WHAT DOES *DOBBS* MEAN FOR THE CONSTITUTIONAL RIGHT TO A LIFE-OR-HEALTH-PRESERVING ABORTION?**

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INTRODUCTION

In *Roe v. Wade*[1] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[2] the Supreme Court ruled that there is a fundamental right to an elective abortion—that is, a right to an abortion for any reason—until fetal viability (currently around twenty-three weeks of gestation). In *Dobbs v. Jackson Women's Health Organization*,[3] the Court overruled *Roe* and *Casey*, thereby abolishing the right to an elective abortion. This Article is about what *Dobbs* means for the second, lesser-known constitutional right *Roe* and *Casey* recognized: the right to an abortion, even after viability, when "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[4] Justice Alito's majority opinion in *Dobbs* contains no explicit, specific statement about the status of this "life-or-health abortion right," as I will call it. As will become clear, however, both its present and its future are uncertain after *Dobbs*.

Begin with the basics: on what basis did *Roe* adopt the life-or-health abortion right, how has it functioned in *Roe*'s abortion regime, what is its scope, and why care about whether it survives *Dobbs* in whole or in part? *Roe*'s life-or-health abortion right appears suddenly at the end of the opinion. After declaring that the abortion right is fundamental, the *Roe* Court asked when the State's interest in protecting fetal life becomes "compelling," thus allowing States to prohibit abortions.[5] The Court's answer, of course, was that the State's interest in fetal life becomes compelling at viability.[6] In the same breath, however, the Court held that even this compelling State interest does not authorize States to prohibit abortions that are necessary to preserve the woman's life or health.[7]

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[1] Roe v. Wade, 410 U.S. 113 (1973).
[2] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
[3] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022).
[4] *Casey*, 505 U.S. at 879 (quoting *Roe*, 410 U.S. at 165).
[5] *Roe*, 410 U.S. at 162-63.
[6] *Id.* at 163.
[7] *Id.* at 163-64.

Roe did not explain the Court's reasons for constitutionalizing either the "life" or "health" components of the right. In context, however, it is clear that the Court did so by balancing the woman's interests against the State's interest in protecting what it called "potential life."[8]

Although *Roe* did not say so, its life-or-health abortion right was an amalgam of old and new: like the Texas law at issue in *Roe*, American abortion statutes had universally *permitted* abortions when necessary to preserve the pregnant woman's life.[9] In stark contrast, until the 1960s, American abortion statutes (including the Texas law in *Roe*), overwhelmingly did *not* permit abortions when necessary to preserve the pregnant woman's health.[10] Even in 1973, thirty States did not authorize health-preserving abortions.[11] *Roe* said nothing about this radical difference—from the standpoint of our legal tradition—between a right to a life-preserving abortion and a right to a health-preserving abortion. It simply recognized a unitary constitutional right, even after viability, to a life-or-health-preserving abortion.[12] This unitary right, however, encompasses two different categories of high-risk pregnancies: life-threatening and health-threatening. Although it is certainly true that many health-threatening conditions can become life-threatening if untreated,[13] life-threatening pregnancies are, by definition, a subset of health-threatening ones.[14]

For the past fifty years, the life-or-health abortion right played a distinctly secondary part in the abortion regime *Roe* and *Casey* established. The vast majority of women who obtained abortions

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[8] *Id.* at 163.

[9] *Id.* at 139.

[10] *See id.*

[11] *Id.* at 118 & n.2 (listing States).

[12] *Id.* at 155.

[13] "Obstetric hemorrhage is the leading cause of severe maternal morbidity and of preventable maternal mortality in the United States." Elliott K. Main et al., *Reduction of Severe Maternal Morbidity from Hemorrhage Using a State Perinatal Quality Collaborative*, 216 AM. J. OBSTETRICS & GYNECOLOGY 298.e1, 298.e1 (2017). Other common emergencies include "conditions like ectopic pregnancies, severe pre-eclampsia or pregnancy complications threatening septic infections or hemorrhages." Charlie Savage, *Justice Dept. Sues Idaho Over Its Abortion Restrictions*, N.Y. TIMES (Aug. 2, 2022), https://www.nytimes.com/2022/08/02/us/politics/biden-abortion-idaho-lawsuit.html [https://perma.cc/F32Q-S9EX].

[14] The relative sizes of the two categories depend on how threats to life and threats to health are defined.

under *Roe* did so by exercising their no-questions-asked right to a pre-viability elective abortion.[15] The life-or-health abortion right mattered in only two comparatively infrequent settings. First, it served as a required exception to State laws prohibiting post-viability abortions (as most States continued to do after *Roe*),[16] or restricting post-viability abortion methods to increase the chances the viable fetus would be born alive.[17] Second, the Court's post-*Roe* cases ruled that the life-or-health right was also a required exception to the application of all State *regulations* of pre- or post-viability abortions.[18] For example, a clinic need not comply with a twenty-four-hour waiting period if that delay would endanger a particular woman's life or health.[19]

Now that *Dobbs* has abolished the constitutional right to elective abortion, *Roe*'s life-or-health abortion right—were it to survive intact—would assume much greater importance, as the only constitutionally mandated exception to State laws prohibiting abortion even in the early stages of pregnancy (when almost all abortions occur). The stakes are potentially high: for the past half-century, although the life-or-health right has infrequently come into play, its scope has been both vague and broad. *Roe* did not explain what legal standard should be used to determine whether continuing a pregnancy endangers the woman's life or health.[20] Nor

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[15] Over 98% of abortions are estimated to occur before viability. *See Induced Abortion in the United States*, GUTTMACHER INST. (Sept. 2019), https://www.guttmacher.org/fact-sheet/induced-abortion-united-states [https://perma.cc/JH24-EQ8W] (indicating that only 1.3% of abortions occur after 21 weeks).

[16] Stephen G. Gilles, Roe*'s Life-or-Health Exception: Self-Defense or Relative-Safety?*, 85 NOTRE DAME L. REV. 525, 530-31 (2010) (noting that, as of 2010, forty-one States had statutes prohibiting post-viability abortions).

[17] *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 768-69 (1986) (striking down a restriction on post-viability abortion methods for failure to include a sufficiently broad maternal-health exception).

[18] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 880 (1992).

[19] *Id.* at 885. Laws prohibiting specific abortion methods were also required to provide an exception for cases in which any other method would be life-or-health-endangering. *See* Stenberg v. Carhart, 530 U.S. 914, 929-31 (2000).

[20] Many scholars have argued that in *Roe*'s companion case, *Doe v. Bolton*, the Court's "definition of a women's [*sic*] 'health' . . . as encompassing anything affecting her 'well-being' virtually precluded any possible regulation of abortion during the entire months of pregnancy." JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 695 (2006) (quoting Doe v. Bolton, 410 U.S. 179, 191-92 (1973)). *See also, e.g.*, Mary Ann Glendon, *The Women of* Roe v. Wade, 134 FIRST THINGS 19, 20 (2003) ("*Roe*'s dictum that [post-viability] restrictions might be permissible if they did not interfere

did *Roe*—or any post-*Roe* decision—commit the Court to understanding the right as grounded in an overriding interest in good health, or alternatively (and more narrowly) in self-defense principles.[21] Post-*Roe* decisions, however, signaled that health risks did not have to be life-threatening, or even severe, to trigger the life-or-health abortion right.[22]

In the wake of those cases, *Casey* stated that a woman is constitutionally entitled to an abortion whenever continuing her pregnancy would subject her to "significant health risks"[23]—a standard that could mean anything from non-trivial health risks to only seriously dangerous ones.[24] The Court's post-*Casey* decisions

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with the mother's health was negated by *Doe*'s definition of 'health' as 'well-being.'"); Michael Stokes Paulsen, *Abortion as an Instrument of Eugenics*, 134 HARV. L. REV. F. 415, 415 n.4 (2021) (describing *Doe*'s definition of health as "a formulation that renders the abortion choice essentially plenary in the third trimester as well"). I have argued, to the contrary, that *Doe*'s all-encompassing description of "health" applies only in the context of *elective* abortions, and therefore cannot possibly determine the meaning of *Roe*'s right to a health-preserving abortion. Gilles, *supra* note 16, at 554-58; *accord* Sherif Girgis, Essay, Dobbs*'s Immediate Legal Impact: Rational-Basis Review, Non-Elective Abortions, and* Doe v. Bolton 11 (July 24, 2022) (unpublished manuscript) (on file with author) ("Simply put, *Doe* was not about health exceptions at all . . . ."). As Part I will explain, *Dobbs* moots this interpretive disagreement by implicitly overruling *Roe*'s right to a health-preserving abortion.

[21] *See* Gilles, *supra* note 16, at 527 (A "relative-safety," or good-health, approach would focus on whether abortion is materially *safer* than continued pregnancy, whereas a self-defense approach would focus on whether "continued pregnancy would put the mother in grave danger of death or serious injury."). The Court's pre-*Dobbs* decisions "vacillated between—and at times straddled—these two approaches, without ever offering anything resembling a reasoned explanation." *Id.* at 529.

[22] *See, e.g.*, *Thornburgh*, 476 U.S. at 769 (striking down a law because it "require[s] the mother to bear an increased medical risk in order to save her viable fetus") (quoting Am. Coll. of Obstetricians & Gynecologists v. Thornburgh, 737 F.2d 283, 300 (1984)).

[23] *Casey*, 505 U.S. at 880. *Casey* did not say whether significant *mental* health risks suffice to come within the health exception. In the context of upholding Pennsylvania's "requirement that a woman be apprised of the health risks of abortion and childbirth," however, *Casey* stated that "[i]t cannot be questioned that psychological well-being is a facet of health." *Id.* at 882. *Cf.* United States v. Vuitch, 402 U.S. 62, 71-72 (1971) (construing statutory language authorizing abortions "necessary for the preservation of the mother's life or health" to conform to "the general usage and modern understanding of the word 'health,' which includes psychological as well as physical well-being").

[24] *Casey*, 505 U.S. at 879-80. The *Casey* Court upheld Pennsylvania's health exception, which required a "serious risk of substantial and irreversible impairment of a major bodily function," *id.* at 879 (quoting 18 PA. CONS. STAT. § 3203 (1990)), but only after deferring to the Third Circuit's narrowing construction of that language, which interpreted it to require only "a significant threat to the life or health of a woman." *Id.* at 880. The three specific conditions at issue in *Casey* were pre-eclampsia, inevitable

have treated this vague standard as controlling without further defining it.[25] In practice, the "significant health risk" test has generally enabled abortion providers to rely on the health-preserving abortion right whenever continued pregnancy presents material, case-specific risks[26] to the woman's physical health—and, in some circuits, to her mental health as well.[27] If *Roe*'s life-or-health abortion right remains good law after *Dobbs*, a hard-to-estimate but sizeable percentage of women facing unwanted pregnancies in States that ban elective abortions will be constitutionally entitled to an abortion at whatever stage of pregnancy "significant health risks" are present.

That scenario, however, will not happen if—as this Article assumes—the Court adheres to its holdings and reasoning in *Dobbs*. The following summary of the *Dobbs* Court's reasoning on the merits will set the stage for a preliminary analysis of why *Roe*'s

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abortion, and prematurely ruptured membrane. *Id.* at 978-79 (holding that each of these health risks qualified as a medical emergency under the statute as so construed). The language of Pennsylvania's health exception strongly resembles the self-defense concept of "serious bodily harm," but *Casey* ignored that resemblance. *See infra* note 127 and accompanying text. Nevertheless, because the Court upheld this provision of the Pennsylvania statute, a substantial minority of the States that banned post-viability abortions continued to define their exceptions to these bans in self-defense-like language. *See* Gilles, *supra* note 16, at 530-32. It is unclear whether this restrictive statutory language had any effect on how abortion providers in those States applied *Casey*'s "significant health risks" formulation.

[25] *See*, *e.g.*, Gonzales v. Carhart, 550 U.S. 124, 161 (2007) (treating *Casey*'s test as "controlling").

[26] Case-specific risks, of course, take account of risk factors that rest on statistical evidence. For example, a complication that would not impose significant health risks on a young, healthy woman might create significant risks if the woman were older and had pre-existing health problems. Such predictive judgments about individual women, however, are quite different from assuming that every pregnant woman is at risk of all possible pregnancy-related problems. Seemingly adopting that assumption, one recent commentator fallaciously claims that contemporary medical "research establishes that every pregnancy and birth entails significant risk for the pregnant person," and deduces that "[u]nrestricted abortion access, throughout pregnancy, is the health exception's logical mandate." Elyssa Spitzer, *Pregnancy's Risks and the Health Exception in Abortion Jurisprudence*, 22 GEO. J. GENDER & L. 127, 152, 171 (2020).

[27] Gilles, *supra* note 16, at 531-32 (suggesting reasons why lower courts will employ a broad interpretation of what qualifies as a "significant health risk"). *See also*, *e.g.*, Karlin v. Foust, 188 F.3d 446, 490 (7th Cir. 1999) (holding that a statute requiring "serious risk of substantial and irreversible impairment of one or more of the woman's major bodily functions" was "broad enough to reach significant threats to both physical and mental health" (quoting WIS. STAT. § 253.10(2)(d) (1998))).

life-or-health abortion right will almost certainly be overruled or severely limited (if *Dobbs* has not already done so *sub silentio*).[28]

Dobbs begins by holding that, in general, "a fundamental right must be 'objectively, deeply rooted in this Nation's history and tradition.'"[29] Applying that test, *Dobbs* finds that the right to abortion is not fundamental because "[u]ntil the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion."[30] The primary evidence on which the Court bases this conclusion is the restrictive abortion laws enacted by the States in the decades before and after the adoption of the Fourteenth Amendment in 1868, which remained in effect in almost every State until the 1960s.[31] Those laws overwhelmingly prohibited abortion throughout pregnancy, subject only to an exception for abortions necessary to save the life of the woman.[32] *Dobbs* holds that this enduring consensus criminalizing abortion throughout pregnancy necessarily means that the right to elective abortion cannot qualify as an implied fundamental right under the deeply rooted in tradition test.[33]

Dobbs also acknowledges that, even if a right lacks the requisite foundation in tradition, it may qualify as fundamental if it "is an integral part of a broader entrenched right" recognized in the Court's precedents.[34] *Dobbs* holds, however, that the right to an abortion cannot qualify under this alternative test because it lacks "a sound basis in precedent."[35] Unlike the other implied rights recognized in the Court's precedents (including the right to contraception), abortion poses "the critical moral question"[36] whether (and when) the human fetus should be entitled to "the most basic human right—to live."[37] The fact that abortion destroys the living fetus, *Dobbs* rules, "sharply distinguishes" the right to

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[28] For discussion of the latter possibility, see *infra* notes 45-51 and accompanying text.

[29] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).

[30] *Id.* at 2235.

[31] *See id.* at 2237, 2243-44, 2248-49 (relying on that evidence).

[32] *Id.* at 2253 (citing Roe v. Wade, 410 U.S. 113, 139 (1973).

[33] *Id.* at 2253-54.

[34] *Id.* at 2257.

[35] *Id.*

[36] *Id.* at 2236.

[37] *Id.* at 2261.

abortion, making the Court's other implied-rights decisions simply "inapposite."[38]

Since the two branches of the life-or-health abortion right have dramatically different histories, it should be immediately apparent that *Dobbs* has very different implications for their constitutional status. Because the right to a life-preserving abortion has extremely strong support in our legal history and tradition, it will likely remain good law. Because the same American statutes that prohibited elective abortions overwhelmingly also prohibited health-preserving abortions, the right to a health-preserving abortion will presumably fare no better than the right to an elective abortion. Indeed, the fact that a few jurisdictions chose to authorize health-preserving abortions strongly suggests that the other States deliberately rejected these broader exceptions.[39] Prior to the 1960s, a health-preserving abortion right had virtually no support in our legal tradition. Lacking that support, it must be overruled unless stare decisis analysis entitles it to protection. At first pass, then, the constitutional right to a life-preserving abortion likely survives *Dobbs*, but *Roe*'s broad constitutional right to a health-preserving abortion does not.

The analysis, however, must also consider the alternative path to the implied right status that *Dobbs* acknowledges: whether the right in question "is an integral part of a broader entrenched right."[40] Doing so lends further support to the life-saving abortion right, because it can be understood as grounded in the right of self-defense, which itself is likely fundamental. Our legal tradition has always recognized a right to use deadly force to avert imminent threats to life.[41]

This same line of analysis also offers potential support for a narrowly-defined 'self-defense' version of the health-preserving abortion right. Traditional (and contemporary) self-defense law also authorizes the use of *deadly* force to avert imminent threats of *serious bodily harm*.[42] The self-defense version of a health-

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[38] *Id.* at 2258.

[39] *See infra* notes 61-65 and accompanying text.

[40] *Dobbs*, 142 S. Ct. at 2257.

[41] *See infra* notes 124-25 and accompanying text.

[42] Deadly force is generally defined as force that is likely to cause death or "serious bodily harm." *See infra* note 123.

preserving abortion right would allow abortion (which invariably amounts to deadly force) when continuing the pregnancy was necessary to avert imminent danger of death or "serious bodily harm" to the woman. Although this possibility is sufficiently plausible to deserve careful consideration, I will argue that *Dobbs* should lead the Court to reject it.[43]

In light of this preliminary analysis, this Article is structured as if the Court will soon agree to re-examine *Roe*'s life-or-health abortion right, will grant certiorari on the following questions, and will answer them by applying the tests and reasoning contained in the *Dobbs* majority opinion:

> (1) Should the Court overrule the constitutional right to a health-preserving abortion recognized in *Roe* and *Casey*, which applies whenever continued pregnancy would subject the woman to "significant health risks"?
>
> (2) Should the Court overrule the constitutional right to a *life*-preserving abortion recognized in *Roe* and *Casey*?
>
> (3) If the Court upholds *Roe*'s life-preserving abortion right, but abrogates *Roe*'s health-preserving abortion right, should the Court recognize a constitutional self-defense abortion right when continued pregnancy would threaten death or "serious bodily harm" to the woman?

Part I addresses Question 1 (*Roe*'s health-preserving abortion right). I argue that the Court should hold that *Roe* and *Casey* were egregiously wrong to recognize a broad right to a health-preserving abortion, lacking any substantial support in our legal history and tradition or in the Court's precedents. Their holdings, based on nothing more than conclusory and arbitrary interest-balancing, are not entitled to stare decisis protection. *Dobbs* requires the Court to abrogate the right to a health-preserving abortion recognized in *Roe* and *Casey*.

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[43] *See infra* Part IV. As a predictive matter, however, it seems quite conceivable that this narrower version of a life-or-health abortion right could emerge, with both its branches defined in accordance with the traditional limits on the use of deadly force. The Court's habitual evasiveness regarding the exact scope of *Roe*'s life-or-health exception might even allow it to claim that this is the best interpretation of that right.

Part II takes up Question 2 (*Roe*'s life-preserving abortion right). I argue that there is an implied fundamental right to a life-preserving abortion, albeit for reasons *Roe* neglected to explain or rely on. That right has deep roots in our legal tradition, as *Dobbs* requires, both specifically in American abortion statutes, and more generally in a right of self-defense that is itself presumptively fundamental. Assuming a stare decisis analysis is necessary, the right to a life-preserving abortion should also be affirmed for that reason—because it cannot be said that *Roe* erred egregiously on this question of constitutional law.

Parts III and IV are devoted to Question 3 (a new "serious bodily harm" abortion right). Part III explains why—assuming that there is an implied constitutional right to self-defense that includes a right to use deadly force to avert threats of "serious bodily harm"—that right prima facie supports a parallel serious-bodily-harm abortion right.

Part IV explains why the right is nevertheless not fundamental under *Dobbs*. A serious-bodily-harm abortion right does not qualify as deeply rooted in our legal tradition, because the pre-*Roe* American abortion statutes in which that tradition was embedded overwhelmingly did not permit abortions if continued pregnancy was not life-threatening. Moreover, this right is not "integrated in a broader entrenched right" of self-defense. There are radical differences between abortion and normal self-defense situations that sharply distinguish a rule allowing deadly force to avert "serious bodily harm" from a constitutional right to destroy a fetus, which, under *Dobbs*, the State may protect as an "unborn human being" whenever pregnancy threatens such harm.[44]

Before turning to these hypothetical "questions presented," I pause to alert readers to a difficult and important question—and to explain why this Article does not attempt to answer it. Has *Dobbs* expressly overruled *Roe* and *Casey in toto*? If so, *Dobbs* has already overturned every holding in those opinions, including their holdings recognizing the life-or-health abortion right.[45] The question is

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[44] Threats of *severely* life-impairing bodily harm, such as a permanent vegetative state, however, would likely qualify for inclusion in the constitutional right to a life-preserving abortion because they seem on a par with death itself.

[45] Most notably, *Roe* also holds that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. 113, 158 (1973).

difficult because the sweeping language of the *Dobbs* opinion ("[T]he Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled . . . ."), read literally, says "yes" (several times),[46] but the Court's normal practices regarding the scope of its rulings strongly suggest that the opinion should be read to say "no." The constitutionality of *Roe*'s life-or-health abortion right was neither challenged nor ruled on below,[47] was not within the scope of the question on which the Court granted certiorari,[48] and was not briefed and argued by the parties.[49] If indeed the Court elected to depart from these customary norms (as its unqualified overruling language suggests), one would have expected it to explain why, consider the substantive soundness of the life-or-health abortion right, engage in a stare decisis analysis as to each affected holding,

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[46] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022). *See also id.* at 2242 ("We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . ."); *Id.* at 2284 ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.").

[47] The plaintiffs in *Dobbs*, an abortion clinic and its physician, challenged Mississippi's recently-enacted statute banning elective abortions after fifteen weeks, roughly two months before viability. *See* Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536 (S.D. Miss. 2018). *See also* Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 269 (5th Cir. 2019). The plaintiffs did not challenge the Mississippi Act's narrowly defined "medical emergency" provision for abortions after fifteen weeks, although it arguably infringed the life-or-health abortion right. *See* MISS. CODE ANN. § 41-41-191 (2018) (authorizing abortions only when "necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition arising from the pregnancy itself, or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function"). The lower courts, applying *Roe* and *Casey*, held the fifteen-week ban unconstitutional because it prohibited a significant number of pre-viability abortions. *Dobbs*, 945 F.3d at 273-74, 279.

[48] The Court granted certiorari on the question whether "all pre-viability prohibitions on elective abortions are unconstitutional." *Dobbs*, 142 S. Ct. at 2244 (quoting Pet. for Cert. 1). Only after the Court granted certiorari did Mississippi make its "primary argument," a more far-reaching one, asking the Court to "reconsider and overrule *Roe* and *Casey*." *Id.* at 2242.

[49] Even the State's request that the Court overrule *Roe* and *Casey* was framed in terms of elective abortions. *See, e.g.*, Brief for Petitioners at 1, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) ("Under the Constitution, may a State prohibit elective abortions before viability? Yes. Why? Because nothing in constitutional text, structure, history, or tradition supports a right to abortion. A prohibition on elective abortions is therefore constitutional if it satisfies the rational-basis review that applies to all laws.").

and include in its opinion an unequivocal statement that '*Roe* and *Casey* are overruled *in toto*' (or that 'the holdings in *Roe* and *Casey* recognizing a life-or-health abortion right are also overruled'). *Dobbs* does *none* of those things,[50] leaving the dissent to speculate about how far the decision's legal reach extends.[51]

The result is an important legal puzzle confronting the lower courts,[52] which must decide whether all or part of *Roe*'s life-or-

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[50] In its stare decisis analysis of the quality of *Roe*'s reasoning, the Court quotes *Roe*'s life-or-health holding as part of a summary of *Roe*'s "detailed set of rules" but offers no specific comment on it. *Dobbs*, 142 S. Ct. at 2266. In a footnote noting that *Roe* and *Casey* heavily restricted State laws regulating or prohibiting post-quickening abortions, the Court observes that *Roe*'s companion case, "*Doe v. Bolton*, 410 U.S. 179 (1973), has been interpreted by some to protect a broad right to obtain an abortion at any stage of pregnancy provided that a physician is willing to certify that it is needed due to a woman's 'emotional' needs or 'familial' concerns." *Dobbs*, 142 S. Ct. at 2255 n.40 (citation omitted). Although the Court offers no comment on the status of this "broad right to obtain an abortion at any stage of pregnancy," or the reading of *Doe* on which it supposedly rests, it notes Justice Thomas's disagreement with that reading in his denial of certiorari in Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 209 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036, 1039 (1998). *Id.*

[51] The *Dobbs* dissent does not take a definite—or consistent—position on what *Dobbs* means for life-or-health abortions. At first, the dissent observes that "[t]he majority does not say—which is itself ominous—whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical treatment." *Dobbs*, 142 S. Ct. at 2329 (Breyer, Sotomayor, & Kagan, JJ., dissenting). This suggests that *Dobbs* does not abrogate (but likely spells trouble for) *Roe*'s life-or-health abortion right. Later, the dissent implies that the majority's rational-basis review standard for laws regulating or prohibiting abortions will apply to the question, "[m]ust a state law allow abortions when necessary to protect a woman's life and health?" *Id.* at 2336 (Breyer, Sotomayor, & Kagan, JJ., dissenting). Rational-basis review would not apply, however, unless and until *Roe*'s life-or-health abortion right has been abrogated. Finally, the dissent asserts that the majority has issued "a decision greenlighting even total abortion bans," which (read literally) seems to suggest that the *Dobbs* majority thinks there is no constitutional path to a life-preserving abortion right. *Id.* at 2350 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

[52] In the only published opinion addressing the issue to date, the Second Circuit, rejecting a challenge to mandatory vaccination requirements based on an alleged fundamental right "to health and life" in *Casey*, responded as follows:

> The Supreme Court, however, recently overruled *Casey*, along with *Roe v. Wade*. Moreover, to the extent the cases still provide support for the propositions that a state cannot prevent abortions that are necessary to protect the health or life of a woman or hinder the independent medical judgment of a treating physician to recommend an abortion, the cases are distinguishable.

Goe v. Zucker, 43 F.4th 19, 32 n.14 (2d Cir. 2022) (citations omitted).

health abortion right is still legally binding[53] until (if ever) the Supreme Court provides a definitive answer. Nevertheless, the issue is *not* important for purposes of this Article and is therefore beyond its scope. This Article is about whether, in the end, *Dobbs* supports or rules out a life-preserving abortion right, a broad health-preserving abortion right, or a self-defense abortion right that would encompass pregnancies threatening death or "serious bodily harm." Because *Dobbs* does not purport to rule on the constitutional merits of *Roe*'s life-or-health abortion right, the answers to these questions do not turn on whether or not *Dobbs* has overruled *Roe* and *Casey in toto*. If this Article's conclusions are correct, the Court should come to the same substantive conclusions in either case: it should endorse a constitutional right to a life-preserving abortion, affirm that *Roe*'s right to a health-preserving abortion is abolished, and decline to recognize a new implied right to a self-defense abortion applicable to all threats of "serious bodily harm."[54]

I. THE COURT SHOULD EXPRESSLY OVERRULE *ROE*'S HEALTH-PRESERVING ABORTION RIGHT.

I turn now to the first hypothetical "question presented": should the Court overrule the constitutional right to a *health*-preserving abortion recognized in *Roe* and *Casey*, which applies whenever continued pregnancy would subject the woman to

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[53] A lower court could rule—on new grounds judged consistent with *Dobbs*—that there is a constitutional right to a life-preserving abortion or even to a health-preserving abortion. In doing so, however, the court would be breaking new constitutional ground, rather than applying *Roe*'s life-or-health abortion right as described and applied in *Casey*.

[54] The role of stare decisis in the Court's consideration of these issues would vary depending on whether *Dobbs* has overruled *Roe* and *Casey in toto*. Total overruling would necessarily exclude any possibility that *Roe*'s life-or-health abortion right was protected by stare decisis, thereby making that doctrine irrelevant. By contrast, if *Dobbs* has not overruled *Roe*'s life-or-health abortion right, the Court would need to perform a stare decisis analysis (presumably patterned on the one in *Dobbs*) to determine whether either branch of the right was entitled to stare decisis protection. For purposes of this Article, however, this difference proves to be a moot point. Parts I and II each include a stare decisis analysis, but in neither case does it affect the ultimate conclusion: *Roe*'s right to a health-preserving abortion should be abrogated even if doing so requires overriding stare decisis protection, and *Roe*'s right to a life-preserving abortion should be affirmed even if it is not eligible for stare decisis protection.

"significant health risks"? The answer is clearly yes. First, in an important forthcoming article, Professor Sherif Girgis argues that *Dobbs*'s *ratio decidendi*—the reasoning essential to the Court's abolition of the right to elective abortion—necessarily entails rejecting *Roe*'s right to a *health*-preserving abortion, while not undermining the right to a *life*-preserving abortion.[55] If Girgis is right, as I think he is, the Supreme Court is bound by that *implicit* overruling, and so (*a fortiori*) are the lower courts.[56] Second, even if the case for implicit overruling falls short, I will argue that *Dobbs*'s reasoning establishes that *Roe*'s right to a health-preserving abortion is *presumptively* unconstitutional—and therefore should be overruled unless it qualifies for *stare decisis* protection, which, under *Dobbs*'s approach to stare decisis, it clearly does not.[57]

A. Dobbs*'s Ratio Decidendi Implicitly Overrules* Roe*'s Right to a Health-Preserving Abortion*

If the *ratio decidendi* of *Dobbs*—the reasoning essential to the Court's abolition of the right to elective abortion—squarely and directly leads to the conclusion that *Roe* erred in recognizing the life-or-health abortion right, *Dobbs* has *pro tanto* implicitly abolished that right. Girgis argues that this condition is satisfied because of the decisive part American abortion statutes played in *Dobbs*.[58] By the time of the Fourteenth Amendment, three quarters

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[55] Girgis, *supra* note 20 (manuscript at 5-7). This type of overruling turns on a conclusion about how directly the Court's essential reasoning applies to the constitutional merits of a question its prior decision did not directly address. As such, it is very different from the "*in toto*" overruling discussed in the Introduction, which turns on the scope of the Court's judgment overruling a prior decision, independent of the merits of collateral holdings in that decision.

[56] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."); *see also* Ramos v. Louisiana, 140 S. Ct. 1390, 1404 (2020) ("It is usually a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases.").

[57] The difference between these two paths boils down to which way "the force of *stare decisis*" (as *Casey* called it) cuts. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 853 (1992). If *Dobbs*'s essential reasoning implicitly overrules *Roe*'s right to a health-preserving abortion, stare decisis would weigh *against* reviving it. If *Dobbs*'s essential reasoning makes *Roe*'s right to a health-preserving abortion presumptively extra-constitutional, stare decisis may still protect it, and the Court must engage in a stare decisis analysis before abrogating it.

[58] Girgis, *supra* note 20 (manuscript at 6-7).

of the States had enacted statutes prohibiting abortion throughout pregnancy, and "[t]he trend in the Territories that would become the last 13 States was similar."[59] The great majority of those jurisdictions permitted abortions only when necessary to preserve the life of the mother.[60] In most of those States, that exception was spelled out "in so many words."[61] In a small and shrinking minority of States, the statute criminalized abortions whenever done "unlawfully" or "without lawful justification."[62] Case law in those States varied, but sometimes interpreted such language as authorizing health-preserving abortions.[63] Only a few jurisdictions, at one time or another, adopted exceptions for "serious and permanent bodily injury" or, even more broadly, for "the health of the mother." As late as 1960, forty-six States prohibited all but life-

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[59] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 (2022).

[60] *Id.*

[61] Girgis, *supra* note 20 (manuscript at 7).

[62] See *Dobbs*, 142 S. Ct. at 2285-300, for a discussion of State abortion legislation. Appendix A lists the first statute "criminalizing abortion at all stages of pregnancy" in each of the thirty-seven States existing in 1868. Nine of these statutes were enacted after 1868. *Id.* at 2285-96. Of those thirty-seven statutes, twenty-seven contain express life-only exceptions; one (Maryland) refers to "the safety of the mother," and nine contain "willfully and maliciously" or similar language. *Id.* Appendix B lists the first such statutes in each of the thirteen territories that subsequently became States. *Id.* at 2296-00. Of these, ten contain express life-only exceptions, two (New Mexico and Wyoming) allow abortions that are life-preserving or necessary "to prevent serious and permanent bodily injury"; and one (Colorado) contained no exception, although it did require "the intention to procure the miscarriage of any woman then being with child." *Id.* at 2297-00. Finally, the 1901 District of Columbia statute permitted abortions "when necessary to preserve her life or health." *Id.* at 2300. It is noteworthy that *no* statute adopted after 1866 (Nebraska) used the "willfully and maliciously" language rather than explicitly allowing life-preserving (and, rarely, health-preserving) abortions. *Id.* at 2292. Moreover, by 1950, six of the nine States listed in Appendix A as using "willfully and maliciously" language had replaced it with life-of-the-mother exceptions. Texas is a striking example: the 1854 statute contained in Appendix A requires the intent "unlawfully and maliciously" to procure an abortion, *id.* at 2289, but that provision was replaced after only three years: the Texas statute at issue in *Roe* contained an exception, first adopted in 1857, for abortions "by 'medical advice for the purpose of saving the life of the mother,'" Roe v. Wade, 410 U.S. 113, 119 (1973).

[63] *See* Commonwealth v. Brown, 121 Mass. 69, 76 (1876). In the twentieth century, this same court interpreted a provision of this type broadly, as allowing abortion if "necessary to preserve the woman's life or her physical or emotional health." *Dobbs*, 142 S. Ct. at 2253 n.35 (describing Commonwealth v. Wheeler, 53 N.E.2d 4, 5 (1944)). By then, however, only two other States (New Jersey and Pennsylvania) still retained similar language, and *Dobbs* finds "no clear support in [their] case law for the proposition that abortion was lawful where the mother's life was not at risk." *Id.*

preserving abortions, and "[t]his overwhelming consensus endured until the day *Roe* was decided."[64]

The crux of Girgis's argument is that *Dobbs*, in applying its 'deeply rooted in tradition' test, did not merely conclude that the right to elective abortion lacked the requisite support in our legal tradition. The Court adopted, as a crucial premise of its decision, the proposition that "[t]here is no deeply rooted right to *X* if 'the vast majority of the States [had] enacted statutes criminalizing' *X* as of 1868, and later practice was similar."[65] In so doing, he continues, the Court treated the restrictive American abortion statutes as "so to speak, constitutional *per se*. They don't just happen to be constitutionally permissible, in virtue of satisfying some independent standard; they *are* the constitutional standard on how much States are free to regulate today."[66] It necessarily follows—and *Dobbs* so holds—that the right to elective abortion is not fundamental because, throughout our tradition, the vast majority of States criminalized elective abortions. The same premise necessarily leads to the parallel conclusion that the right to a health-preserving abortion is not fundamental because, throughout our tradition, the vast majority of States also criminalized health-preserving abortions. Thus, *Dobbs*'s *ratio decidendi* compels the conclusion that there is no fundamental right to a health-preserving abortion.

In my view, Girgis is right: *Dobbs*'s *ratio decidendi* directly and necessarily implies that there is no implied constitutional right to a health-preserving abortion under the controlling deeply-rooted in tradition test. Nor is there any possibility that *Roe*'s version of such a right could be preserved as "an integral part of a broader entrenched right" recognized in the Court's fundamental rights cases.[67] Because both paths to implied-right status are foreclosed, lower courts are bound to reject constitutional challenges to State laws that prohibit health-preserving abortions, and the Supreme

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[64] *Dobbs*, 142 S. Ct. at 2253.

[65] Girgis, *supra* note 20 (manuscript at 5) (second alteration in original) (footnote omitted) (citing *Dobbs*, 142 S. Ct. at 2252-53).

[66] Girgis, *supra* note 20 (manuscript at 8).

[67] As Part III will discuss, the only "broader right" that could plausibly play that role is a right to self-defense—and our legal tradition has never authorized persons to use deadly force whenever another person's continued existence subjects them to "significant health risks."

Court should consider itself bound to abrogate *Roe*'s health-preserving abortion right if that question comes before it.

B. Stare Decisis Analysis Confirms that Roe*'s Health-Preserving Abortion Right Should Be Overruled*

Although I agree with Girgis's analysis, arguments for overruling based on a prior opinion's reasoning are inherently more contestable than arguments based on explicit holdings. The Justices not infrequently disagree about which reasoning in their prior opinions should be treated as binding,[68] and one can imagine some lower courts disagreeing with Girgis's characterization of *Dobbs*'s legally binding effects.[69] Moreover, some of the same factors (grounded in the Court's customary norms) that create uncertainty about whether *Dobbs* overruled *Roe* and *Casey in toto* might lead the Court to be hesitant about relying solely on the *ratio decidendi* argument. Because a *stare decisis* analysis strongly supports the same ultimate conclusion—*Roe*'s health-preserving abortion right must be abolished—the Court might well choose to rely, in the alternative, on the less absolute characterization of *Dobbs*'s implications that is needed to trigger stare decisis analysis.

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[68] For example, the majority in *Seminole Tribe* claimed to be applying binding law. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66-67 (1996) ("We adhere . . . to the well-established rationale upon which the Court based the results of its earlier decisions."). The dissenting Justices, however, argued that although "there are statements in the cases that point toward [the majority's] conclusion," those statements "are dicta in the classic sense, that is, sheer speculation about what would happen in cases not before the court." *Seminole Tribe*, 517 U.S. at 125 (Souter, J., dissenting). *Compare, e.g.*, Printz v. United States, 521 U.S. 898, 926 (1997) (asserting that New York v. United States, 505 U.S. 144, 188 (1992), "held" that the federal government "may not compel the States to enact or administer a federal regulatory program"), *with Printz*, 521 U.S. at 963 (Stevens, J., dissenting) (arguing that the words "or administer" were dictum because "that language was wholly unnecessary to the decision of the case").

[69] The Court has often reminded the lower courts that "[i]t is this Court's prerogative alone to overrule one of its precedents . . . Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." Bosse v. Oklahoma, 137 S. Ct. 1, 3 (2016) (per curiam) (citing United States v. Hatter, 532 U.S. 557, 567 (2001); Hohn v. United States, 524 U.S. 236, 252-53 (1998)). *Dobbs* does not purport to "reconsider" *Roe*'s life-or-health abortion holding—it studiously refrains from any specific discussion of its merits. Consequently, it would not be surprising to see lower-court opinions along the lines of "until this Court receives definitive guidance from the Supreme Court, it must continue to enforce the right to a life-or-health-preserving abortion."

By attaching controlling significance to the tradition embedded in the restrictive American abortion statutes, *Dobbs* strongly implies that *Roe* erred as an original matter in recognizing the right to a health-preserving abortion, and therefore that the right is *presumptively* extra-constitutional. That conclusion does not suffice to abrogate the right, but it does suffice to require a stare decisis analysis. As I'll now argue, applying *Dobbs*'s stare decisis reasoning, which identifies "five factors [that] weigh strongly in favor of overruling *Roe* and *Casey*," shows that they also weigh heavily in favor of abolishing the health-preserving abortion right.[70]

Dobbs's stare decisis analysis begins by finding *Roe* and *Casey* "egregiously wrong and deeply damaging," because "the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people."[71] That description squarely applies to the health-preserving abortion right: having first "usurped" the States' authority to prohibit elective abortions before viability, *Roe* and *Casey further* usurped much of the States' remaining authority—to prohibit post-viability abortions and regulate all abortions—by superimposing a health-preserving abortion right on all State laws touching on abortion.

Dobbs's stare decisis analysis places equally heavy emphasis on the "exceptionally weak" quality of *Roe*'s and *Casey*'s reasoning in recognizing the right to elective abortion.[72] *Roe*'s reasoning for recognizing the health-preserving abortion right is no better.[73] *Roe* claimed, without any explanation, that the State's interest in protecting fetal life grows stronger as the pregnancy progresses.[74] It further claimed, on the basis of a conclusory assertion about

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[70] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022). The five factors are "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance." *Id.*

[71] *Id.* at 2265.

[72] *Id.* at 2243.

[73] I omit separate consideration of *Casey*, which reaffirmed *Roe*'s life-or-health abortion right by quotation, sans reasoning. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (quoting Roe v. Wade, 410 U.S. 113, 164-65 (1973)).

[74] *Roe*, 410 U.S. at 162-63.

viability (a line *Dobbs* holds to be "arbitrary")[75], that the State's interest in fetal life becomes compelling at that time.[76] Then, without *any* further reasoning, *Roe* posited that the preservation of the mother's life or health always trumps the State's compelling interest in protecting the viable fetus.[77] *Roe* presumably arrived at this conclusion by somehow balancing the woman's interests against the State's (and *Casey* later interpreted *Roe* in interest-balancing terms).[78] *Dobbs* rejects this methodology in terms that also apply to the health-preserving abortion right:

> Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." But the people of the various States may evaluate those interests differently. . . . Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.[79]

Having arrogated the authority to balance interests, *Roe* compounded that mistake by failing to offer any justification for dramatically expanding the traditional exception for life-preserving abortions to include health-preserving ones. That is an egregious error under the "deeply rooted in [our] history and tradition" test *Dobbs* mandates for implied fundamental rights.[80] To top it off, after conceding that the State has a *compelling* interest in protecting the lives of viable fetuses, *Roe* nullified that interest whenever continued pregnancy would endanger the woman's health.[81] When else has the Court held, or even suggested, that an individual's interest in continued health—or even in continued

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[75] *Dobbs*, 142 S. Ct. at 2269.

[76] *Roe*, 410 U.S. at 163.

[77] *Id.* at 165.

[78] *See* Stephen G. Gilles, *Why the Right to Elective Abortion Fails* Casey*'s Own Interest-Balancing Methodology—and Why It Matters*, 91 NOTRE DAME L. REV. 691, 701-06 (2015).

[79] *Dobbs*, 142 S. Ct. at 2236.

[80] *Id.* at 25.

[81] *Roe*, 410 U.S. at 162-64.

life—categorically trumps the application of a law that is narrowly tailored to advance a compelling State interest?[82]

The right to a health-preserving abortion, as posited in *Roe* and applied in *Casey* also "score[s] poorly on the workability scale,"[83] albeit for somewhat different reasons than *Casey*'s "undue burden" test. Like the undue burden test, *Casey*'s "significant health risks" description of the right's scope is vague, leaving a "wide gray area" of uncertainty.[84] The Court's decades-long failure to explain how severe, imminent, and likely health risks must be in order to trigger the right gave lower courts no guidance and, for that reason, one might have expected multiple circuit splits such as the undue burden test generated.[85] That it did not is a testimony to just how difficult it would be for a prosecutor to prove that a doctor's certification of "significant health risks" was not based on a good-faith medical judgment. *Roe*'s health-preserving abortion right left the States ill-equipped to police any but the most extreme examples of prohibited late-term abortions disguised as health-preserving ones. That is concededly a different kind of unworkability than what *Dobbs* faulted *Casey* for. But a constitutional standard that effectively deprives a State of the ability to advance a compelling State interest is unworkable in a more fundamental sense because it fails in practice to strike the very balance of interests on which it claims to be based.

The fourth *Dobbs* factor—"distorti[ng] . . . important but unrelated legal doctrines"[86]—looms less large for the Court's cases dealing with the health-preserving abortion right (although *Colautti v. Franklin* clearly distorted the void-for-vagueness doctrine).[87] But *Dobbs* does not suggest that *each* of the five factors that weighed against stare decisis for the right to elective abortion

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[82] *Cf.* Selective Draft Law Cases, 245 U.S. 366, 378 (1918) ("[T]he very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."). A law prohibiting abortions is self-evidently narrowly tailored to protect the State's interest in the life of each individual fetus.

[83] *Dobbs*, 142 S. Ct. at 2272.

[84] *Id.*

[85] *See id.* at 2274-75.

[86] *Id.* at 2238.

[87] 439 U.S. 379, 400-01 (1979); *see* Gilles, *supra* note 16, at 567-68 (describing the distortion).

must be present to justify an overruling. As for the "reliance" factor, the same absence of "concrete reliance" that applies to elective abortions applies to health-preserving ones, and for the same reason: "reproductive planning could take virtually immediate account of any sudden restoration of State authority to ban abortions."[88] Finally, the *Dobbs* Court's rejection of *Casey*'s unprecedented argument that reaffirming *Roe*'s "essential holding" was necessary to "the preservation of public approval of the Court" is applicable here as well—because it rests on the general principle that "[t]he Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles."[89]

To summarize: now that *Dobbs* has abolished the constitutional right to elective abortion, *Roe*'s health-preserving abortion right must also be abolished (if *Dobbs* has not already had that effect, as Girgis argues).[90] *Roe* and *Casey* recognized *both* of these abortion rights on the basis of the same defiance of our legal tradition, the same disregard for "the critical moral question posed by abortion,"[91] and the same arrogation of the people's role in balancing the competing interests of the woman and the fetus.[92] Nor can stare decisis insulate *Roe*'s health-preserving abortion right from being overruled. In declaring that right, *Roe* was egregiously wrong, badly reasoned, struck a purported balance that was unworkable in practice, and created a right that did not engender substantial reliance.

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[88] *Dobbs*, 142 S. Ct. at 2276 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992)). On average, women may be less able to anticipate pregnancy-related health problems than other problems that would lead them to seek an abortion if they became pregnant. But the key distinction regarding reliance drawn in Dobbs is between "conventional, concrete reliance interests" and "a more intangible form of reliance," not between more and less foreseeable results of becoming pregnant. *Id.*

[89] *Dobbs*, 142 S. Ct. at 2278.

[90] Girgis, *supra* note 20 (manuscript at 5-7). In the short run, there is an important practical difference between these two scenarios: if a stare decisis analysis is necessary to overrule *Roe*'s health-preserving right, the lower courts must wait for the Supreme Court to do so. *See* Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (per curiam).

[91] *Dobbs*, 142 S. Ct. at 2258.

[92] *Id.*

II. A RIGHT TO A LIFE-PRESERVING ABORTION CAN BE ESTABLISHED BASED ON TRADITION (AND THE SELF-DEFENSE RIGHT UNDERLYING THAT TRADITION)

Part I argued that *Roe*'s broad, vague right to a health-preserving abortion either already has been abrogated by virtue of *Dobbs*'s *ratio decidendi*, or inevitably will be abrogated because it rests on an egregiously erroneous ruling that does not warrant stare decisis protection. On the other hand, precisely because the American legal tradition on which *Dobbs* relies universally recognized the lawfulness of life-preserving abortions, the life-preserving abortion right has at least a prima facie claim to fundamental-right status. Consequently (unless *Dobbs* overrules *Roe* and *Casey in toto*), *Roe*'s life-preserving abortion right likely *is* entitled to stare decisis protection.[93] After *Dobbs*, it is impossible to argue that *Roe* and *Casey* were *egregiously* wrong in recognizing a fundamental right to a life-preserving abortion and that the Nation was deeply damaged as a result.[94]

The analysis differs if *Dobbs* has overruled *Roe* and *Casey in toto,* so that no holding in those opinions is binding law.[95] On that assumption, the slate is wiped clean, and a life-and-health abortion

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[93] It seems quite unlikely that any State will ban life-preserving abortions. Nevertheless, there may well be litigation over the *scope* of the life-preserving abortion right—especially in States that do not permit health-preserving abortions. Idaho's abortion statute defines a life-preserving abortion as one that is "necessary to prevent the death of the pregnant woman," and makes that justification an affirmative defense to the crime. Savage, *supra* note 13. A constitutional challenge to a State's definition or application of its exception for life-preserving abortions would invite the counterargument that the statute must be upheld because there is no constitutional right to a life-preserving abortion.

[94] As Justice Kavanaugh points out in his *Dobbs* concurrence, then-Justice Rehnquist, who made the American statutes in force in 1868 the centerpiece of his *Roe* dissent, simultaneously suggested that abortions to save the life of the mother are constitutionally required. *Dobbs*, 142 S. Ct. at 2305 n.2 (Kavanaugh, J., concurring) (citing Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting)).

[95] This possibility gains some plausibility from the proposition that "*stare decisis* is 'a doctrine of preservation, not transformation.'" *Dobbs*, 142 S. Ct. at 2281 (quoting Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring)). *Dobbs* invokes that proposition in rejecting Chief Justice Roberts's claim that *Roe*'s viability rule can be "discarded" while preserving the right to elective abortion on stare decisis grounds. *Dobbs*, 142 S. Ct. at 2281. If the viability rule is not "separable from the constitutional right," it could be argued that *Roe*'s life-preserving right is not separable from its health-preserving right. *Id.*

right—whatever its exact scope—"must stand on its own" if it "is to become the law of the land."[96] After *Dobbs*, might the Court recognize a newly minted and narrower version of a non-elective abortion right than the one *Roe* and *Casey* erroneously imposed on the States?

To answer that question, the place to begin is obviously with a proposed post-*Dobbs* constitutional right to a *life-preserving* abortion. Unless that right exists, *a fortiori* there is no right to any version of a *health-preserving* abortion.

The relevant history is spare and straightforward. At common law, there was no specific doctrine authorizing abortions to protect the woman, but there was also no rule making self-defense (or the related defense of necessity) inapplicable. Courts and commentators treated it as obvious that a doctor would be justified in performing an abortion to save the life of the woman.[97] The early American statutes codifying the crime of abortion generally contained life-of-the-mother exceptions or language from which courts could infer that a life-saving abortion would not be "unlawful."[98] Without exception, the nineteenth-century statutes, compiled in the Appendices to *Dobbs* permitted life-preserving abortions, and no State subsequently prohibited them.[99] Whatever its exact scope,[100] therefore, the right to a life-preserving abortion

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[96] *Dobbs*, 142 S. Ct. at 2282 (discussing the "reasonable opportunity [to have an abortion]" rule proposed by Chief Justice Roberts, after concluding that it is a "new" rule that "*stare decisis* cannot justify").

[97] *See, e.g.*, Commonwealth v. Sholes, 95 Mass. (13 Allen) 554, 558 (1866) (An abortion "done by a surgeon for the purpose of saving the life of the woman" is among the "circumstances which would furnish a lawful justification"); FRANCIS WHARTON, 2 A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 1230 (7th ed. 1874). ("Of course it is a defence that the destruction of the child's life was necessary to save that of the mother.").

[98] *See* DELLAPENNA, *supra* note 20, at 277. A few early statutes did not contain an express maternal-life exception, but required that the abortion be done "willfully and maliciously." *Id.* at 268-69 (citing an 1821 Connecticut statute). That language would presumably have provided a doctor who performed a life-saving abortion with a defense at common law. *Cf. Dobbs*, 142 S. Ct. at 2253 n.35 (noting that the few States with similar provisions did not allow abortions "where the mother's life was not at risk," and possibly only in cases where her health was threatened).

[99] *See Dobbs*, 142 S. Ct. at 2282.

[100] The traditional American abortion statutes did not attempt to quantify the imminence or probability of death from continued pregnancy. If there is a constitutional right to a life-preserving abortion, case law and other relevant evidence about how the right was understood may provide some guidance on these important issues.

has a powerful claim to being deeply rooted in our legal history and tradition.[101]

Recognizing a new implied constitutional abortion right after *Dobbs*, however, cannot be taken for granted. *Dobbs* "return[s] the issue of abortion to the people's elected representatives,"[102] thereby allowing them to determine how "the critical moral question posed by abortion"[103] should be answered. That moral question is not limited to whether *elective* abortion should be permitted. If the people of a State determine that the fetus (whether at conception or some later point in its development) is an unborn human being whose right to live should be legally safeguarded from abortion, as *Dobbs* holds that the Constitution allows them to do, their moral (and legal) reasoning will not have reached its end. The people will immediately confront a further question: under what circumstances, if any, does morality require (or permit) a legal exception to protect the life or health of the mother although, pre-viability, terminating the pregnancy necessarily will result in the death of an innocent human being?

Many plausible answers have been given to this moral question and its legal implications. Here, I shall mention only two, chosen because they provide illuminating contrasts with the model that American statutes almost universally followed. First, espousing the view that directly killing an innocent human being is always morally wrong, a State might authorize terminating the pregnancy if necessary to save the woman's life, but forbid *directly* killing the fetus.[104] No pre-*Roe* American statute drew this

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[101] *See* Girgis, *supra* note 20 (manuscript at 3-4). Granted, the absence of a prohibition on life-saving abortions does not *ipso facto* demonstrate that the liberty to have such an abortion was deeply rooted *as a right* in our history. Here, however, the States were consciously expanding the common-law crime of abortion, while in the same breath, explicitly authorizing life-preserving abortions. And they were doing so against a common-law background in which general self-defense principles provided powerful confirmation that an abortion to save one's life was more a matter of traditional, natural right than of legislative grace or social policy.

[102] *Dobbs*, 142 S. Ct. at 2244.

[103] *Id.* at 2258.

[104] As a theological and moral matter, the Catholic Church endorsed this position in the late nineteenth century, "excluding 'any surgical procedure whatsoever that directly kills either the fetus or the pregnant mother.'" GERMAIN G. GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 179 (1970) (quoting an 1889 pronouncement by the Congregation for the Doctrine of the Faith). The Church repeatedly reaffirmed this position during the twentieth century. *See id.* at 180-84. The

distinction between what I have elsewhere termed "fetus-sparing" abortion methods (such as inducing premature labor) and techniques that kill the fetus.[105] Indeed, nineteenth-century American doctors frequently chose to directly kill late-term fetuses when that was the only feasible means of saving the woman's life.[106]

Alternatively, a State whose citizens "believe fervently that a human person comes into being at conception [or some later point] and that abortion ends an innocent life"[107] might decide that preference should not be given to the life of *either* the woman or the fetus. Instead, the State might require that both lives be weighed equally, and that an abortion be allowed only if it would be preferable on that assumption.[108] This approach would typically

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Church apparently did not, however, insist that this strict position be enforced by secular criminal law. *See* John T. Noonan, Jr., *Introduction* to THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES ix, xi (John T. Noonan, Jr. ed., Harvard Univ. Press 1970) ("[W]here the life of the mother could be saved only by taking of the life of the child in the womb[,] [t]he casuistry of theologians and the common sense of lawmakers agreed that, with these alternatives, no legal obligation could be imposed on the mother to prefer the child's life to her own; if she made the choice of self-sacrifice[,] it was in obedience to a higher law of love than common morality or law could enforce.").

[105] *See* Gilles, *supra* note 16, at 534. After viability, the fetus may survive if a fetus-sparing method is used. For that reason, during *Roe*'s reign, many States attempted to require doctors to use fetus-sparing methods when performing post-viability abortions. The Supreme Court sharply limited the effectiveness of these laws by effectively requiring that they applied only if the fetus-sparing method would not expose the mother to any significantly greater health risk. *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 769 (1986); Gilles, *supra* note 16, at 569-71. Under *Dobbs,* States will likely be free to mandate the use of fetus-sparing methods when doctors perform life-preserving abortions so long as using that method does not itself endanger the woman's life.

[106] For various reasons (including rickets and calcium deficiencies), many nineteenth-century English and American women suffered from small or deformed pelvises through which the fetus's head could not pass, causing obstructed labor that often resulted in the death of both mother and child. Caesarean section was not an option, because—in an era without antisepsis or antibiotics—it typically resulted in the death of the woman. *See* Jane Elliot Sewell, *Cesarean Section – A Brief History*, *in* A BROCHURE TO ACCOMPANY AN EXHIBITION ON THE HISTORY OF CESAREAN SECTION AT THE NATIONAL LIBRARY OF MEDICINE 7-9 (1993). The solution was "a once common procedure known as a 'craniotomy'—the crushing of an impacted fetal head when normal birth proved impossible and failure to extract the fetus would doom both mother and child to death." DELLAPENNA, *supra* note 20, at 527.

[107] *Dobbs*, 142 S. Ct. at 2240 (describing one of the "sharply conflicting views" held by many Americans).

[108] For example, suppose there is a 30% chance that the mother of a pre-viable fetus will die before the fetus becomes viable (in which case the fetus will die as well) and a 70% chance that both mother and fetus will survive. If the fetus is aborted, the mother

permit abortions when both the woman and the fetus would likely die unless the pregnancy was terminated, but would tend to *forbid* them when—although the woman's life was in serious danger—the odds were that both the woman and the fetus would survive if the pregnancy continued. It is striking, however, that no State seems ever to have adopted this proposal.[109] Instead, so long as terminating the pregnancy was deemed necessary to preserve the woman's life, the doctor could lawfully perform an abortion. The statutes did not define "necessary" or "preserve," but I am not aware that any court ever held that the attending physician (or physicians) was required to determine that maternal death was inevitable (or even more likely than not) before concluding that an abortion was justified.[110]

These comparisons highlight two important respects in which traditional American abortion statutes tracked the law of self-defense. Just as self-defense law authorizes the use of deadly force to kill a person who imminently threatens another's life, the abortion statutes permitted the doctor to terminate a life-threatening pregnancy by methods that involved directly killing the

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will live, and thus one life will be saved. If no abortion is performed, there is a 30% chance that two lives will be lost, and a 70% chance that two lives will be saved, so, on average, 1.4 lives are saved. The hypothetical statute in text would therefore prohibit this abortion even though it would presumably qualify as life-preserving under the traditional statutory exceptions.

[109] On this point, Texas's characterization of its statute as requiring that "the life of the pregnant mother . . . [be] balanced against the life she carries within her" is over-simplified. Roe v. Wade, 410 U.S. 113, 150 (1973).

[110] I acknowledge, however, that the statutes typically described the exception in terms that could be read to require a substantial probability of death. *See, e.g.*, N.Y. REV. STAT., pt. 4, tit. 2, ch. 1, § 9 (1829) ("unless the same shall have been necessary to preserve the life of such mother"); ME. REV. STAT., tit. 12, ch. 160, § 13 (1841) ("unless the same shall have been done as necessary to preserve the life of the mother"); 1841 Ala. Laws 143 ("unless the same shall be necessary to preserve her life"). *Dobbs*, 142 S. Ct. at 2285-96 (collecting statutes). None of the statutes specified whether "necessary," in this context, should be understood to mean "absolutely necessary," "very necessary," or merely "necessary," as in "convenient" or "useful" for a particular purpose (to borrow from Chief Justice Marshall's explanation of the word's range of meanings in the early nineteenth century). McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 323-26 (1819) (discussing the word "necessary" in the Necessary and Proper Clause). It is also noteworthy that some of the statutes (including the New York statute quoted in this footnote) created what amounts to a second exception for an abortion that "shall have been advised by two physicians to be necessary for such purpose." N.Y. REV. STAT., pt. 4, tit. 2, ch. 1, § 9 (1829). Investigating the possible implications of these statutory nuances is beyond the scope of this Article.

fetus. And, just as self-defense law allows the use of deadly force even if the aggressor is more likely to die than the defender, likewise with abortion: even though a pre-viability abortion was certain to result in the death of the fetus, a severe risk of maternal death sufficed to come within the exception.

As Part III will discuss, the statutory right to a life-preserving abortion is narrower in scope than standard self-defense doctrine, which also authorizes the use of deadly force to avoid threats of "serious bodily harm."[111] That difference, however, does not alter the fact that the right to a life-preserving abortion aligns with the core, paradigmatic case of self-defense: preserving one's own *life* by using whatever force is necessary to stop an imminent threat to it. Under *Dobbs*, even if a right lacks an independently sufficient foundation in tradition, it may qualify as fundamental if it is "an integral part of a broader entrenched right" recognized in the Court's precedents.[112] This alternative path to fundamental-right status did not save "the right to obtain an abortion," because *Dobbs* held that it lacks "a sound basis in precedent."[113] The fact that abortion destroys a living fetus, *Dobbs* ruled, "sharply distinguishes" the right to abortion from the other implied rights recognized in the Court's precedents by uniquely presenting a "critical moral question"[114]: whether (and when) the human fetus should be entitled to "the most basic human right—to live."[115]

As already explained, that "critical moral question" is also implicated by a right to a life-preserving abortion. But unlike the right to elective abortion, a right to a life-preserving abortion involves a person's right to self-preservation in the face of a threat to her life. Under traditional self-defense principles, a pregnant woman—like any other person—has the right to use deadly force to defend herself against threats of imminent death, and a third person (the physician) is privileged to use deadly force in her defense.[116] Consequently, the right to a life-preserving abortion *can*

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[111] *See infra* text accompanying notes 128-29.

[112] *Dobbs*, 142 S. Ct. at 2257.

[113] *Id.*

[114] *Id.* at 2258.

[115] *Id.* at 2261.

[116] *See, e.g.*, MODEL PENAL CODE § 3.05(1)(b) (AM. L. INST. 1962) (authorizing the defense of another if "under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force . . . .").

be understood as "an integral part of a broader entrenched right"[117]—the traditional right of self-defense.

It will be objected that the "entrenched" rights the *Dobbs* Court considered had been specifically recognized as fundamental by the Court's precedents—whereas the Court has never squarely ruled that there is a fundamental right to self-defense.[118] Because *Dobbs* is not explicit on this point, one cannot rule out the possibility that only previously-recognized fundamental rights can qualify as "entrenched." As I read *Dobbs*, however, a right can qualify as "entrenched" if it is in fact deeply rooted in our legal tradition and has been treated by the Court as a fixed point in reasoning about rights acknowledged to be fundamental. Self-defense easily satisfies those conditions. In interpreting the Second Amendment, one of the Court's premises has been that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day."[119] Indeed, the Court has repeatedly held that "individual self-defense is 'the *central component*' of the Second Amendment right" to keep and bear a firearm.[120] If States or the federal government could simply abolish any right to self-defense, the Second Amendment right would be vulnerable to nullification. An implied right to self-defense can thus be seen as presupposed by the enumerated right.[121] The fact that the Court has never

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[117] *Dobbs*, 142 S. Ct. at 2257.

[118] In *Dobbs*, the relevant precedents were those dealing with what *Roe* described as "privacy" rights and *Casey* described as "autonomy" rights. *See id.* at 2257-58.

[119] McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).

[120] *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008)); *Heller*, 554 U.S. at 628 (describing the "inherent right of self-defense" as "central to the Second Amendment right"). *See also* N.Y. State Rifle & Pistol Ass'n v. Bruen (*NYSRPA II*), 142 S. Ct. 2111, 2125 (2022) ("[T]he Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense.").

[121] Prior to the Supreme Court's holding in *Heller* that the Second Amendment protects an individual right to keep firearms for self-defense, the D.C. Circuit, applying *Glucksberg*'s history-and-tradition test for unenumerated rights, held that terminally ill patients have no fundamental self-defense right to experimental drugs that have passed Phase I clinical testing but have not yet received FDA approval as safe and effective—even if those drugs could possibly save their lives, and even if no other treatment could. Abigail All. for Better Access to Developmental Drugs v. Eschenbach, 495 F.3d 695, 701 (D.C. Cir. 2007) (en banc). The D.C. Circuit rejected the argument, advanced by two dissenting judges, that "the [fundamental] right of self-defense enforces the right of a person facing death to take reasonable steps to protect her own life," and that this right includes obtaining access to drugs that might prove life-saving.

proclaimed the right to be fundamental should, if anything, argue in favor of giving it that status: self-defense is so deeply entrenched in our legal tradition that the Court has never had occasion to rule on the question. Finally, the core of self-defense is the right to use deadly force against life-endangering threats posed by another living being.[122] Therefore, although *Roe*'s life-or-health abortion right cannot stand after *Dobbs*, a right to a life-preserving abortion is supported both by tradition *and* by the right of self-defense underlying that tradition.[123] The case for recognizing it as an implied fundamental right under *Dobbs* is therefore a compelling one.[124]

III. THE PRIMA FACIE CASE FOR A SELF-DEFENSE ABORTION RIGHT THAT ALSO INCLUDES THREATS OF SERIOUS BODILY HARM

We've seen that both tradition and the latent fundamental right of self-defense strongly support recognizing the right to a life-preserving abortion. By contrast, the right to a health-preserving

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Id. at 717 (Rogers, J., dissenting). Even without the benefit of *Heller*, however, the majority did not deny that there might be a fundamental right to self-defense. Nor did it "address the broader question of whether access to medicine might ever implicate fundamental rights." *Id.* at 701. Instead, it argued that, under *Glucksberg*, the right at issue was properly characterized as "the right to access experimental and unproven drugs in an attempt to save one's life, which we conclude . . . is not deeply rooted in our Nation's history and traditions," rather than the broader "right to save one's life" on which the dissent was based. *Id.* at 701 n.5.

[122] In addition to authorizing self-defense against aggressive human beings, American law gives effect to the right to use deadly force against animals in various ways, such as recognizing it as a defense to charges of animal cruelty or tort claims for killing a plaintiff's animal. *See, e.g.*, State v. Hull, No. 31078-7-III, 2014 WL 7231496 (Wash. Ct. App. 2014). *See also* People v. Lee, 32 Cal. Rptr. 3d 745 (Cal. Ct. App. 2005) (self-defense against an animal is a valid defense to the crime of grossly negligently discharging a firearm).

[123] The exact scope of the right to a life-preserving abortion cannot be determined by reading the terse pre-*Roe* State statutes. This Article does not undertake the historical inquiry that would be necessary to address that question.

[124] The case would be even stronger if there were direct historical evidence that the framers of the American abortion statutes believed they were obligated, by natural law or their own State constitutions, to permit life-preserving abortions. Although I'm unaware of such evidence, I've also seen no evidence that State legislators believed they were merely making an ordinary policy decision by including the statutory exception. Indeed, even those who think life-preserving abortions are morally wrong often acknowledge that they should not be criminalized. *See supra* note 105.

abortion—understood broadly, as in *Casey*'s formulation, to include all "significant health risks"—is bereft of support in *either* tradition or self-defense principles. The most one could possibly claim is that, in the decade before *Roe*, the number of jurisdictions permitting health-preserving abortions increased from two to twenty.[125] *Dobbs*, which gives the greatest weight to the period surrounding the adoption of the Fourteenth Amendment, leaves no doubt that those relatively recent developments do not qualify as a deeply-rooted tradition.

Nor does a broad health-preserving abortion right conform to traditional self-defense principles. For centuries, standard formulations of self-defense in Anglo-American law have authorized the use of deadly force (that is, force intended to or likely to cause death or "serious bodily harm") when reasonably thought necessary to avoid imminent danger of death or "serious bodily harm."[126] It would be possible, of course, to construe a right to a I health-preserving abortion to mean an abortion necessary to avert "serious bodily harm." Yet neither *Roe* nor any of the Court's subsequent decisions ever adopted that interpretation—and that is

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[125] This number includes Alabama and the District of Columbia, which had life-or-health exceptions in 1973. Roe v. Wade, 410 U.S. 113, 139, 146 n.40 (1973) (discussing the fourteen States that had adopted versions of the Model Penal Code's approach requiring "substantial risk that continuance of the pregnancy would . . . gravely impair the physical or mental health of the mother" and the four States that had enacted statutes permitting elective abortions).

[126] In Blackstone's version: "Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them." 1 WILLIAM BLACKSTONE, COMMENTARIES *126. As stated in a prominent early American self-defense case, "no man is justified or excusable in taking away the life of another, unless the necessity for so doing is apparent as the only means of avoiding his own destruction or some very great injury." State v. Wells, 1 N.J.L. 424, 430 (N.J. 1790). *See also, e.g.*, Commonwealth v. Selfridge, 2 Am. St. Trials 544, 697 (Mass. 1806) (instructing the jury that the defendant is guilty of manslaughter unless he proves that there was "no means of saving his life, or his person from the great bodily harm which was apparently intended by the deceased against him."). The Model Penal Code continues the tradition, defining "deadly force" as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury." MODEL PENAL CODE § 3.11 (AM. L. INST. 1962). It authorizes the use of deadly force when "the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat." *Id.* § 3.04(2)(b). A recent comprehensive study finds that fifty-one out of fifty-two American jurisdictions allow the use of deadly force against threats of death or serious bodily injury. Paul H. Robinson et al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 116 n.258 (2015).

hardly the most natural reading of *Casey*'s open-ended "significant health risks" language.[127] An unqualified health-preserving abortion right authorizes deadly force against the fetus under a wide range of circumstances in which the law of self-defense would not.

Nevertheless, *traditional self-defense doctrine on the use of deadly force is not limited to situations in which the woman's life is endangered.*[128] Whatever the precise contours of "serious bodily harm," it unquestionably includes many impairments of a woman's physical health that are not life-threatening.[129] Prima facie, therefore, self-defense principles support recognizing an implied right to a narrowly defined health-preserving abortion right. Under that approach, the woman would have a constitutional right to an abortion when continuing her pregnancy would put her in imminent danger of death or serious bodily injury. "Significant health risks" that did not rise to the level of serious bodily injury would not qualify. To emphasize exactly what this self-defense approach adds to the life-preserving abortion right, I will sometimes refer to it as the "serious-bodily-harm abortion right."

A serious-bodily-harm abortion right can claim only modestly more support in our legal tradition than *Roe*'s broader health-preserving right. When abortion was simply a crime at common law, terminating a pregnancy in self-defense would presumably have been lawful—although there is apparently no judicial decision on point. As of 1868, nine States criminalized abortions whenever

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[127] *Casey* and subsequent decisions sent inconsistent—and never explicit—signals about the meaning of "significant health risks." *See* Gilles, *supra* note 16, at 583-85; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 880 (1992). As more fully described in note 24, *Casey* upheld Pennsylvania's emergency provision, which used language seemingly adapted from the concept of "serious bodily harm" but only after adopting the Third Circuit's narrowing construction of that language. *See supra* text accompanying note 24.

[128] In addition, "[a]t common law, a person could justifiably use deadly force in self-defense of sodomy and rape." State v. Havican, 569 A.2d 1089, 1092 (Conn. 1990). A contemporary majority of thirty American jurisdictions have codified that privilege, and some other jurisdictions treat rape as per se serious bodily injury. Robinson et al., *supra* note 126, at 49; McDonald v. City of Chicago, 561 U.S. 742, 857-58 (2010). *See, e.g.*, *Havican*, 569 A.2d at 1093. Whether there is an implied constitutional right to abortion in cases of rape (or in some subset of cases of rape) is beyond the scope of this Article.

[129] This Article does not address the difficult question: When, if ever, does harm to mental health qualify as "serious bodily harm"? *See* Gilles, *supra* note 16.

done "unlawfully" or "without lawful justification."[130] Because self-defense is a justification, judicial interpretation of that language would likely have allowed serious-bodily-harm abortions.[131] (As would the unqualified "health" language in the two jurisdictions with life-or-health exceptions). In addition, two territories (Wyoming and New Mexico) expressly allowed abortions when necessary to prevent serious bodily injury.[132] Because it requires "substantial risk" of "grave impairment" of the woman's physical or mental health, the much later Model Penal Code approach also appeals to self-defense principles (while greatly broadening them in the abortion context).[133]

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[130] *See supra* note 62.

[131] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 n.35 (noting that it is unclear whether case law in New Jersey and Pennsylvania would have classified any non-life-saving abortions as "without lawful justification").

[132] *See id.* at 2298-99.

[133] By including "mental health" as a separate category, the Model Penal Code went far beyond standard self-defense doctrine on the use of deadly force. Paul Benjamin Linton has collected evidence regarding abortion convictions that shows just *how* far:

> [I]n the thirteen States that adopted one version of another of the Model Penal Code provision on abortion before *Roe*, beginning in 1967, no licensed physician was ever prosecuted and convicted for performing an abortion for a reason not permitted by the Code. The absence of any prosecutions under the Model Penal Code provision for performing an abortion for a reason not allowed by the Code reinforces the notion that the exceptions, particularly the one for the pregnant woman's mental health, were completely elastic.

Paul Benjamin Linton, *Abortion Convictions Before* Roe, 36 ISSUES L. & MED. 77, 79 (2021) (footnote omitted).

Equally dramatic is:

> California's experience with the 1967 Therapeutic Abortion Act, which defined the requisite injury to mental health as "mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint." As the California Supreme Court noted, this standard "appears to be, with only minor modifications, a statement of the former standard for involuntary commitment to a mental institution." Yet in 1970, more than 98% of all abortions in California (more than 60,000 in total) were approved on mental health grounds. This prompted the California Supreme Court to deadpan that "[s]erious doubt must exist that such a considerable number of pregnant women could have been committed to a mental institution."

Yet although a respectable number of States allowed serious-bodily-harm abortions at one time or another before *Roe*, a large supermajority of States always opted for the narrower life-only abortion right. The fact that a minority of States chose to incorporate an implicit self-defense exception (or an even broader "health" one) supports an inference that the majority of States deliberately limited their exceptions to life-preserving abortions. Evidence that courts generally interpreted "life of the mother" exceptions broadly to include all serious bodily harms, might change the analysis. So far as I am aware, no one has produced evidence of that kind. In its absence, a serious-bodily-harm abortion right falls far short of the support in tradition required to qualify as an implied fundamental right.

Nevertheless, if (as I've argued) there is an implied fundamental right of self-defense, *that* right could conceivably provide an alternative foundation for a serious-bodily-harm abortion right. Like the right to use deadly force to avert danger of death, the right to use deadly force to avert danger of "serious bodily harm" has deep roots in our legal tradition.[134] If standard self-defense principles are used to define the scope of a self-defense abortion right, prima facie the Court should recognize a right to abortion whenever continued pregnancy would threaten serious harm to a woman's physical health.[135] As Part IV will explain, however, this argument's surface plausibility does not withstand careful consideration.

Gilles, *supra* note 16, at 560 n.161 (first quoting CAL. HEALTH & SAFETY CODE § 25954 (West 1967) (repealed 1995); then quoting People v. Barksdale, 503 P.2d 257, 264 (Cal. 1972) (in bank [sic]); and then quoting *id.*).

[134] Those deep roots are evident on the face of the case law, statutes, and treatises dealing with the privilege of self-defense. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742 (2010).

[135] One might think that the numerous pre-*Dobbs* State statutes defining their life-or-health exceptions in language similar to the "serious bodily harm" doctrine provide some support for this approach. If States were already allowing abortions in cases of "substantial permanent impairment of the life or physical health" of the woman, or the like, doesn't that suggest a national consensus that abortion is justified if continued pregnancy threatens "serious bodily harm"? *See* Gilles, *supra* note 16, at 531 n.31. Absolutely not. Those statutes were drafted under duress: the threat of invalidation for inconsistency with *Roe*'s vague, broad life-or-health abortion right. Had it not been for *Roe* and *Casey*, States would have been free to adhere to (or adopt) life-only exceptions to their post-viability bans (and to their emergency exceptions), and some would presumably have done so.

IV. WHY THE SERIOUS-BODILY-HARM ABORTION RIGHT DOES NOT QUALIFY AS FUNDAMENTAL

Under *Dobbs*, there are several independent problems with the argument for a serious-bodily-harm abortion right, each of which is potentially fatal. First, the core of self-defense is the right to use deadly force against the most serious threats—those that are life-endangering. It is not self-evident that a latent constitutional self-defense right would forbid a State to restrict the defensive use of deadly force to cases in which the actor reasonably apprehends imminent danger of death.[136] *Dobbs*, like *Glucksberg* before it, does not promise to constitutionalize *every* right traditionally recognized by common law or State statutes. The right must also be "essential to our Nation's 'scheme of ordered liberty.'"[137] The right to use deadly force against life-threatening aggression meets that description. As I'll now explain, the right to use deadly force against all threats of "serious bodily harm" would not necessarily follow.

The use of deadly force in self-defense is commonly described as governed by a principle of proportionality.[138] "Very rough proportionality" would be a more accurate description. Both "deadly force" and "serious bodily harm" are enormously broad categories. Deadly force spans the whole spectrum from highly-lethal force that will almost certainly kill, to force likely only to cause "serious bodily harm." In turn, "serious bodily harm" spans the spectrum from devastating but non-fatal injuries to far less severe harms such as a broken arm or the loss of several teeth.[139] As a result, when

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[136] That restriction would limit, but by no means abolish, the Second Amendment right to possess a firearm for self-defense.

[137] *Dobbs*, 142 S. Ct. at 2246 (citing Timbs v. Indiana, 139 S. Ct. 682, 686 (2019); *McDonald*, 561 U.S. at 767; Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[138] *E.g.*, Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 5 ("[It is] a basic principle of self-defense . . . that the force used must be proportional to the harm threatened.").

[139] Many States following the Model Penal Code's treatment of "serious bodily harm" require the protracted loss of an important physical function, but that can mean as little as a broken arm or the loss of a few teeth. *See* RESTATEMENT (SECOND) OF TORTS § 65 cmt. e, illus. 2 (AM. L. INST. 1965) (using the potential of one person to re-break another's recently broken arm to illustrate that the person facing "serious bodily harm" may "use the same force to prevent [the other person] from continuing to twist his arm" because of his belief that there was intent to break his arm); People v. Everett, 973 N.Y.S.2d 207, 207 (N.Y. App. Div. 2013) (establishing the element of "serious physical injury" because

necessary, the law allows an actor to use highly-lethal force to stop a low-level threat of "serious bodily harm." In such cases, the defensive force is arguably disproportionate to the aggressive threat.

Suppose, then, that a State decided to narrow the "proportionality" principle to reduce this lack of proportionality. One option would be to restrict the defensive use of *highly*-lethal force (force that would very probably cause death) to exclude threats of "serious bodily harm." But to do so by drawing a hard-and-fast line between threats to life and threats of "serious bodily harm" would be problematic, because some non-fatal bodily harms (for example, massive brain damage, or a permanent coma) are so severely life-impairing that they are commonly regarded as on a par with death.[140] Although such devastating bodily harm would usually include a serious risk of death, it seems arbitrary – as well as contrary to long-standing legal tradition – to prohibit highly-lethal force in self-defense simply because, for whatever reason, a danger of life-impairing injury poses little or no risk of death.

But imagine instead a hypothetical State law that restricts the defensive use of highly-lethal force to imminent threats of death *or* severely life-impairing bodily harm.[141] This law would still leave a "defender" free to use some types (or degrees) of "deadly force" against threats of non-lethal "serious bodily harm," but it would cabin the use of highly-lethal force to proportionately harmful threats. The Court might strike this law down because it clearly departs from our legal tradition; but the Court might also uphold the law, because it is designed to refine proportionality, not reject

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of the victim's permanent loss of several front teeth). In some States, "a protracted impairment of health has been routinely found where the injuries last a year or more after the attack." Colleen D. Duffy & Ivy Ozer, *The State of Physical Injury and Serious Physical Injury in New York Criminal Law*, 81 ALB. L. REV. 1077, 1095 (2017). The potential breadth of "serious bodily harm" as a category is suggested by one prominent early defense of *Roe*, which argued, *inter alia*, that even a normal pregnancy constitutes "serious bodily harm," because "[w]hat a woman suffers from pregnancy is a protracted impairment of function of her body as a whole." Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1614 (1979).

[140] Thank you to Nelson Lund for bringing this important point to my attention.

[141] In ordinary self-defense settings, distinguishing between ordinary deadly force and highly-lethal force would be difficult both doctrinally and for actors attempting to comply with the law. There is no such difficulty in the abortion context because every pre-viability abortion is fatal.

it, and because the burden on the liberty to defend oneself is relatively modest.[142] If so, an abortion right that was grounded in the constitutional self-defense right would be similarly limited, to pregnancies that threatened death or severely life-impairing bodily harm.

Nevertheless, I will assume that the post-*Dobbs* Court would be prepared to recognize (or at least be willing to assume) a fundamental right to use deadly force to avoid imminent danger of *all* threats of "serious bodily harm," as generally understood today.[143] That is still not sufficient. In *Glucksberg*, the Court stated that the "deeply rooted in [our] history and tradition" approach also calls for "a 'careful description' of the asserted fundamental liberty interest."[144] The *Dobbs* opinion had no need to apply that requirement and made no mention of it. As the Court recently confirmed, however, "*Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices."[145] On that understanding, a 'careful description' of the putative right to a serious-bodily-harm abortion shows that it cannot qualify as fundamental. "[T]he right at issue[,] . . . *narrowly defined*,"[146] is the woman's right to terminate her pregnancy because it poses a threat of "serious bodily harm"—not her general right to self-defense against aggressors. As demonstrated by American abortion statutes prior to *Roe*, the traditional understanding of the woman's specific

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[142] In suggesting that the Court might elect to leave the States some room to modify traditional self-defense doctrines such as the tests for using deadly force, I am not arguing that such laws are desirable as a policy matter.

[143] I have not attempted to determine whether the boundaries of "serious bodily harm" have shifted since the adoption of the Fourteenth Amendment, nor to ascertain how much variation there is among the States as to what bodily harms qualify as "serious."

[144] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (first quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

[145] Obergefell v. Hodges, 576 U.S. 644, 671 (2015). The *Obergefell* Court was able to conclude that there is a fundamental right to same-sex marriage only by *rejecting* the *Glucksberg* approach in the context of "marriage and intimacy." *Id.* The dissenters in *Obergefell* reached the opposite conclusion by applying what they agreed was "the 'careful' approach to implied fundamental rights taken by this Court in *Glucksberg*." *Id.* at 702 (Roberts, C.J., dissenting).

[146] McDonald v. City of Chicago, 561 U.S. 742, 797 (2010) (Scalia, J., concurring).

right to terminate her pregnancy limits it to threats to her life.[147] Consider Texas's defense of its statute, as summarized in *Roe*:

> [T]his justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail.[148]

This rationale reflects a situation-specific judgment about how best to balance the interests of two human beings, not a judgment that the fetus is an aggressor against whom the woman may invoke standard self-defense principles governing the use of deadly force. Under the *Glucksberg* approach, that judgment is constitutionally permissible because our tradition consistently adopted it.

This analysis is supported by *Glucksberg*'s treatment of *Cruzan v. Director, Missouri Department of Health*,[149] which "assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment."[150] In holding that there is no fundamental right to physician-assisted suicide, the *Glucksberg* Court rejected the attempt to ground *Cruzan* in a broader right to die, as opposed to a narrower right to refuse nutrition and hydration even if that hastens death:

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[147] *Dobbs* does not fully explain what counts as the relevant "tradition" under a *Glucksberg* analysis. Should courts rely primarily on the tradition prior to the adoption of the Fourteenth Amendment, and how much do later developments also count? *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2260 (2022) (replying to the dissent's claim that the Court focused exclusively on nineteenth-century abortion by pointing out that the Court's "review of this Nation's tradition extends well past that period" to include "more than a century after 1868.").

[148] Roe v. Wade, 410 U.S. 113, 150 (1973) (footnote omitted). Consistently with self-defense principles, the balancing contemplated by the Texas law gave greater weight to the life of the mother than to the life of the fetus.

[149] 497 U.S. 261 (1990).

[150] Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing *Cruzan*, 497 U.S. at 279-79).

> The right assumed in *Cruzan* . . . was not simply deduced from abstract concepts of personal autonomy. . . . The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct.[151]

By analogy, under the *Glucksberg* approach, the constitutional right to a life-preserving abortion can be characterized as "not simply deduced from abstract concepts" of self-defense, but based instead on a specific, traditional rule that a mother can elect to save her own life from a pregnancy that gravely threatens it.[152] Prior to *Roe*, the decision to have a health-preserving abortion generally did not enjoy "similar legal protection" to the decision to have a life-preserving one.[153] And although they can unquestionably be difficult to separate in practice, conceptually "the two acts are widely and reasonably regarded as quite distinct."[154]

Given the primacy of tradition in *Dobbs*, the foregoing analysis might be the end of the matter: the Court may recognize a constitutional right to a life-preserving abortion but reject any extension to pregnancies threatening "serious bodily harm"[155] for lack of the requisite support in our legal history.

Once again, however, it is necessary to consider the alternative route to status as a fundamental right that *Dobbs* leaves open: whether the right in question is "an integral part of a broader entrenched right."[156] Assuming that the Court would be prepared to recognize a constitutional right to use deadly force in self-defense against threats of "serious bodily harm," it can plausibly be argued that a coextensive abortion right is "an integral part" of the broader

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[151] *Id.* at 725 (citing Quill v. Vacco, 80 F.3d 716, 800-08 (2d Cir. 1996)).

[152] *Id.* at 703.

[153] *Id.* at 725.

[154] *Id.*

[155] Because every State allows life-preserving abortions, the Court could avoid ruling that there is in fact a fundamental right to a life-preserving abortion by assuming its existence arguendo. On that assumption, the Court could rule that there is no right to a health-preserving abortion, or to an abortion to avoid serious bodily harm. The Court could follow this approach even in a challenge to an allegedly too-narrow application of a "life of the woman" exception in a State abortion statute if it concluded that the statutory exception was at least as broad as the assumed constitutional right.

[156] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022).

right to self-defense. If anything, extending a right that is (belatedly) deemed fundamental based on its pedigree in tradition is a smaller step than the *Dobbs* Court appeared willing to take by assuming that rights arguably *lacking* support in tradition but "entrenched" in precedent, can by analogy give rise to new (or extended) constitutional rights.[157]

The *Dobbs* Court does not spell out just how a court should determine whether a right is "an integral part of a broader entrenched right,"[158] but some guidance can be gleaned from the Court's reasoning. In explaining why the right to abortion is not an integral part of the rights recognized in the Court's cases, the Court considered, *inter alia*, whether abortion can properly be regarded as an extension of, or closely analogous to, one or more of them. It held that the abortion right is "sharply distinguishe[d] . . . from the rights recognized in the cases on which *Roe* and *Casey* rely" because abortion destroys the life of the fetus, thereby posing the "critical moral question" whether the fetus should be regarded as "an 'unborn human being.'"[159] Those recognized rights include the right to contraception, which is clearly the most nearly analogous to abortion—an analogy on which the *Dobbs* dissent heavily relied.[160] In response, the Court argued that if the rights to contraception, sexual intimacy, and same-sex marriage "are fundamentally the same as the right recognized in *Roe* and *Casey*, the implication is clear:" contrary to what both *Roe* and *Casey* conceded, "[t]he Constitution does not permit the States to regard the destruction of a 'potential life' as a matter of any significance."[161]

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[157] The *Dobbs* dissenters claim that "most of the [privacy or autonomy] rights the majority claims it is not tampering with" are not "deeply rooted in history," *id.* at 2319 (Breyer, Sotomayor, & Kagan, JJ., dissenting), and the majority never denies that this may be an accurate characterization of some of those rights.

[158] *Id.* at 2257. My premise throughout this Article is that the *Dobbs* Court actually approves of this test, rather than simply assuming it as a possibility and explaining why it wouldn't rescue the right to elective abortion. If this premise turns out to be mistaken, any version of a health-preserving abortion right would be untenable, and even the case for a life-preserving abortion right would be weakened.

[159] *Id.* at 2257-58. *See also id.* at 2236, 2260 (invoking the destruction of the fetus as the crucial distinction between abortion and other implied fundamental rights).

[160] *Id.* at 2319 (Breyer, Sotomayor, & Kagan JJ., dissenting) ("The right to terminate a pregnancy arose straight out of the right to purchase and use contraception.").

[161] *Id.* at 2261.

It appears, then, that whether a right is "an integral part of a broader entrenched right" depends on whether the right can be seen as "fundamentally the same" as a right that is accepted as fundamental, or whether instead it can be "sharply distinguished" from possible analogues. At first glance, one might think there is no comparably "sharp" distinction between self-defense against perceived aggression threatening "serious bodily harm" and an abortion to terminate a pregnancy likewise threatening "serious bodily harm." The threats are of the same magnitude, and although the State will presumably have decided that the fetus is a "human being," so are the perceived aggressors against whom self-defense principles authorize the use of deadly force. If (as I'm now supposing) there is a fundamental right to use deadly force to avoid any imminent threat of "serious bodily harm," prima facie that right should extend to abortions.

Whatever appeal this argument may have as a matter of legislative policy, it fails to establish a broader constitutional right to an abortion whenever continued pregnancy threatens "serious bodily harm." As I explain below, although no single difference between aborting a pregnancy that threatens bodily harm and using deadly force against a perceived aggressor has the "bright-line" sharpness of the difference between contraception and abortion, there are profound differences that make the rights "fundamentally different."[162] A principled line can therefore be drawn between threats of death and threats of serious bodily injury in the abortion context.[163] The fact that the traditional law of self-

[162] If the Court were to recognize a fundamental right to use deadly force in self-defense against threats of "serious bodily harm," statutes that refused to recognize that right in the context of abortion might trigger heightened scrutiny under the fundamental rights branch of equal protection doctrine. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 672-76 (2015) (holding that denial of the right to same-sex marriage also violates the Equal Protection Clause). A full analysis of this equal protection issue is beyond the scope of this Article. The reasons given in text, however, would provide a foundation for the argument that a ban on serious-bodily-harm abortions is narrowly tailored to advance the compelling State interest in fetal life, and would clearly satisfy the rational basis review *Dobbs* generally requires courts to use when reviewing the constitutionality of abortion laws. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

[163] No doubt suffering a serious bodily injury will often present some increased risk of death. But that should not obscure the difference between a life-only abortion right and one that extends to all threats of serious bodily injury. "Serious bodily harm" that increases the risk of death sufficiently to qualify as life-endangering is already covered

defense draws no such distinction regarding the use of deadly force does not show otherwise. Some of the strongest reasons *for* allowing deadly force against aggressors are absent or attenuated in the radically different setting of abortion, and some of the strongest reasons *against* allowing deadly force in the abortion context are absent or attenuated in ordinary cases involving actual or perceived aggression.

To begin with, as exemplified by Texas's contention in *Roe* that justifying abortion requires balancing "the life of the pregnant mother . . . against the life she carries within her,"[164] our tradition need not be understood as simply transposing conventional self-defense doctrines to the context of a pregnancy that threatens the woman's life or health. Instead, the life-against-life framing implicit in the traditional American abortion statutes strongly suggests that life-preserving abortions were viewed as more akin to cases of "necessity,"[165] in which two innocent persons are trapped in a situation in which only one can survive (as in Bacon's famous

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by the "life" exception. Including serious harm that would *not* qualify as life-endangering would necessarily expand its scope by lowering the thresholds of probability and imminence of death (whatever those might turn out to be) in some cases—and by allowing threats that posed *no* risk of death in others. How big an expansion is an empirical question, and I am not aware of data on how often a pregnancy is likely to cause "serious bodily harm" without also endangering the woman's life. Intuitively, however, one would expect there to be significantly more cases in which a pregnancy posed serious health risks than truly life-threatening ones. In any event, the difference is morally and doctrinally a substantial one.

[164] *Roe*, 410 U.S. at 150. "Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail."

[165] James S. Witherspoon, *Reexamining* Roe: *Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 47 (1985) ("This exception is based not on a legislative preference for the life of the mother over the life of the child, but on the general defense of 'legal necessity,' which is related to the defense of self-defense"). *See* WHARTON, *supra* note 97, §§ 1028-1029 (discussing "sacrifice of life in childbed" immediately after describing self-defense in situations of necessity in which both parties are innocent); *accord* D. Seaborne Davies, *The Law of Abortion and Necessity*, 2 MOD. L. REV. 126 (1938) (discussing English law). Davies describes "the extreme vagueness of Necessity as a general defence in English criminal law," and suggests that "English lawyers have fought shy of defining the defence, and, indeed, have generally considered that it is better left undefined." *Id.* at 135-36. For a decision interpreting an American life-only exception in terms suggestive of the necessity defense, see State v. Rudman, 136 A. 817, 819 (Me. 1927) ("[T]o the destruction of unborn life for reasons, whatever they may be, other than necessity to save the mother's life, the law is intended, we believe, to be an express and absolute prohibition.").

example of two shipwrecked sailors on a plank).[166] Blackstone treated this defense as:

> [O]ne species of homicide *se defendendo* [self-defense], where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferable to that of another, where one of them must inevitably perish.[167]

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[166] Sorting out the exact relationship between self-defense and the defense of "necessity" in our legal tradition is a project beyond the scope of this Article.

[167] BLACKSTONE, *supra* note 126, at *186. Blackstone distinguishes between "justifiable homicide," such as killing to prevent the commission of a capital crime, and "excusable" homicide, a broad category that includes homicide by "misadventure" (non-negligent accident), self-defense arising from fights or quarrels, and cases of necessity (in which neither party is responsible for a situation in which "one of them must inevitably perish"). *Id.* at *181, *182, *186. Does this mean that, for purposes of characterizing our legal tradition, there was no "right" to self-defense in cases of necessity (or any other "excusable" homicide)? I think not. The distinction between justifiable and excusable homicides had been an important and consequential feature of medieval English common law. As Blackstone explains, "anciently" the penalty for excusable homicide had "consisted in a forfeiture" of all or part of the slayer's "goods and chattels . . . by way of fine or weregild." *Id.* at *188. But "as early as our records will reach," he writes, the excused slayer received "a pardon and writ of restitution of his goods as a matter of course *and right*, only paying for suing out the same." *Id.* (emphasis added). Beyond that, by Blackstone's time, the judges would spare the slayer even this expense, "where the death has notoriously happened by misadventure or in self-defence," by permitting or directing "a general verdict of acquittal." *Id.* In practice, then, excused homicide was *not* subject to punishment or even collateral expense. Thus, although the necessity version of self-defense, like self-defense arising from a fight or quarrel, was not classified as a perfectly-lawful "justifiable homicide," *Id.* at *182, both subcategories of excusable self-defense were in practice functionally equivalent to rights.

Nevertheless, according to Blackstone, even in his day excusable homicide was still regarded as involving at least some "trivial" degree of "fault, error, or omission," and therefore technically punishable, although not felonious. *Id.* at *182. In cases of accidental homicide, the law "presumes negligence, or at least a want of sufficient caution," and "since in quarrels both parties may be, and usually are, in some fault; and it scarce can be tried who was originally in the wrong; the law will not hold the survivor entirely guiltless." *Id.* at *186-87. But even if categorical presumptions of slight fault could disqualify an action as a "right" for our purposes (which seems doubtful), neither presumption would apply to cases of necessity, in which both parties must be "equally innocent." *Id.* at *186.

And finally: Anglo-American law has long since rejected the vestigial distinction between excusable and justifiable homicide in self-defense to which Blackstone adhered (at least in name). BOAZ SANGERO, SELF-DEFENCE IN CRIMINAL LAW 12 (2006) ("Although in the old English common law a distinction existed between killing that was justified and killing that was excused . . . it is no longer accepted in Anglo-American

According to Blackstone, "[h]e who thus preserves his own life at the expence of another man's is excusable though unavoidable necessity, and the principle of self-defence[—]since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life."[168] On this account, when continued pregnancy threatens the woman's life, she can choose abortion and reclaim exclusive possession of her body because her survival is at stake.

The defense of necessity, rather than the more general law of self-defense, is the better match for pregnancies that threaten the woman's life or health. The complete "innocence" of the fetus makes it radically distinguishable from the actual or apparent aggressors with whom self-defense law has always been designed to deal. Legally speaking, the fetus is more "innocent" than even an insane aggressor, who is innocent for purposes of criminal law, yet liable in tort for the harm insanely (and unlawfully) done to others.[169] The fetus is not only not acting voluntarily; it is not acting at all. Instead, it is *developing* according to a natural progression. The complete absence of both mens rea and actus reus leaves the fetus innocent of *any* responsibility for the predicament in which it and the woman now find themselves.[170] It is therefore axiomatic that in

law."). "Every State in the United States recognizes self-defense, including the use of deadly force in self-protection, as a justification defense." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 199 (1995). Nor, in modern law, does it matter for purposes of guilt or punishment whether the necessity defense is theorized as an excuse or a justification. *Id.* at 185 ("Today, justified and excused actors are treated the same by the criminal courts: each is acquitted of the offense and neither is punished for her conduct"). Seen in historical context, then, Blackstone's recognition of a necessity defense that is squarely based on "the principle of self-defence" provides authoritative evidence that it was one "species" of self-defense as traditionally understood. BLACKSTONE, *supra* note 126, at *186.

168 BLACKSTONE, *supra* note 126, at *186.

169 The traditional and still prevailing rule is that "insane persons are liable for their torts and have no immunity by reason of their insanity." RESTATEMENT (SECOND) OF TORTS § 895J cmt. a (1979).

170 For these reasons, it seems misleading to describe the fetus as an "innocent aggressor" merely because its continued presence in her body directly or indirectly threatens the woman's life or health. *See, e.g.*, DAVID S. ODERBERG, APPLIED ETHICS: A NON-CONSEQUENTIALIST APPROACH 25 (2000); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 339 n.127 (2007) (characterizing fetuses as so-called "innocent attackers" who don't realize the threat they pose to others). Suppose that a person is abducted, strapped to an explosive device, rendered unconscious, and propelled

no pregnancy can the fetus be more responsible for the dilemma than the woman.[171] Treating high-risk pregnancies as cases of necessity is therefore the best conceptual framework within the law of self-defense, broadly understood.

It could be argued that this proposition suffices to establish that the constitutional abortion right includes only life-saving abortions. Blackstone seems to have approved of the necessity defense only in cases where life was pitted against life,[172] and the leading American case approving the defense did not go beyond that scenario.[173] Writing in the late nineteenth century, however, James Fitzjames Stephen described the defense as available somewhat more broadly, although he still limited it to avoiding "inevitable and irreparable evil."[174]

In the end, a different distinction between necessity and standard self-defense proves decisive. The key feature of the classic necessity situations was that the interests on each side – life against life—were equal in the eyes of the law. Blackstone wrote that "necessity" allows individuals to prefer their own *lives* to the lives of other innocent persons—not to prefer avoiding "serious bodily harm" to themselves over those other lives.[175] Stephen's

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into a closed space with another innocent person who will be killed or harmed by the explosion. Would "innocent aggressor" be an appropriate description?

171 One could imagine a regime in which the scope of a right to non-elective abortion was calibrated to the woman's responsibility (or lack thereof) for the pregnancy, but prior to the Model Penal Code's recognition of a rape exception, distinctions of that kind cannot be found in American abortion law.

172 Bacon had suggested more broadly that stealing food to satisfy hunger was not a felony because it was done for "conservation of life," 4 FRANCIS BACON, THE WORKS OF FRANCIS BACON, BARON OF VERULAM, VISCOUNT ST. ALBAN, AND LORD HIGH CHANCELLOR OF ENGLAND 34 (1803), but Blackstone rejected this, as did Hale and others. *See* W. H. Hitchler, *Necessity as a Defence in Criminal Cases*, 33 DICK. L. REV. 138, 141-42 (1929).

173 *See* United States v. Holmes, 26 F. Cas. 360, 367 (E.D. Pa. 1842) (refusing to extend the defense to a sailor who threw passengers from an overloaded lifeboat, but "admit[ting] that sailor and sailor may lawfully struggle with each other for the plank that can save but one"). Because, however, the facts in Holmes involved an overloaded lifeboat, it would be risky to infer from the court's focus on life-and-death that the necessity defense was always so limited.

174 SIR JAMES FITZJAMES STEPHEN ET AL., A DIGEST OF CRIMINAL LAW (CRIMES AND PUNISHMENTS) 25 (6th ed. 1904) [hereinafter CRIMES AND PUNISHMENTS]. That formulation might suggest that pregnancies threatening severely life-impairing bodily harm should also be eligible for constitutional protection under the rubric of necessity.

175 4 WILLIAM BLACKSTONE, COMMENTARIES *16-17.

formulation, while not quite as strict, still required that "the evil inflicted by [the actor] was not disproportionate to the evil avoided."[176] Except in extreme cases of devastating, albeit non-fatal, bodily injuries, that cannot be said of "serious bodily harm" as against loss of life. Thus, during the most relevant era for determining the meaning of a Fourteenth Amendment right grounded in self-defense principles,[177] the "necessity" defense would not have encompassed ordinary threats of "serious bodily harm." [178]

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[176] SIR JAMES FITZJAMES STEPHEN ET AL., *supra* note 174, at 25. Stephen immediately adds that "[t]he extent of the principle is unascertained," but by this, he meant that "it is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it, but these cases cannot be defined beforehand, and must be adjudicated upon by a jury afterwards". 2 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF CRIMINAL LAW OF ENGLAND 109-10 (1883).

[177] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2266 (2022) ("[T]he most important historical fact [is] how the States regulated abortion when the Fourteenth Amendment was adopted.").

[178] In 1884, the Queen's Bench rejected the plea of necessity in *Regina v. Dudley & Stephens*, in which two seamen killed and ate a cabin boy to save themselves from probable death by starvation. Regina v. Dudley and Stephens (1884) 14 QB 273 at 273 (Eng.). On these facts, the court refused to apply the necessity defense, declaring:

> There are many conceivable states of things in which it might possibly be true, but if Lord Bacon meant to lay down the *broad* proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day.

Id. Some English authorities concluded that this amounted to eliminating the defense. *See* HITCHLER, *supra* note 172, at 143-44. Stephen disagreed, distinguishing the affirmative killing of the helpless boy from the contending sailors in the plank case. CRIMES AND PUNISHMENTS, *supra* note 174, at 25.

If *Dudley & Stephens* were taken to be our tradition's dominant view regarding the scope of the necessity defense, it would call into question my argument that the fundamental right to self-defense supports recognizing a fundamental right to a life-preserving abortion. Read broadly, *Dudley & Stephens* suggests that deliberately removing the fetus from the woman's body, knowing it will die, is unlawful homicide. Read as James Fitzjames Stephen did, *Dudley & Stephens* suggests that affirmatively killing the fetus would be forbidden, but removing it non-violently from the woman's body would be justified by necessity. But on neither reading would it be permissible to terminate a pregnancy by violently destroying the fetus, even if both woman and fetus would soon die unless that were done. *Id.*

It is not *Dudley & Stephens*, however, but Bacon, Blackstone, and the American decision in *Holmes*, that represent the dominant view in our tradition as it stood when the Fourteenth Amendment was adopted. The *Holmes* court was quite clear:

In the twentieth century, the Model Penal Code proposed incorporating the necessity defense as a back-stop lesser-evil defense that applies in the absence of "exceptions or defenses dealing with the specific situation involved".[179] Currently, forty-five American jurisdictions recognize this defense, which applies only if an actor reasonably believes that otherwise criminal conduct "is necessary to avoid an imminent harm or evil . . . greater than that sought to be prevented by the law prohibiting the actor's conduct."[180] In a State that considers the fetus to be an "unborn human being," the modern lesser-evils defense clearly would not extend to pregnancies threatening only "serious bodily harm."[181]

> [S]uppose that two persons who owe no duty to one another that is not mutual, should, by accident, not attributable to either, be placed in a situation where both cannot survive. Neither is bound to save the other's life by sacrificing his own, nor would either commit a crime in saving his own life in a struggle for the only means of safety.

United States v. Holmes, 26 F. Cas. 360, 366 (1842). As for Lord Coleridge's opinion in *Dudley & Stephens*, it unaccountably ignores Blackstone, airily dismisses *Holmes* (while mischaracterizing its reasoning) as not "an authority satisfactory to a court in this country," and concedes that "my Brother Stephen . . . both in his Digest and in his History of the Criminal Law, uses language perhaps wide enough to cover this case." *Dudley & Stephens*, 14 QB at 282. Whether or not *Dudley & Stephens* was rightly decided on its facts, it is scant authority for disregarding the evident kinship between the "necessity" branch of self-defense law and American statutory exceptions permitting abortions to save the woman's life.

[179] MODEL PENAL CODE § 3.02(1)(b) (AM. L. INST. 1962).

[180] Robinson et al., *supra* note 126, at 6. *Cf.* United States v. Bailey, 444 U.S. 394, 410 (1980) ("[T]he defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils"). More recently, in *United States v. Oakland Cannabis Buyers' Cooperative*, the Supreme Court declined to decide "whether necessity can ever be a defense when the federal statute does not expressly provide for it," but held that the defense cannot possibly be available when it would "be at odds with the terms of [the criminal statute]" at issue. 532 U.S. 483, 491 (2001). The Court reasoned that since the defense depended on whether "physical forces beyond the actor's control rendered illegal conduct the lesser of two evils," a contrary "determination of values" by Congress would necessarily abrogate the defense. *Id.* at 490-91. That reasoning, however, was predicated on the fact that "federal crimes are defined by statute rather than by common law," *id.* at 490, and came in a context in which there was no relevant tradition recognizing the necessity defense. Nevertheless, *Oakland Cannabis Buyers' Cooperative* arguably lends some support to the position that, after *Dobbs*, judgments about the scope of a necessity defense in the abortion context should be left to legislatures in the absence of a contrary tradition.

[181] Interestingly, the Model Penal Code itself allows the necessity defense when more lives are saved than are lost, but *rejects* it when, as in the plank case, that condition is

Even if this relatively recent reworking of the necessity defense should carry some weight , it would not change the conclusion: viewed through the "necessity" lens, deadly force against the fetus is not authorized simply because pregnancy would threaten "serious bodily harm" to the woman. At most, severely life-impairing injuries would count as life-preserving when they seem closely "proportionate" to loss of life.

It could be objected that whatever the analogy between abortion and cases of "necessity" suggests, the more general (and much more developed) body of self-defense doctrine should be controlling for constitutional purposes.[182] Even if that were correct (contrary to the reasons I have just presented), there are fundamental mismatches between self-defense law and "serious bodily harm" abortions that support treating them as outside the domain of a constitutional self-defense right.

Like the "necessity" defense, the standard law of self-defense permits an actor whose own life is at stake to prefer it to the life of another. But as we move from the context of two innocent actors to an actor who reasonably perceives an imminent threat from aggression by another person, the *scope* of this self-preference expands enormously. As previously noted, the deadly-force doctrine requires only a weak degree of "proportionality" when an actor reasonably believes an actual or perceived aggressor poses an imminent threat of "serious bodily harm." The actor may use highly lethal force even if the expected harm is non-lethal, provided it would qualify as serious—which requires only that it would likely cause the protracted loss of any important physical function.[183] The question is whether, assuming this deadly-force rule is included in the constitutional self-defense right, it should extend to the abortion context.

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not met. MODEL PENAL CODE § 3.02(1)(a) (AM. L. INST. 1962). When one compares that position with the Model Penal Code's approach to life-or-health abortions, it is clear that the Code resolves *Dobbs*'s "serious moral question" about the status of the pre-viable fetus by valuing its life at *much* less than the woman's life.

[182] In both England and America, the law of "necessity" was notoriously thin and vague. *See* Davies, *supra* note 165, at 135 ("[T]the extreme vagueness of Necessity as a general defence in English criminal law is too well-known to need exposition"). Apart from English authorities, Hitchler relies almost exclusively on *United States v. Holmes*. *See supra* text accompanying notes 172 and 173.

[183] *See supra* note 141.

In addition to protecting the fundamental interests in self-preservation and bodily integrity, self-defense law also meshes with the goal of deterring unlawful aggression. In doing so, it must give latitude to persons acting in response to threatening behavior, without enabling them to use self-defense as a cover for their own aggression. The broad authorization to use deadly force in response to threats of deadly force strikes this balance against a background in which actual or apparent aggression is typically present. To be sure, the deadly-force doctrine applies even when the aggressor is insane, and thus "innocent" for purposes of criminal law. But those cases are rare, and it is not because of *them* that the doctrine goes as far as it does by allowing deadly force against all "serious bodily harm."

Rather, the culpability of aggressors and the need to deter wrongful aggression have resulted in a rule that favors the person acting in self-defense (the "defender"). The defender must often make a high-stress, real-time assessment of the imminence and seriousness of the threat posed by the aggressor, and it is frequently impossible to know whether the threat is life-threatening or not; within the degrees of deadly force, the defender may have few or no options about how to calibrate an effective response; and *any* "serious bodily harm," should it be suffered, likely impairs the defender's ability to defend against a second round of aggression. The aggressor is responsible—and typically culpable—for creating these difficulties, and deterrence will suffer if defenders are held to rigid proportionality rules.

Within the limits of loose proportionality, then, it is unsurprising that those who are reasonably perceived as aggressors bear the risk that defenders will threaten (or actually do) more harm to them than they threatened to inflict on the defender. If the threat crosses the "serious bodily harm" threshold, the defender can use as much force as is necessary given the defender's actual capabilities at the time. Despite that, the defensive use of deadly force will often do less harm to the aggressor than the aggressor threatened. Many an aggressor, attempting to kill someone, has been stopped by deadly force in self-defense that wounded but did not kill. Indeed, aggressors are often scared off by the threat or use of defensive deadly force without suffering *any* bodily injury.

Contrast all this with pregnancies that threaten the woman with "serious bodily harm" but not death. The fetus is completely innocent; it is not deterrable; and it is incapable of fleeing from the threat of abortion. As for the woman and her doctor: although some pregnancy-related threats of "serious bodily harm" arise as sudden emergencies, in many cases the doctor will have time and ability to determine whether or not a threat of "serious bodily harm" is also life-threatening. Most importantly, a pre-viability abortion will always result in the death of the fetus—making abortion maximally lethal.[184] By contrast, when a pregnancy threatens serious bodily harm but not death, the harm to the woman will sometimes not materialize, and even when it does will almost always be smaller than the harm to the fetus.[185] Thus, in the context of pre-viability abortion, normal self-defense doctrine results in a massively skewed allocation of risks.[186] *The traditional deadly-force rule*

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[184] The analysis is somewhat different for post-viability abortions. The viable fetus has a realistic chance of survival that increases with gestational age—but only if a fetus-sparing abortion method (induction of labor or a Caesarean section) is used. But a realistic chance of survival necessarily implies at least a realistic chance of *death*. Even if a fetus-sparing method is used to terminate the pregnancy, the extremely premature newborn is at serious risk of death for many weeks after viability. *See When Is It Safe To Deliver Your Baby?*, HEALTH UNIVERSITY OF UTAH, https://healthcare.utah.edu/womenshealth/pregnancy-birth/preterm-birth/when-is-it-safe-to-deliver.php [https://perma.cc/EJ8T-YHSV] (last visited Oct. 26, 2022) (at twenty-eight weeks, the chance of fetal death is 10-20%; even at thirty-two weeks it is 5%). In the context of *post*-viability abortions, a serious-bodily-harm abortion right would also limit the State's authority to mandate that a fetus-sparing abortion method be used. For example, if at twenty-eight weeks continuing the pregnancy threatened "serious bodily harm," the woman would be entitled to an abortion; if fetus-sparing abortion methods would threaten "serious bodily harm" that could be avoided by using a fetus-killing abortion method, the woman would be entitled to have the fetus killed in utero, even though it was viable.

[185] The qualification "almost always" is necessary because some non-fatal injuries seem so severely life-impairing as to be on a par with death. *See supra* text accompanying notes 139-40.

[186] On the assumption that doctors who perform abortions will faithfully apply the legal category of "serious bodily harm," in one respect, the deadly-force rule presents less risk to fetuses than to aggressors. Defenders who mistakenly but reasonably believe that an aggressor presents a threat of "serious bodily harm" have the right to use deadly force, and such mistakes are not uncommon. Conscientious doctors with time to assess risks would be less likely to be mistaken about whether a pregnancy poses a risk of "serious bodily harm." But on closer examination, this apparent advantage is largely illusory: when a defender reasonably but mistakenly uses deadly force, the resulting harm to the aggressor ranges anywhere from non-serious bodily harm to (rarely) death. When a

would treat fetuses far worse than aggressors. Even if the constitutional self-defense right fully incorporates the serious-bodily-harm rule, to apply that rule in the *sui generis* case of abortion would devalue the life of the fetus, overriding the State's determination that it is an unborn human being whose life should be protected.[187]

When we turn from legal rules and doctrine to the law in operation, additional important differences emerge between self-defense against aggressors and self-defense against pre-viable fetuses. Consider problems of proof, which are notoriously more pervasive in abortion than in criminal law generally.[188] Whether in the context of police investigations, prosecutorial judgments, or criminal trials, the alleged aggressor and other witnesses are typically available to testify when an actor pleads self-defense. At an abortion procedure, only the woman and the abortion provider are normally present, and both have incentives to exaggerate the threat (particularly if the pregnancy was unwanted for other reasons).[189] Although prohibitions on abortion will be difficult to enforce in any event, a life-only exception provides some additional protection to fetuses by requiring evidence that the risks to the woman are truly proportional to the fatal danger to the pre-viable fetus.

Translating "serious bodily harm" in self-defense law to the abortion context would also cause intractable line-drawing and slippery-slope problems. Drawing the line at danger of "serious bodily harm" creates far more vagueness and uncertainty than

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doctor reasonably but mistakenly performs a pre-viability abortion on serious-bodily-health grounds, the resulting harm is always fetal death.

[187] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022) ("[o]ur Nation's historical understanding of ordered liberty does not prevent the people's elected representative from deciding how abortion should be regulated," and "[v]oters in [some] States may wish to impose tight restrictions based on their belief that abortion destroys an 'unborn human being'").

[188] Severe problems of proof have always hindered the enforcement of laws prohibiting abortions. *See* DELLAPENNA, *supra* note 20, at 299-301, 542-47.

[189] This point gains added force because of the moral hazard involved in abortion. For many women facing an unwanted pregnancy, the death of the fetus is the central point of an abortion, quite apart from whatever health risks the pregnancy poses. *See generally* Stephen G. Gilles, *Does the Right to Elective Abortion Include the Right to Ensure the Death of the Fetus?*, 49 U. RICH. L. REV. 1009 (2015).

drawing it at danger of death.[190] In self-defense law, juries are entrusted with applying the "serious bodily harm" standard, and their decisions are case-specific and unaccompanied by opinions that could serve as precedent. Consequently, the standard's vagueness creates symmetrical, case-specific risks to both alleged "defenders" and alleged "aggressors" in self-defense cases. In the abortion context, the standard's vagueness systematically skews outcomes in favor of the party in control of the evidence—the abortion provider.[191] After fifty years of *Roe's* regime, during which many doctors who perform abortions have been instructed by Supreme Court precedent to regard fetuses as sub-human non-persons, and to focus exclusively on the health and preferences of their pregnant patients, the difficulty of enforcing a vague standard invites non-compliance. This problem is a serious one even if most doctors who perform non-elective abortions would conscientiously attempt to apply the "serious bodily harm" standard. Unlike a single jury, a single abortion provider can decide a multitude of these life-and-death cases over the course of a career.

As against the foregoing considerations, it could be objected that permitting States to prohibit abortions in *all* "serious bodily harm" cases would deprive women of their right to self-defense even when the threatened harm is severely life-impairing, although not fatal. This objection has real force: as already discussed in considering the scope of the constitutional right to use deadly force in self-defense, it seems arbitrary to draw a hard-and-fast line at threats of death. A permanent coma, complete paralysis, massive brain damage, and similarly devastating injuries are widely and

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[190] Thresholds for imminence and likelihood of harm must be drawn for both life-preserving and serious-bodily-harm abortions, but an additional (and inherently fuzzy) line must be drawn for the latter.

[191] *Roe*'s requirement that States permit, even after viability, any abortion deemed necessary "in appropriate medical judgment," Roe v. Wade, 410 U.S. 113, 164-66 (1973), made the life-or-health right even harder to police and led to disputes over whether States could require that such judgments be "reasonable," or only that they be "in good faith." *See* Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 205-06 (6th Cir. 1997) (invalidating a statute requiring "reasonable medical judgment" for lack of a scienter requirement). If there is a post-*Dobbs* right to a life-preserving abortion, the Court will need to decide how far State legislatures can go in setting specific standards or guidelines within which "medical judgment" must operate.

reasonably believed to be as bad as (or worse than) loss of life.[192] It would be much more arbitrary, however, to draw the deadly-force line at "serious bodily harm" in the abortion context. Some women will suffer severely life-impairing harm if the constitutional right to abortion is limited to life-preserving abortions, strictly defined to require a substantial threat of death. But if the abortion right includes every pregnancy that threatens "serious bodily harm," a far larger number of fetuses will die although continued pregnancy did *not* threaten severely life-impairing bodily harm to the woman. If those were the only options, the States should be free to limit abortions to pregnancies that threaten the woman's life.

There is, however, a better option. For the reasons I have described, the Court should hold that the constitutional self-defense abortion right does not extend to ordinary threats of "serious bodily harm." But because threats of severely life-impairing bodily harm are virtually as injurious as death itself from the standpoint of *self*-preservation, the Court should also define the constitutional right to a life-preserving abortion to include them.[193] So defined, the constitutional abortion right would avoid both the under-inclusiveness of a strictly-defined 'life-only' exception, and the far greater over-inclusiveness of a serious-bodily-harm abortion right.[194]

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[192] It could also be objected that serious harm to health can often shorten life expectancy, and that the line between threats of death and threats of harm to health is therefore arbitrary. At a minimum, the argument goes, a woman should be entitled to an abortion if the pregnancy is expected to significantly reduce her life expectancy. This objection ignores the fact that a pre-viability abortion (and virtually all abortions fit that description) will inevitably reduce the life expectancy of the fetus to zero. As with threats of severely life-impairing harm, however, I acknowledge that an extreme reduction in life expectancy seems nearly as harmful as imminent death. This issue, along with other questions regarding precise definition of the constitutional right to a life-preserving abortion, is beyond the scope of this Article.

[193] Defining "severely life-impairing bodily harm" would not be easy, but would certainly be no harder than defining "serious bodily harm."

[194] Alternatively, the Court could reach the same result without relying on my argument that threats of "serious bodily harm" from continued pregnancy are sharply distinguishable from threats of "serious bodily harm" in ordinary self-defense settings. As noted in Part III, a plausible case can be made that the implied self-defense right to use highly-lethal force against aggressors should itself be limited to threats of death or severely life-impairing bodily injury. *See supra* text accompanying notes 137-41. If the Court concluded that the constitutional right to use deadly force in self-defense does not extend to typical threats of "serious bodily harm," the constitutional case for a coextensive abortion right would collapse.

A quite different objection argues that other differences between self-defense in normal settings and in the unique context of abortion cut *in favor of* a serious-bodily-harm abortion right. The physical and emotional burdens of carrying an unwanted pregnancy and the long-term consequences of becoming a mother for the woman (and her family) have no counterparts in typical self-defense situations. The woman's interests in avoiding those serious harms (which implicate both her autonomy and her bodily integrity), the argument goes, should be added to her self-defense interest in avoiding "serious bodily harm."

This interest-balancing argument deserves serious consideration—but by whom? A broader version of it is probably what led the *Roe* and *Casey* Courts to postulate, by fiat, a health-preserving abortion right untethered from "serious bodily harm." The people and their elected representatives might decide to balance interests in this way, but the Constitution does not compel them to do so. Under *Dobbs*, the State's freedom to balance interests includes the freedom to decide how that balancing should be structured. *Dobbs* holds that the State may override the woman's interests in avoiding the burdens of an unwanted pregnancy in order to protect the life of the unborn human fetus. Whether a woman's pregnancy is wanted or unwanted (or a mixture of both), the State is then free to decide that the life of the fetus outweighs serious but not life-threatening bodily harm to her. Prior to *Roe*, the laws of most States adopted that approach to the "critical moral question" posed by non-elective abortions. The eventual State-by-State results today may be quite different, but the Constitution should not be interpreted to create a serious-bodily-harm abortion right.[195]

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[195] Narrowly-defined versions of a serious-bodily-harm right, such as the medical-emergency language in the Mississippi statute in *Dobbs*, may find favor in many of the more abortion-restrictive States because that language allows abortions to prevent especially severe damage to the woman's health without encompassing lesser types of "serious bodily harm." *See* MISS. CODE ANN. § 41-41-191 (2018) (authorizing abortions only when "necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition arising from the pregnancy itself, or when the continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function"). After *Dobbs*, however, courts will have no warrant to read such exceptions unnaturally broadly to avoid constitutional doubts regarding their validity,

V. EVEN IF HEALTH-PRESERVING ABORTIONS WERE DE FACTO PERMITTED IN STATES THAT AUTHORIZED ONLY LIFE-PRESERVING ABORTIONS, THAT WOULD NOT ESTABLISH A DEEPLY ROOTED TRADITION UNDER *DOBBS*

Finally, I briefly consider one last path to a self-defense abortion right that would encompass all pregnancies threatening "serious bodily harm." Some scholars have argued that in many jurisdictions laws prohibiting elective abortions were infrequently enforced, and that physicians who performed abortions for pressing health reasons were rarely prosecuted or sanctioned.[196] Moreover, the notion of "therapeutic abortions," developed within the medical profession in the nineteenth century, seems to have increasingly encompassed cases presenting risks of serious bodily harm to the woman.[197] The rise of therapeutic abortions arguably dovetails with the fact that by 1972 one-third of the States adopted less stringent laws regarding pre-viability abortions, *inter alia*, if "there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother."[198] These developments, the argument goes, warrant the conclusion that permitting States to ban serious-bodily-harm abortions is an unjustified departure from normal principles of self-defense, as they came to be understood and applied in our medicolegal tradition prior to *Roe*.

Even if its disputed factual premises are correct,[199] this argument is plainly insufficient to ground a constitutional entitlement after *Dobbs*. Although *Dobbs* considered our legal

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as the Third Circuit and the Supreme Court did with the Pennsylvania medical-emergency exception in *Casey*. *See supra* note 24.

[196] *See generally* MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS (1996); LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973 (1997).

[197] *See* Herbert L. Packer & Ralph J. Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 447 (1959) ("[I]t is clear that the standards of the law are not being strictly complied with. TA's that cannot be said to be 'necessary to preserve life' are being authorized for performance in reputable hospitals.").

[198] *See* Roe v. Wade, 410 U.S. 113, 140 & n.37, 146 n.40 (1973).

[199] *See* DELLAPENNA, *supra* note 20, at 672-74 (presenting evidence that competent abortion providers were still being prosecuted in many States shortly prior to *Roe*).

tradition from pre-colonial England down to the present day,[200] the Court placed greatest weight on "the fact that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy," and a large supermajority of those statutes excepted only abortions necessary to preserve the woman's life.[201] These sweeping abortion bans persisted in almost all the States before 1960 and replaced language more amenable to serious-bodily-harm abortions in several jurisdictions.[202] Even in 1973, a clear majority of the States permitted only life-saving abortions.[203] The liberalizing trend, which was encountering increasing political opposition until *Roe* intervened,[204] comes nowhere close to a deeply-rooted tradition.

Moreover, while it may be true that many doctors in the twentieth century gave an increasingly broad interpretation to the traditional maternal-life exception to these prohibitions, *Dobbs* focuses almost exclusively on the laws on the books, not on the extent of slippage between them and the laws in action. Indeed,

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[200] Professor Monica Eppinger has constructed an elaborate revisionist history of the Anglo-American legal tradition regarding abortion in general, and maternal-life and maternal-health exceptions in particular. *See* Monica E. Eppinger, *The Health Exception*, 17 GEO. J. GENDER & L. 665 (2016). According to Eppinger, for centuries the common law presupposed "a humoral theory of health," *id.* at 673, and always implicitly recognized a highly expansive life-and-health exception for abortions, before and after quickening. *See id.* at 743. She argues that "[t]he contours of this doctrine survived, even as fundamental understandings of health changed, preserved in legality distinctions and in life-health exceptions to restrictions imposed by statute." *Id.* (footnote omitted). But "the grounds for invoking medical necessity became ever narrower through the twentieth century." *Id.* Consequently, the health-exception doctrine in *Roe* "represents continuity with doctrines of the past, enjoying centuries-old antecedents," and "[w]hat is novel are the narrowed grounds on which patients, practitioners, and lawmakers may now invoke it." *Id.* at 743-44. Evaluating these startling claims—which run directly counter to the narrative claiming that the health exception *expanded* over the century before *Roe*—is beyond the scope of this Article, because *Dobbs* makes them irrelevant. The tradition on which *Dobbs* principally relies consists of evidence about how *Americans* understood the English common law, expanded on its criminalization of abortion before and after the adoption of the Fourteenth Amendment, and retained those sweeping legal prohibitions—excepting only abortions necessary to preserve maternal life—until shortly before *Roe*. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2304 n.1 (2022) (Kavanaugh, J., concurring). Eppinger does not dispute that evidence, nor could she.

[201] *Dobbs*, 142 S. Ct. at 2253.

[202] *See id.*

[203] *Id.* at 2253-54.

[204] *See* DELLAPENNA, *supra* note 20, at 634 ("By 1973, the legislative reform or repeal drive had stalled, with only one state having changed its law since 1970, and several proposed reform bills having been defeated.").

Dobbs flatly rejected the analogous argument that the common law's failure to criminalize pre-quickening abortion (while nonetheless deeming it unlawful)[205] created a *de facto* abortion liberty in the early stages of pregnancy:

> [T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so. When legislatures began to exercise that authority as the century wore on, no one, as far as we are aware, argued that the laws they enacted violated a fundamental right.[206]

This reasoning applies with full force to reliance on the contention that health-preserving abortions were *de facto* legal in an increasing number of jurisdictions and localities as the twentieth century progressed. So far as I am aware, until shortly before *Roe* no one argued that the Constitution required the States to allow their laws to be misinterpreted and underenforced in these ways.[207] When pro-life reformers or public officials pushed for stricter enforcement, as some did, their proposals were criticized on a range of policy grounds, not denounced as unconstitutional.[208] That is how *Dobbs* holds these morally freighted issues are to be resolved—through ordinary democratic politics. As the Court wrote about the *Dobbs* briefs debating whether post-*Roe* changes in society strengthen (or weaken) the case for recognizing a constitutional right to abortion: "Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States."[209] Lax enforcement of State laws that were democratically enacted, and could be democratically repealed, does not constitute the kind of deeply-

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[205] *See Dobbs*, 142 S. Ct. at 2236.

[206] *Id.* at 2255.

[207] The Model Penal Code, adopted by the American Law Institute in 1957, did not argue that the Constitution required its proposals. The American Medical Association did not even endorse the Model Penal Code approach until 1967, and the American College of Gynecologists did not do so until 1968. *See* DELLAPENNA, *supra* note 20, at 600. Neither group purported to rest its endorsement on constitutional grounds.

[208] *See* DELLAPENNA, *supra* note 20, at 543-47 (describing efforts to tighten enforcement in the 1940s and 1950s, of which the most prominent was a probe led by New York's Assistant Attorney General John Henry Amen).

[209] *See Dobbs*, 142 S. Ct. at 2259.

rooted tradition *Dobbs* requires for recognition of a new fundamental right.[210]

CONCLUSION

Dobbs makes clear that each State may decide whether to adopt the theory Texas advanced in *Roe*—"that a new human life is present from the moment of conception"[211] (or at some other point in pre-birth human development). The State's freedom to resolve that "critical moral question"[212] favorably to the fetus necessarily includes the freedom to decide when the woman is justified in ending that new human life. There is at least one constitutional limit on that freedom: our society's traditional answer—that the life of the fetus should prevail unless "the life of the pregnant mother herself is at stake"[213]—should qualify as an implied fundamental right under *Dobbs*. By contrast, *Dobbs* clearly rules out a broad right to a health-preserving abortion such as *Roe* created. The leading intermediate possibility—that there is self-defense abortion right whenever pregnancy threatens "serious bodily harm"—only becomes plausible if (as is uncertain) the Court is prepared to constitutionalize a general implied right to use deadly force in self-defense that includes both threats to life and threats of "serious bodily harm." Even if the Court would recognize a self-defense right of that kind, the "serious bodily harm" abortion right should not have constitutional status: it has minimal support in the most relevant legal tradition, and several fundamental differences between ordinary self-defense settings and health-endangering pregnancies show that it is not "an integral part" of a "broader entrenched right." In principle, a strong case can be made that threats of non-fatal but severely life-impairing bodily harm should be deemed to fall within the scope of the right to a life-preserving abortion. But the Constitution does not command the States to treat any and all pregnancy-related threats of "serious bodily harm" as justifying the destruction of a fetus that the State has

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[210] A widespread pattern of judicial rulings that maternal-life exceptions included all threats of "serious bodily harm" would present a closer question—but I am unaware of *any* published opinions along those lines.

[211] Roe v. Wade, 410 U.S. 113, 150 (1973).

[212] *See Dobbs*, 142 S. Ct. at 2258.

[213] Roe, 410 U.S. at 113.

determined to be "an unborn human being." If it adheres to its reasoning in *Dobbs*, the Court should draw the constitutional line at pregnancies whose continuation endangers the pregnant woman's life, or threatens her with permanent, severely life-impairing bodily harm that is tantamount to loss of life.[214]

[214] As noted, *supra* note 192, it could be argued that an abortion is life-preserving if the pregnancy would significantly reduce the woman's life expectancy. It is difficult to see how a constitutional reduced life-expectancy line could be drawn. But even if it could, that line would be quite different from the "serious bodily harm" line, which encompasses serious harms whether they can be shown or presumed to shorten life expectancy.