even though their pregnancies were nonviable.[146] About 60% of patients developed serious conditions like infections or bleeding, and one became permanently infertile.[147] These patients were more likely to

al., *Experiences with Pain of Early Medical Abortion: Qualitative Results from Nepal, South Africa, and Vietnam*, 19 BMC WOMEN'S HEALTH art. 118, at 6-7 (2019), https://perma.cc/H32H-2VBW (finding that childbirth is more painful than medication abortions).

142. *See* NAT. ACADS. OF SCIS., ENG'G & MED., *supra* note 141, at 9. For a meta-analysis of the impact of abortion on mental health, see Vignetta E. Charles, Chelsea B. Polis, Srinivas K. Sridhara & Robert W. Blum, *Abortion and Long-Term Mental Health Outcomes: A Systematic Review of the Evidence*, 78 CONTRACEPTION 436 (2008), https://perma.cc/L23J-SHWT. The highest quality literature shows that abortion has a neutral effect on mental health, while studies with the most flawed methodology find negative effects on mental health. *Id.* at 448-49.

143. Megan Burbank & Emily Kwong, *A Landmark Study Tracks the Lasting Effect of Having an Abortion—Or Being Denied One*, NPR (May 15, 2022, 5:00 AM ET), https://perma.cc/J35R-FR4P.

144. *See* Valerie Fleming, Irina Iljuschin, Jessica Pehlke-Milde, Franziska Maurer & Franziska Parpan, *Dying at Life's Beginning: Experiences of Parents and Health Professionals in Switzerland when an 'In Utero' Diagnosis Incompatible with Life Is Made*, 34 MIDWIFERY 23, 23-24 (2016).

145. *See id.*

146. *See* Anjali Nambiar, Shivani Patel, Patricia Santiago-Munoz, Catherine Y. Spong & David B. Nelson, *Maternal Morbidity and Fetal Outcomes Among Pregnant Women at 22 Weeks' Gestation or Less with Complications in 2 Texas Hospitals After Legislation on Abortion*, 227 AM. J. OBSTETRICS & GYNECOLOGY 648, 649 (2022).

147. *See id.* ("Expectant management resulted in 57% of patients having a serious maternal morbidity.").

develop serious complications than those presenting comparable symptoms in states without such abortion restrictions.[148]

Because severe fetal abnormalities cause the majority of miscarriages and 10% to 20% of stillbirths, near-total and total abortion restrictions disproportionately imperil people carrying fetuses with severe abnormalities.[149] Not only must these pregnant people endure the typical risks of pregnancy and childbirth, but they also face the additional risks of delayed miscarriage and stillbirth care—like sepsis and permanent infertility—all for a nonviable fetus.[150] Though arguably no pregnant person should "have to be on death's door to qualify for maternal exemptions" to abortion proscriptions, this phenomenon is particularly difficult to justify when fetuses will inevitably die before or shortly after birth.[151]

State abortion proscriptions currently place doctors in a bind: They must interpret vague abortion exceptions for medical emergencies, and they face fines, jail time, and revocation of their medical licenses if they err.[152] A constitutional right to abortion on the basis of severe fetal abnormality would preempt state abortion bans, thereby sparing hundreds of thousands of pregnant people from this legal quagmire each year.[153] It would allow doctors to act in accordance with a positive grant of a constitutional right, as was the case under *Roe*, rather than acting within vague, uncertain carveouts within total abortion bans. Thus, this constitutional right would help mitigate the chilling effect of *Dobbs*, empowering doctors to perform medically necessary and humane abortions for nonviable fetuses when doing so would protect pregnant people's health.[154]

A constitutional right to abortion on the basis of severe fetal abnormality would allow affected pregnant people to preventatively abort fetuses rather

148. *Id.*

149. *See supra* note 35 and accompanying text.

150. *See* Nambiar et al., *supra* note 146, at 649. For an example of uncertainty causing delayed care, see Ava Sasani & Emily Cochrane, *'I'm Carrying This Baby Just to Bury It': The Struggle to Decode Abortion Laws*, N.Y. TIMES (Aug. 19, 2022), https://perma.cc/UM54-Z5NC. Stillbirth is nearly six times more likely than live birth to result in life-threatening complications and eighteen times more likely to result in sepsis. *See* Elizabeth Wall-Wieler et al., *Severe Maternal Morbidity Among Stillbirth and Live Birth Deliveries in California*, 134 OBSTETRICS & GYNECOLOGY 310, 314 tbl.2 (2019).

151. Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, 387 NEW ENG. J. MED. 388, 389 (2022) (quoting a maternal and fetal medicine specialist in Texas).

152. *See, e.g.*, Frances Stead Sellers, *Her Baby Has a Deadly Diagnosis. Her Florida Doctors Refused an Abortion.*, WASH. POST (updated May 19, 2023, 5:56 PM EDT), https://perma.cc/WQQ5-35R4; Sasani & Cochrane, *supra* note 150.

153. *See supra* note 35 and accompanying text.

154. *See* Arey et al., *supra* note 151, at 388-90.

than wait for inevitable fetal loss or infant death. It would facilitate safer pregnancy management and emergency care for a group of people who are disproportionately likely to need such services at some point in their pregnancy.[155] And it would preempt state laws, reducing inconsistency and uncertainty arising from vague or impermissibly narrow statutory exceptions, empowering doctors to exercise their reasonable medical judgment with less fear of criminal or professional liability.

2. Common law justifications for health-of-the-mother exceptions

Dobbs claims that "no common-law case or authority . . . suggests a positive *right* to procure an abortion at any stage of pregnancy."[156] When pregnancy imperiled pregnant people's health, however, such a positive right existed. A logical reading of the *Dobbs* Court's favored common law authorities reveals that the common law doctrine of self-defense applies to a pregnant person's decision to terminate a fetus to protect their own health.[157]

For instance, *Dobbs* relies heavily on Blackstone's *Commentaries on the Laws of England*.[158] When detailing the right to life as part of the absolute right of personal security, Blackstone explains that killing a quickened fetus is a crime.[159] Immediately thereafter, Blackstone identifies several other absolute rights encompassed within the right of personal security, any of which would justify therapeutic abortion. First among these is the right to self-defense to protect one's life or limb, a right Blackstone considers so strong as to pardon homicide when there is an "apprehension of losing his life, or even his limbs."[160] Second, Blackstone explains that "the rest of his person or body is also entitled, *by the same natural right*, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member."[161] If the right to defend one's body is "by the same natural right" as the right to life and limb, one should be equally justified in using force to protect against threats to either.[162] Beyond this, individuals enjoy an even broader right to "preservation of a man's health from such

155. *See supra* notes 149-50 and accompanying text.

156. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2251 (2022).

157. *See id.* at 2249 (discussing Blackstone, Coke, Hale, and Bracton).

158. *See id.* at 2249-51.

159. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129-30 (7th ed., Oxford, Clarendon Press 1775). This was true whether the woman took a potion to induce abortion or whether someone beat the woman and caused the death of her fetus. *Id.*

160. *Id.* at 130.

161. *Id.* at 134 (emphasis added).

162. *Id.*

practices as may prejudice or annoy it."[163] Because these rights are absolute, Blackstone explains, the "first and primary end of human laws is to maintain and regulate" them.[164]

Like Blackstone, Hale identifies a right to "self-preservation against an injurious assault" which includes a right to commit homicide in self-defense when facing assault.[165] Coke similarly explains that when someone acts in self-defense, "upon any inevitable cause, [that which has been done for the protection of the body is rightfully done]."[166] The right to commit homicide does not arise only when facing deadly force; for example, both Hale and Coke explain that individuals are justified in using deadly force against a thief who has attempted to rob them in their home.[167] The Supreme Court's recent jurisprudence in the Second Amendment arena confirms that the current Court considers the right to self-defense a fundamental right.[168]

The eminent common law authorities do not outright state that a pregnant person could rely on the doctrine of self-defense when pregnancy imperiled their health. However, these authorities never purport to enumerate every circumstance to which the doctrine applies. Hale discusses necessity as a general "civil defect" related to "crimes and misdemeanors."[169] Hale explains that necessity—including the "necessity of self-preservation"—may relax or abate "the severity of their punishments."[170] Blackstone similarly introduces self-defense in the context of the broad, absolute right to personal security, including the preservation of life, limb, body, and health.[171]

From these common law authorities, three logical inferences emerge. First, if the right of self-defense is general, broad, and absolute when facing threats to life or health, it follows that it also would extend to the specific crime of abortion when one's health is imperiled. Second, if the doctrine of self-defense can excuse even the most grievous of felonies—homicide—it should at least

163. *Id.*

164. *Id.* at 124.

165. 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 52, 480 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736).

166. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 56 (London, M. Flesher 1644) (translated from the Latin: "*Quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur.*").

167. *See id.*; 1 HALE, *supra* note 165, at 481.

168. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct 2111, 2122 (2022) (narrowing states' authority to prevent their citizens from keeping and bearing arms in public for self-defense).

169. 1 HALE, *supra* note 165, at 15-16.

170. *Id.* at 15-16, 52.

171. 1 BLACKSTONE, *supra* note 159, at 129-34.

equally justify the lesser crime of abortion, which was a common law misdemeanor.[172] Third, if one has the right to take an "actual life" to preserve their own life, limb, or body, they should have the right to end a "potential life" to preserve the same. Even more decisively, one should have the right to terminate fetuses with severe abnormalities because they, by definition, cannot become "actual lives."

3. Statutory exceptions for life of the mother

Dobbs is correct that many states proscribed abortion at the time of the Fourteenth Amendment's ratification in 1868. Yet statutory exceptions for therapeutic abortions were similarly ubiquitous. In 1868, 31 out of the 37 states had laws proscribing abortion,[173] but 26 of these laws had an explicit statutory exception for the life of the mother.[174] Three additional states prohibited only unlawful or unjustified abortions, and case law in these states clarified that abortion was permissible when the pregnant person's health was at risk.[175] Only two state laws did not explicitly exempt women from abortion restrictions when their life was imperiled.[176]

The *Dobbs* Court emphasizes that nineteenth-century legislators restricted abortion based on their belief that "abortion kills a human being."[177] Notably, only one of the "many judicial decisions" that *Dobbs* cites to support this proposition—*Nash v. Meyer*, a case decided sixty-six years after the Fourteenth Amendment's ratification—describes fetuses as "human being[s]."[178]

The Court overlooks the fact that concern for maternal well-being also underpinned these nineteenth-century laws.[179] Nearly all other cases to which *Dobbs* cites illustrate the motivations of nineteenth-century legislators,

172. *See id.* at 129-30.

173. *See infra* Appendix.

174. *See id.*

175. *See id.* These three states were Massachusetts, New Jersey, and Pennsylvania.

176. *See id.* Louisiana had no exception for the health of the mother. 1855 La. Acts 132-33. Nebraska's 1866 abortion law banned only the administration of poison to procure abortion. NEB. REV. STAT. pt. 3, ch. 4, § 42 (Estabrook 1866). Nebraska joined the United States in 1867, and when it codified its laws as a state for the first time in 1873, it expanded abortion liability and introduced an exception for the health of the mother. NEB. REV. STAT. ch. 58, pt. 1, ch. 6, § 39 (Brown 1873).

177. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2256 (2022) ("There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point.").

178. *Id.*; Nash v. Meyer, 31 P.2d 273, 280 (Idaho 1934); *see* IDAHO CODE ANN. §§ 17-1810, -1811 (1932). This case's relevance in *Dobbs*'s framework, therefore, is dubious.

179. *See Dobbs*, 142 S. Ct. at 2254-56.

clarifying their intent to protect fetuses *and* pregnant people by regulating abortion. *State v. Miller*, for instance, described how Kansas's abortion law "carries the facial evidence of a legislative intent to . . . protect the pregnant woman and the unborn child."[180] In Ohio, *State v. Tippie* stated that the state's abortion statute "regards not only the life of the child, but also the life of the woman."[181] *Dougherty v. People* explained that Colorado's abortion law was "intended specially to protect the mother and her unborn child," and "[i]n the attempts made at abortion, the health of the mother is more frequently ruined than the life of the child is destroyed," emphasizing that the law was "designed to protect both from injury."[182] And finally, *State v. Gedicke* found that New Jersey's abortion law was designed "not so much to prevent the procuring of abortions," but "to guard the health and life of the female" from abortion-related complications.[183] All of these cases emerged from the highest courts of their respective states.

Although the cases *Dobbs* relies upon in reaching its decision evinced nineteenth-century concern for maternal well-being, *Dobbs* does not. It never requires that states include an exception for the life of the mother, though all fifteen states that have enacted total abortion bans have legislated such an exception.[184] From an originalist-informed perspective, the *Dobbs* Court does not address a deeply rooted historical right to procure a therapeutic abortion to protect a pregnant person's life. Most state laws proscribing abortion at the time of the Fourteenth Amendment's ratification included such an exception. Nineteen of these abortion laws use the phrase "preserve the life" in their text,[185] and the contemporary definition of "preserve" meant "[t]o keep or save

180. 133 P. 878, 879 (Kan. 1913).

181. 105 N.E. 75, 77 (Ohio 1913).

182. 1 Colo. 514, 522-23 (1872).

183. 43 N.J.L. 86, 89 (1881). Further, the trial court in *State v. Moore* emphasized in instructing the jury that abortion, "except when in proper professional judgment it is necessary to preserve the life of the woman, . . . is known to be a dangerous act, generally producing one and sometimes two deaths, . . .the death of the unborn infant and the death of the mother." 25 Iowa 128, 131 (1868) (quoting the trial court). And *Smith v. State* found that when a mother dies due to complications from an abortion, Maine courts will impute malice necessary to prosecute for murder because the act of an abortion imperils the mother's life. *See* 33 Me. 48, 54-55 (1851). In *State v. Ausplund*, Oregon's highest court explained that destroying the product of conception through abortion often killed both the child and the mother. 167 P. 1019, 1022-23 (Or. 1917).

184. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., https://perma.cc/X2KH-F8TX (last updated Aug. 29, 2023); *see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2317-18 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("Under the majority's ruling, . . . States may even argue that a prohibition on abortion need make no provision for protecting a woman from risk of death or physical harm.").

185. *See infra* Appendix.

from injury *or* destruction."[186] Given the broad, absolute common law right to protect one's health, the broad phrasing used to describe therapeutic abortion exceptions, and the contemporaneous case law's clear emphasis on protecting the mother's well-being through abortion regulation, an originalist-informed understanding of the Constitution would support a right for pregnant people to procure a therapeutic abortion.

4. States cannot prohibit abortion in the case of severe fetal abnormality

Of the fourteen states that ban abortion completely, only four have any sort of exception for severe fetal anomalies.[187] In ten states, therefore, pregnant people must carry a nonviable fetus to term, even if the fetus could never survive outside of the womb. This outcome fundamentally contradicts an originalist-informed understanding of abortion by contravening a pregnant person's deeply rooted right to protect their health through abortion.[188] This is true for two reasons.

First, forbidding abortion on the basis of severe fetal anomaly contradicts the historical practice of abortion laws in 1868 and leaves pregnant people with less autonomy than they had 150 years ago.[189] As even the cases cited by *Dobbs* demonstrate, states outlawed abortion both to protect pregnant people and to protect their fetuses.[190] In the case of severe fetal abnormality, the state's interest in protecting potential life is nonexistent because these fetuses are incompatible with life.[191] Thus, only an interest in preserving a mother's health remains. Although legislators and judges considered abortion dangerous

186. *See* NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1031-32 (Springfield, Mass., G. & C. Merriam 1867) (emphasis added).

187. *See* McCann et al., *supra* note 2. The states with exceptions are Alabama, Indiana, Louisiana, and West Virginia. Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted.*, N.Y. TIMES (Jan. 21, 2023), https://perma.cc/5HWZ-KU9L. Because of definitional ambiguities, however, abortions are rarely performed under these exceptions. *See, e.g.*, *id.* ("The lawyers at Dr. Day's hospital felt that Indiana's new law prohibited the methods for the procedure and decided that they could not offer abortions because of the ban's confusing wording."); Sasani & Cochrane, *supra* note 150; Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortions Bans: Implications for the Provision of Abortion Services*, KFF (May 19, 2023), https://perma.cc/W42E-85CW ("[L]ethal fetal anomaly exceptions are poorly defined and limited in statute.").

188. *See supra* Part III.A.2-.3.

189. *Cf.* Kyllo v. United States, 533 U.S. 27, 34 (2001) (explaining that an originalist approach to Fourth Amendment jurisprudence would maintain the same "degree of privacy against government that existed when the Fourth Amendment was adopted").

190. *See supra* notes 179-83 and accompanying text.

191. *See supra* Part I.B.

in the nineteenth century,[192] the technological landscape surrounding abortion is vastly different today; abortion is now fourteen times less likely than childbirth to result in death of the pregnant person.[193] Yet a pregnant person in 1868 enjoyed the right to procure an abortion when it would protect their own health or life, and nineteenth-century abortion laws unambiguously showed concern for a pregnant person's well-being.[194] Given these two facts, if the technological landscape of reproductive technology in 1868 enabled women to identify futile pregnancies and safely avoid health risks by aborting them, the framers of the Fourteenth Amendment would not have obligated women to endure the risks of a futile pregnancy.

Second, there is no rational reason for states to force women to imperil their own health by carrying a futile pregnancy to term. The *Dobbs* Court repeatedly emphasizes a state's legitimate interest in protecting the "potential life" of fetuses, and the Court concludes that states have the right to balance the competing interests of those seeking abortions and the "potential life" of fetuses.[195] In cases of severe fetal abnormality, however, there are no competing interests to balance because these fetuses will, by definition, die before or shortly after birth, so there is no "potential life." No rational relationship exists, therefore, between obligating pregnant people to continue futile pregnancies and any legitimate state ends.[196] Absent any legitimate interests, states act unlawfully in depriving pregnant people of their right, rooted in self-defense, to make decisions to preserve their own health, including aborting fetuses with severe anomalies.

In sum, absent a legitimate interest, states cannot arbitrarily obligate pregnant people to imperil their health by continuing nonviable pregnancies. Such obligations deny pregnant people a right to self-preservation that the framers of the Fourteenth Amendment would have guaranteed had the technology to detect severe fetal anomalies existed in 1868. Thus, as applied to pregnancies for fetuses with severe abnormalities, state abortion proscriptions are unconstitutional under an originalist-informed framework and rational basis review.

192. *See supra* notes 177-83 and accompanying text.

193. Raymond & Grimes, *supra* note 139, at 216.

194. *See supra* Part III.A.1-.3.

195. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241, 2257-58, 2260-61, 2268, 2277, 2280, 2283-85 (2022); *see supra* Part III.C.

196. *See supra* Part I.B (defining severe fetal anomalies as conditions that will result in inevitable death within the first year of a child's life).

B. The Right of Parental Autonomy

Analogies to the Fourteenth Amendment due process right to parental autonomy provide an additional originalist-informed route to an abortion right in the case of severe fetal anomaly. As construed by Supreme Court jurisprudence, this liberty interest concerns a parent's right to "care, custody, and control of their children."[197] The right to parental autonomy empowers parents to make the most consequential decisions over newborns with severe birth defects, including the decision to withhold life-sustaining care. But the principles underlying parental autonomy apply equally to "potential lives" diagnosed with severe anomalies in utero and "actual lives" born with these conditions. As explained above, the technology required to detect severe fetal abnormalities in utero would be "inconceivable" to the framers of the Fourteenth Amendment.[198] Had this technology existed, what rights would these framers have afforded to pregnant people with nonviable pregnancies? Abortion access in the case of severe fetal anomaly enshrines the same degree of parental autonomy as the framers conferred onto pregnant people, merely shifting the initial point at which parents exercise parental autonomy to an earlier point in neonatal development. Thus, the right to parental autonomy provides a route to abortion access that exists entirely independently of the abortion right contemplated and extinguished in *Dobbs*.

1. Parental obligations and parental rights

Among the common law authorities, both Blackstone and Kent explain that parents have obligations toward their children, which give parents substantial rights to control their children's upbringings. Blackstone explains, "[t]he duty of parents to provide for the *maintenance* of their children, is a principle of natural law."[199] This duty extends only to providing necessities rather than "superfluities" and "indulgences of fortune."[200] Concurrent with parental obligations are parental rights. Blackstone explains that a parent's duty toward their children confers onto them positive rights: the power and authority to "keep the child in order and obedience."[201]

Furthermore, in his *Commentaries on American Law*, Kent considers it a "plain precept of universal law" that parents had obligations to maintain and

197. Troxel v. Granville, 530 U.S. 57, 65 (2000).

198. *See supra* notes 39-44, 126-27 and accompanying text.

199. 1 BLACKSTONE, *supra* note 159, at 447.

200. *Id.* at 449.

201. *Id.* at 452.

educate their children.[202] Like Blackstone, Kent explains that these duties give parents rights over their child: the authority to maintain and educate their child and the right to discipline their child in accordance with parental duties.[203] Both Blackstone, describing English common law, and Kent, describing early American common law, afford parents broad discretion to direct the upbringing of their children.

Such common law obligations and rights clearly existed in the United States at the time of the Fourteenth Amendment's ratification. In New York, a parent long had a "perfect common law duty" to maintain their offspring.[204] Such a duty, rooted in natural or common law, also existed in Illinois, Indiana, Massachusetts, and Ohio.[205] In Illinois, it afforded parents the authority "to be the judge of the wants of the child, and of [their] ability to supply them."[206] Similarly, in Georgia, guardians and parents had the "right to judge what are necessaries" in childrearing.[207] In Vermont, there existed a "right of a parent to control his own child [depending] upon his furnishing necessaries."[208] And as the Supreme Court of New Jersey explained in 1857, "[t]he authority and rights of parents over their children result from their duties."[209] This sampling of case law emerging from state courts around 1868 reflects the clear bipartite system of parental obligations and their corresponding rights that existed at common law.

Through a century of jurisprudence concerning parental autonomy, the Supreme Court has repeatedly affirmed a parent's deeply rooted, expansive right to make decisions regarding the upbringing of their child. The Court first located the common law right of parental autonomy in the Fourteenth Amendment in *Meyer v. Nebraska*.[210] In this 1923 case, the Court held that the Fourteenth Amendment confers rights "long recognized at common law as essential to the orderly pursuit of happiness by free men."[211] Among these

202. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 189-91 (O. W. Holmes, Jr. ed., 12th ed., Boston, Little, Brown & Co. 1873).

203. *Id.* at 203.

204. Edwards v. Davis, 16 Johns. 281, 285 (N.Y. Sup. Ct. 1819).

205. *See* Clark v. Gotts, 1 Ill. App. 454, 457-58 (1877); Lower v. Wallick, 25 Ind. 68, 73 (1865); Brow v. Brightman, 136 Mass. 187, 188 (1883); Pretzinger v. Pretzinger, 15 N.E. 471, 473 (Ohio 1887).

206. *Clark*, 1 Ill. App. at 458.

207. Nicholson v. Spencer, 11 Ga. 607, 610 (1852) (emphasis omitted); *see id.* ("Necessaries are such things as are useful and suitable to the party's state and condition in life, and not merely such as are requisite for bare subsistence." (emphasis omitted)).

208. Gordon v. Potter, 17 Vt. 348, 353 (1845).

209. Osborn v. Allen, 26 N.J.L. 388, 391 (1857).

210. 262 U.S. 390 (1923).

211. *Id.* at 399.

long-recognized rights was "the power of parents to control the education of their own."[212]

Just two years later, the Court expanded the right of parental autonomy in *Pierce v. Society of Sisters*.[213] When overturning an Oregon law that mandated public school attendance, the Court concluded that the law "unreasonably interfere[d] with the fundamental liberty of parents and guardians to direct the upbringing and education of children under their control."[214] The Court continued: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[215] The right to parental autonomy is storied in the Court's modern jurisprudence: When referencing *Meyer* and *Pierce* more than seventy years later, the Court deemed the right of parental autonomy "perhaps the oldest of the fundamental liberty interests recognized by this Court."[216]

Following *Meyer* and *Pierce*, the Supreme Court has consistently construed the right to parental autonomy expansively. The Court has extended it to the right to live in nontraditional familial configurations[217] and to create exemptions from compulsory secondary education requirements.[218] The Court has used parental autonomy to rebuff efforts to deprive biological parents of custody over their children.[219] And in *Troxel v. Granville*, the Court held that judges lacked authority to intrude on parental visitation preferences.[220] The Court has often justified these expansions and protections with an originalist-informed understanding of the Constitution, stating in various cases that familial relations and parental autonomy are "beyond debate as an enduring American tradition,"[221] are "basic in the structure of our society,"[222] are "as old

212. *Id.* at 401. Accordingly, the Court struck down a Nebraska law that forbade instructors from teaching in languages besides English. *Id.* at 401-03.

213. 268 U.S. 510 (1925).

214. *Id.* at 534-35.

215. *Id.* at 535.

216. Troxel v. Granville, 530 U.S. 57, 65 (2000).

217. Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977).

218. Wisconsin v. Yoder, 406 U.S. 205, 214, 234 (1972).

219. Stanley v. Illinois, 405 U.S. 645, 649, 658 (1972).

220. *See Troxel*, 530 U.S. at 68-70.

221. *Yoder*, 406 U.S. at 232.

222. Ginsberg v. New York, 390 U.S. 629, 639 (1968).

and as fundamental as our entire civilization,"[223] and are "deeply rooted in this Nation's history and tradition."[224]

A century of Supreme Court jurisprudence reveals a clear, consistent pattern—protecting parental autonomy—and an equally clear rationale—its roots in our nation's history and tradition. When states have attempted to subordinate parental autonomy to state authority, the Court has typically invalidated state laws for intruding upon a "private realm of family life which the state cannot enter."[225] The Court assumes that parents presumptively act in a child's best interest and that parents, not states, are best positioned to determine those interests.[226] But even if the parent is *not* acting in their child's best interest, states typically cannot intrude on parental autonomy.[227] In *Reno v. Flores*, Justice Scalia wrote for the majority that "'the best interests of the child' is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated . . . to the interests of the parents or guardians themselves."[228] This is a testament to just how deferential the Court is toward parental autonomy. The Court has declared parental autonomy to be a "fundamental right" since *Meyer* and *Pierce*.[229]

As a result, states have authority to intrude on parental autonomy *only* when parents fail to meet a minimum level of care, like in cases of abuse or neglect. In such cases, although states have no positive obligation to do so,[230] states can and do criminally prosecute parents who expose their children to unreasonable danger.[231] But absent "clear and convincing evidence" of such

223. Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

224. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); *see also* Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 845 (1976) ("[T]he liberty interest in family privacy has its source . . . in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'" (quoting *Moore*, 431 U.S. at 503)).

225. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

226. *See* Troxel v. Granville, 530 U.S. 57, 68 (2000); *Prince*, 321 U.S. at 166.

227. Reno v. Flores, 507 U.S. 292, 304 (1993).

228. *Id.*

229. *See Troxel*, 530 U.S. at 65-66. This has led Justice Thomas to propose strict scrutiny as the appropriate standard of review for parental autonomy cases. *Id.* at 80 (Thomas, J., concurring).

230. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."); *id.* at 201 ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.").

231. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 160-61 (1944) (reviewing the criminal conviction of a guardian who violated Massachusetts's child labor laws). All states criminally proscribe child abuse and neglect. *State Laws on Child Abuse and Neglect*,

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neglect or abuse, states lack authority to deprive parents, whether or not they are "model parents," of their right to exercise control over their children.[232] The right to parental autonomy is not limitless,[233] but states carry the substantial burden of overcoming presumptions against their intrusion into parental rights.[234]

2. Parental autonomy over severely disabled newborns

The Supreme Court's jurisprudence regarding parental medical decisions over children is less robust, and the Court has yet to decide the narrow question of which rights parents hold when making medical decisions about newborns with terminal medical conditions. Two Supreme Court decisions consider the issue of parental autonomy over a child's medical care: *Parham v. J.R.* and *Bowen v. American Hospital Association*. The *Parham* Court held that the right to parental autonomy gave parents the right to commit children to state mental hospitals without a precommitment adversarial hearing.[235] In *Bowen*, the Court held that parental consent is paramount before hospitals can treat a newborn child, but this decision concerns statutory law rather than the Fourteenth Amendment.[236] Both cases, though not squarely addressing the question of severe fetal anomaly, accord with the Court's broad conception of parental autonomy even in the domain of medical decisionmaking.[237]

Although the Supreme Court has never expressly decided how comprehensively the Fourteenth Amendment right to parental autonomy protects medical decisions over newborns, state and federal law has aimed to close the gap. For newborns with terminal conditions, neither state nor federal law abridges a parent's autonomy to withhold life-sustaining care, and medical organizations and ethicists advise against infringing upon a parent's autonomy over end-of-life decisions.[238] As a result, for parents of newborns with terminal conditions, the right of parental autonomy is at its peak, extending to the most consequential of decisions: allowing them to die.

CHILD WELFARE INFO. GATEWAY, https://perma.cc/8UAD-8687 (archived Oct. 28, 2023).

232. *See* Santosky v. Kramer, 455 U.S. 745, 753, 769-70 (1982).

233. Nor, of course, can parents kill or allow their children to die from neglect. *See infra* note 274 and accompanying text.

234. *See* Parham v. J.R., 442 U.S. 584, 602-04 (1979).

235. *See id.* at 603-04.

236. Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 630 (1986) ("Indeed, it would almost certainly be a tort as a matter of state law to operate on an infant without parental consent.").

237. *See supra* Part III.B.1.

238. *See* Donley, *supra* note 15, at 201-04.

The Child Abuse Amendments of 1984, for instance, exclude from the definitions of abuse and neglect the failure to provide life-sustaining care when a physician reasonably judges that such treatment would "merely prolong dying" or would "not be effective in ameliorating or correcting all of the infant's life-threatening conditions."[239] The same holds true at the state level, where parental autonomy reigns supreme in medical treatment decisions for severely disabled children.[240]

Furthermore, guidelines from both the American Medical Association (AMA) and the American Academy of Pediatrics (AAP) instruct physicians to respect parental end-of-life decisions for newborns with lethal conditions.[241] For instance, the AAP's 2017 updated guidance on forgoing life-sustaining medical treatment notes that parents receive considerable deference when making decisions concerning end-of-life care for their children.[242] The AAP also explains that, when the prognosis for high-risk newborns is uncertain and survival would involve a diminished quality of life, parental assessments of the child's best interests should determine the treatment approach.[243] In these situations, withholding life-sustaining care is not only permissible, but is ethically advisable.[244] In all respects, physicians should address family decisionmakers' viewpoints with the "utmost regard."[245]

Not only is it well established and medically uncontroversial that parents regularly exercise their right to parental autonomy to withdraw or limit life-sustaining care for critically ill newborns, but it is also extraordinarily common. According to empirical studies of pediatric intensive care units (ICUs), decisions to withdraw life-sustaining care are staggeringly prevalent. Around half of infants who die in pediatric ICUs die from active withdrawal of life support or death after do-not-resuscitate orders.[246] Parental rights over

239. *See* Child Abuse Amendments of 1984, Pub. L. No. 98-457, § 121(3), 98 Stat. 1749, 1752 (codified as amended at 42 U.S.C. § 5106g).

240. *See Bowen*, 576 U.S. at 628-29 & n.13 ("[S]tate law vests decisional responsibility in the parents, in the first instance, subject to review in exceptional cases by the State acting as *parens patriae*.").

241. *See* Michael White, *The End at the Beginning*, 11 OCHSNER J. 309, 310, 315 (2011), https://perma.cc/S8CF-U3UB.

242. Kathryn L. Weise, Alexander L. Okun, Brian S. Carter & Cindy W. Christian, *Guidance on Forgoing Life-Sustaining Medical Treatment*, 140 PEDIATRICS e20171905, at 3-5 (2017).

243. *Id.* at 5.

244. *Id.* at 2-3.

245. *Id.* at 4.

246. *See* Donald D. Vernon, J. Michael Dean, Otwell D. Timmons, William Banner, Jr. & Elizabeth M. Allen-Webb, *Modes of Death in the Pediatric Intensive Care Unit: Withdrawal and Limitation of Supportive Care*, 21 CRITICAL CARE MED. 1798, 1799 (1993); A.Y.T. Goh, L.C.S. Lum, P.W.K. Chan, F. Bakar & B.O. Chong, *Withdrawal and Limitation of Life*

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critically ill newborns are at their peak,[247] and doctors' primary responsibility is to facilitate a parent's decision, even if that decision involves withdrawing life-sustaining care from their newborn.

3. The right of parental autonomy extends to abortion in the case of severe fetal anomaly

The right of parental autonomy is deeply rooted in our nation's history and tradition, and, for parents of newborns with severe disabilities, it protects even end-of-life decisions to withdraw life-sustaining care.[248] This right naturally extends to parental decisions to abort fetuses with severe abnormalities, which accords both with the principles underlying the right of parental autonomy and with an originalist-informed understanding of that right.

The principles underlying the Fourteenth Amendment right to parental autonomy are entirely consistent with decisions to terminate fetuses with severe abnormalities. As abortion expert and legal scholar Greer Donley explains, abortion of fetuses with severe congenital abnormalities is fundamentally analogous to end-of-life decisions after such children are born.[249] First, the same motivations underlie both decisions, such as protecting fetuses or newborns from inevitable pain and suffering and avoiding parental grief from the later death of a wanted fetus or child.[250] The same powerful presumption that parents are acting in their newborn's best interest when withholding life-sustaining care after birth should therefore extend to their decisions to terminate fetuses with severe abnormalities before birth.[251] Furthermore, the same basic action often occurs when terminating fetuses and allowing newborns to die.[252] In dilation and evacuation abortions, the first step is cutting the umbilical cord and allowing fetal demise to occur.[253] In such cases, the parent withholds life-sustaining hydration, nutrition, and oxygen from the fetus or newborn, whether that sustenance comes from an umbilical cord or from a ventilator and feeding tube.[254]

Support in Paediatric Intensive Care, 80 ARCHIVES DISEASE CHILDHOOD 424, 426 (1999), https://perma.cc/9UXH-85P6.

247. *See infra* notes 238-45.

248. *See supra* Parts III.B.1-.2.

249. Donley, *supra* note 15, at 226-27.

250. *Id.* at 227-30.

251. *Id.* at 230.

252. *See id.* at 232-33.

253. *Id.* at 233.

254. *Id.*

The motivation and actions underlying abortion on the basis of severe fetal anomaly and the withdrawal of life support are the same, so parents should enjoy the same expansive right to parental autonomy before and after a nonviable fetus has been born. Because of developments in reproductive technology that the framers of the Fourteenth Amendment never could have anticipated, pregnant people can now detect severe fetal abnormalities before rather than after birth, allowing them to exercise their parental autonomy earlier. A historically rooted understanding of the Constitution under *Dobbs* does not require that we ignore improvements in technology when contemplating expansive rights. Instead, it implores us to enshrine the same degree of protection under the same originating principles that the framers espoused.[255] Because parents have historically enjoyed an expansive right to parental autonomy, including the right to make end-of-life decisions for their child with severe disabilities, an originalist-informed constitutional understanding permits end-of-life decisions at the earliest point at which a parent is equipped to make them—today, while their fetus is still in utero.

No matter the standard of review, state abortion proscriptions without an exception for severe fetal abnormality impermissibly intrude on parental rights. The common law and a century of Supreme Court jurisprudence recognize that parental autonomy is a fundamental right.[256] A parent's interest in exercising autonomy over end-of-life decisions for severely disabled children is equally strong before and immediately after their child's birth. The state's interests at these two points, however, differ considerably. The more a "potential life" decreases in viability, the more a state intrudes upon a parent's fundamental right to make decisions about their child's potential life. The standard of review for parental autonomy rights is higher than rational basis review; states seeking to interfere with parental decisions must overcome a strong presumption that the parent acts in their child's best interests.[257] But if states cannot even overcome this presumption to interfere with end-of-life decisions for "actual lives" of children with severe disabilities, it follows that they lack the authority to intervene in end-of-life decisions over "potential lives."

State laws that ban abortion without exceptions for severe fetal anomaly fail the deferential standard of review for parental autonomy and fail rational basis review. States lack any rational reason to interfere with the traditional deference afforded to parental decisions when the "potential lives" the state purports to protect are, by definition, incompatible with life. Absent a

255. *Cf. supra* notes 128-32 and accompanying text (describing how the Court extended the same "degree" of Fourth Amendment protection that existed at the Founding to modern technology).

256. *See supra* notes 221-24 and accompanying text.

257. *See supra* notes 225-29 and accompanying text.

legitimate reason, states have no authority to intrude on domains where parents have traditionally received nearly unfettered deference since the Founding.

C. Refuting *Dobbs*'s Secondary State Interests in Regulating Abortions of Fetuses with Severe Fetal Anomalies

Dobbs makes clear that the state's primary interest in regulating abortion stems from its "legitimate interest" in "potential life."[258] However, the *Dobbs* Court lists several other "legitimate state interests" besides protecting fetal life: "the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability."[259] In this Subpart, I explain how each one of these "legitimate state interests" does not apply in the context of severe fetal anomaly.[260]

1. Maternal health and safety

Rather than promoting the "protection of maternal health and safety,"[261] prohibiting abortion in the case of severe fetal abnormality jeopardizes maternal health and endangers pregnant people. In general, abortion is much safer than pregnancy, but this is particularly so for pregnancies characterized by severe fetal anomalies.[262] Fetal anomalies are the leading cause of miscarriage and a leading cause of stillbirths.[263] Consequently, prohibiting pregnant people from terminating fetuses with severe abnormalities obligates them either to wait until their body naturally miscarries or to undergo the perils of stillbirth or childbirth for a child who will die shortly after birth.[264] Furthermore, the emotional consequences of obligating pregnant people to carry fetuses with severe anomalies to term are devastating: Imagine watching a nonviable fetus grow in one's body for months, deflecting questions from inquisitive passersby, and enduring all the risks of pregnancy while knowing that the child will inevitably die shortly after birth.[265] Permitting abortion in such cases is both medically beneficial and humane.

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258. *See supra* notes 59-60.

259. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

260. *Id.*

261. *Id.*

262. *See supra* notes 139-43, 149-51 and accompanying text.

263. *See supra* note 35 and accompanying text.

264. *See, e.g.*, *supra* note 35 and accompanying text; Dickman et al., *supra* note 14, at 1-2 (explaining that anencephaly has a 100% post-birth mortality rate).

265. *See* Donley, *supra* note 15, at 231.

2. Cruel medical procedures and fetal pain

Abortion on the basis of severe fetal anomaly is not "gruesome or barbaric," nor would prohibiting it "mitigat[e] fetal pain."[266] Depending on the method used, terminating fetuses with severe abnormalities before birth can generate less fetal pain than the commonplace practice of denying newborns life-sustaining care.[267] There are procedures for initiating abortion that cause fetal demise within about five minutes and avoid affirmatively inducing fetal death, like severing the umbilical cord or removing the placenta.[268] In contrast, in cases where parents withdraw life-sustaining care from a newborn, it can take much longer—up to nearly six-and-a-half hours—for the child to die.[269] For children who are inevitably going to die shortly after birth, in utero abortion is quicker, more humane, and potentially less painful than withdrawal of life-sustaining treatment or death from failed resuscitation.[270]

3. The integrity of the medical profession

Abortion in the case of severe fetal abnormality does not compromise "the integrity of the medical profession" for several reasons.[271] First, the Supreme Court in *Gonzales v. Carhart* allowed states "to prevent certain practices that extinguish life and are close to actions that are condemned."[272] The practice in question was a particular type of abortion procedure that Congress found to bear a "disturbing similarity to the killing of a newborn infant."[273] As explained above, allowing children to die by withdrawing life-sustaining care

266. *Dobbs*, 142 S. Ct. at 2284.

267. *See* Donley, *supra* note 15, at 231-33.

268. *See id.* at 232-33 (analogizing the cutting of an umbilical cord to the removal of a ventilator for a child who cannot independently breathe); Kristina Tocce, Kara K. Leach, Jeanelle L. Sheeder, Kandice Nielson & Stephanie B. Teal, *Umbilicial Cord Transection to Induce Fetal Demise Prior to Second-Trimester D&E Abortion*, 88 CONTRACEPTION 712, 713-14 (2013) (finding that fetal demise occurred in 5.5 minutes or less for about 70% of dilation and evacuation abortions and that the longest time for fetal demise was 11 minutes).

269. Felix Oberender & James Tibballs, *Withdrawal of Life-Support in Paediatric Intensive Care—A Study of Time Intervals Between Discussion, Decision and Death*, 11 BMC PEDIATRICS art. 39, at 2 (2011), https://perma.cc/5V8G-GJGH.

270. *Cf.* Vernon et al., *supra* note 246, at 1800-01 (describing how infants in the pediatric ICU die).

271. *Dobbs*, 142 S. Ct. at 2284.

272. 550 U.S. 124, 158 (2007).

273. *Id.* (quoting Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14)(L), 117 Stat. 1201, 1206 (codified at 18 U.S.C. § 1531 note)); *see* Tocce et al., *supra* note 268, at 713-14.

shortly after birth actually *is* "the killing of a newborn infant."[274] If withholding life-sustaining sustenance over hours is not a "condemned" outcome but is rather the standard of care for critically ill newborns, then a procedure that results in the same outcome but takes mere minutes should find equal medical acceptance.[275]

Second, abortion in the case of severe fetal abnormality would occur only when medically appropriate. The very definition of severe fetal abnormality that this Note embraces involves the reasonable judgment of physicians and relies upon standards set forth by medical ethicists.[276] This provides a clear outer bound that roots diagnoses of severe fetal abnormality and subsequent abortion decisions within accepted medical guidelines.[277] The definition also requires a high degree of diagnostic certainty.[278] Obligating physicians to contravene their own ethical and medical standards does little to preserve the integrity of the medical profession.

Third, allowing abortion in the case of severe fetal abnormality promotes trust and faith in medical institutions. Pregnancies with severe fetal abnormalities are disproportionately likely to result in miscarriage and stillbirth, and abortion proscriptions in such circumstances force pregnant people to endure perilous delays to medically necessary treatment.[279] Furthermore, these abortions accord with the Hippocratic Oath that all doctors take, which requires that doctors exercise judgment in promoting health and mitigating harm.[280] Tying doctors' hands and obligating pregnant people to wait until they are "on death's door" before receiving a medically necessary abortion denigrates the integrity of the medical profession.[281]

4. Disability-based discrimination

Prohibiting abortion because of severe fetal abnormalities would not prevent "discrimination on the basis of . . . disability."[282] Disability-selective abortion is ethically contentious among disability advocates because advocates believe that it can provoke discrimination against living disabled people.[283]

274. *See supra* note 269 and accompanying text. Indeed, withdrawal of life-sustaining care causes the death of the newborn.

275. *See supra* notes 268-69 and accompanying text.

276. *See supra* notes 55-58, 63-65 and accompanying text.

277. *See id.*

278. *See id.*

279. *See supra* Part III.A.1.

280. *See* Chervenak et al., *supra* note 56, at 474.

281. *See supra* note 151 and accompanying text.

282. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

283. *See* Parens & Asch, *supra* note 51, at s2.

The abortions contemplated in this Note, however, differ from the typical case because the motivations for abortion differ. For fetuses that are incompatible with life or meaningful cognitive development, the motivations for abortion are rooted not in the ableist desire for a perfect child but in a desire to avoid imminent and inevitable fetal loss.[284] Thus, the ethical consequences of disability-selective abortion are far less objectionable for fetuses with severe fetal abnormalities than for fetuses with non-life-threatening abnormalities, who would otherwise be born and have sustained life beyond one year.[285] For this reason, renowned disability advocates like Adrienne Asch and Erik Parens acknowledge a parent's ethical justification for terminating these fetuses.[286]

5. There is no rational reason to prohibit abortion in the case of severe fetal abnormality

Even if the Supreme Court declined to apply its originalist-informed precedent and failed to recognize how the right to abortion in the case of severe fetal anomaly implicates fundamental rights, abortion proscriptions without an exception for severe fetal anomaly would still fail rational basis review. States derive no benefit and serve no legitimate interests by prohibiting abortions of fetuses with severe fetal anomalies. There can be no interest in the "potential life" of a fetus that is medically defined as lacking potential life, and even if states did have such an interest, they willingly abdicate that interest as soon as the child is born by permitting parents to withhold life-sustaining care. Instead, abortion proscriptions without exceptions for severe fetal anomaly serve only to irrationally deprive pregnant people of their liberty interest. This deprivation constitutes arbitrary, impermissible state action under the Fourteenth Amendment's Due Process Clause.[287]

Conclusion

At first glance, the holding in *Dobbs* appears to permit absolute abortion bans. When considering the marginal case of severe fetal anomaly, however, *Dobbs*'s holding appears less sweeping. Even under *Dobbs*'s understanding of the

284. Donley, *supra* note 15, at 229 ("Parents are also extremely motivated to avoid the death, and corresponding grief, that comes with the loss of a wanted pregnancy."); Parens & Asch, *supra* note 51, at s17 ("Families have a morally defensible interest in avoiding the stress and sorrow associated with having a child who has a uniformly fatal condition . . . .").

285. *See supra* Part I.B.

286. Parens & Asch, *supra* note 51, at s17 ("Families have a morally defensible interest in avoiding the stress and sorrow associated with having a child who has a uniformly fatal condition . . . .").

287. *See supra* Parts III.A.4, III.B.3.

Constitution, pregnant people possess an affirmative right to abortion on the basis of severe fetal anomaly, grounded in the fundamental rights to protect one's own health and the right to parental autonomy. Both rights are deeply rooted in our nation's history and tradition, and the framers of the Fourteenth Amendment understood them to be expansive. Today, through innovations in reproductive technology, pregnant people can reliably identify and safely terminate fetuses with severe anomalies. When considering this technological innovation, originalist-informed methodologies demand not that fundamental Fourteenth Amendment rights remain static but rather that they extend naturally into the modern era. Through a thorough examination of common law, case law, Supreme Court jurisprudence, and statutes effective at the time of the Fourteenth Amendment's ratification, a clear conclusion emerges: Had the framers of the Fourteenth Amendment been able to harness the technology to detect fetuses with severe anomalies, they would have guaranteed the right to abortion in the case of severe fetal anomaly.

Appendix: State Abortion Statutes in 1868

State	Year Passed	Exception for Health of Mother?	Title of Law	Other Notes
Alabama	1841	Yes	Act of Jan. 9, 1841, ch. 6, § 2, 1841 Ala. Laws 103, 143	Exception: "preserve" mother's life
Arkansas	1837	Yes	ARK. REV. STAT. ch. 44, div. 3, art. 2, § 6 (Ball & Roane 1838)	Exception: "preserve" mother's life
California	1850	Yes	Act of Apr. 16, 1860, § 45, 1850 Cal. Stat. 229, 233	Exception: "save" woman's life
Connecticut	1860	Yes	Act of June 23, 1860, § 1, 1860 Conn. Pub. Acts 65, 65	Exception: "preserve" mother's life
Florida	1868	Yes	Act of Aug. 6, 1868, ch. 3, § 11, 1868 Fla. Laws 61, 64	Exception: "preserve" mother's life
Illinois	1867	Yes	Act of Feb. 23, 1867, § 3, 1867 Ill. Pub. Laws 89, 89	Law does not apply to surgeon performing abortion for any "bona fide medical or surgical purpose."
Indiana	1859	Yes	Act of Mar. 5, 1859, 1859 Ind. Acts 130, 131	Exception: "preserve" mother's life
Iowa	1858	Yes	Act of Mar. 15, 1858, 1858 Iowa Acts 93, 93	Exception: "preserve" mother's life

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State	Year Passed	Exception for Health of Mother?	Title of Law	Other Notes
Kansas	1859	Yes	Act of Feb. 3, 1859, § 10, 1859 Kan. Sess. Laws 231, 233	Exception: "preserve" mother's life
Louisiana	1855	No	Act of Mar. 14, 1855, § 24, 1855 La. Acts 130, 132-33	
Maine	1857	Yes	ME. REV. STAT. tit. 11, ch. 124, § 8 (1857)	Exception: "preserve" mother's life
Maryland	1868	Yes	Act of Mar. 18, 1868, § 2, 1868 Md. Laws 314, 315	Exception: "secure the safety of the mother"
Massachusetts	1845	No	Act of Jan. 31, 1845, 1845 Mass. Acts 406, 406	This law forbids abortion when "malicious[] or without lawful justification." Case law contemporary to the passage of the Fourteenth Amendment clarifies that this law includes an exception to preserve the mother's life and health. *See* Commonwealth v. Sholes, 95 Mass. 554 (13 Allen), 558 (1866); Commonwealth v. Brown, 121 Mass. 69, 76-77 (1876).
Michigan	1846	Yes	MICH. REV. STAT. tit. 30, ch. 154, §§ 32-34 (1846)	Exception: "preserve" mother's life

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State	Year Passed	Exception for Health of Mother?	Title of Law	Other Notes
Minnesota	1866	Yes	MINN. GEN. STAT. ch. 94, § 11 (1867)	Exception: "preserve" mother's life
Mississippi	1857	Yes	MISS. REV. CODE ch. 64, § 34, art. 173 (1857)	Exception: "preserve" mother's life
Missouri	1835	Yes	Act of Mar. 20, 1835, art. 2, §§ 10, 36, 1835 Mo. Rev. Stat. 165, 168, 172	Exception: "preserve" mother's life
Nebraska	1866	No	NEB. REV. STAT. pt. 3, ch. 4, § 42 (Estabrook 1866)	Nebraska's 1866 law is an anti-poison law. In Nebraska's first code after it gained statehood, its abortion proscription expanded to include medicine and instruments. It also added an exception to "preserve the life" of the mother. NEB. REV. STAT. ch. 58, pt. 1, ch. 6, § 39 (Brown 1873).
Nevada	1861	Yes	Act of Nov. 26, 1861, § 42, 1861 Nev. Laws 56, 63	Exception: "save" mother's life
New Hampshire	1849	Yes	Act of Jan. 4, 1849, §§ 1-2, 1849 N.H. Laws 708, 708	Exception: "preserve" mother's life

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State	Year Passed	Exception for Health of Mother?	Title of Law	Other Notes
New Jersey	1849	No	Act of Mar. 1, 1849, 1849 N.J. Laws 266, 266-67	This law forbids abortion when "malicious[] or without legal justification." Case law contemporary to the passage of the Fourteenth Amendment clarifies that abortion is justified where the mother's life is at risk. *See* State v. Gedicke, 43 N.J.L. 86, 89 (1881).
New York	1845	Yes	Act of May 13, 1845, 1845 N.Y. Laws 285, 285-86	Exception: "preserve" mother's life
Ohio	1834	Yes	Act of Feb. 27, 1834, §§ 1-2, 1834 Ohio Gen. Acts 20, 20-21	Exception: "preserve" mother's life
Oregon	1864	Yes	OR. CODE CRIM. PROC. ch. 43, § 509 (Deady 1866)	Exception: "preserve" mother's life
Pennsylvania	1860	No	Act of Mar. 31, 1860, §§ 87-88, 1860 Pa. Laws 382, 404-05	This law forbids only abortions performed "unlawfully." *Dobbs* suggests that this includes cases when the life of the mother is at risk. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 n.35 (2022).
Rhode Island	1861	Yes	Act of Jan. 1861, ch. 371, 1861 R.I. Acts & Resolves 133, 133	Exception: "preserve" mother's life

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State	Year Passed	Exception for Health of Mother?	Title of Law	Other Notes
Texas	1857	Yes	TEX. PENAL CODE tit. 17, ch. 7, arts. 531-36 (1857)	Exception: "saving the life of the mother"
Vermont	1867	Yes	Act of Nov. 21, 1867, § 1, 1867 Vt. Acts & Resolves 64, 64-65	Exception: "preserve" mother's life
Virginia	1847	Yes	VA. CODE tit. 54, ch. 191, § 8 (1860)	Exception: "saving the life of such woman or child"
West Virginia	1863	Yes	W. VA. CONST. art. XI, § 8 (1862); VA. CODE tit. 54, ch. 191, § 8 (1860)	West Virginia's first state constitution, adopted in 1862 and ratified in 1863, imported Virginia's common law and statutory law. Virginia's abortion law, therefore, was operative in West Virginia in 1868 and includes an exception for "saving the life of such woman or child."
Wisconsin	1858	Yes	WIS. REV. STAT. tit. 27, ch. 164, § 11 (1858)	Exception: "preserve" mother's life