MANDATING NATURE'S COURSE

Sherry F. Colb & Michael C. Dorf†

Laws that substantially restrict abortion, gender-affirming care, and aid in dying do not merely forbid particular acts; they effectively mandate burdensome bodily obligations. Yet many proponents of such restrictions purport to support a right to bodily autonomy in other contexts, for example by opposing public health vaccination and masking mandates. They distinguish the former restrictions on the ground that such laws merely allow nature to take its course (NTIC). The NTIC claim is widespread. It may appeal to religion, a tendency to equate nature with wholesomeness, or a version of the act/omission distinction. Nonetheless, the NTIC defense fails because it rests on unarticulated normative grounds for attributing some but not all results of legal prohibitions to nature. Rejecting NTIC claims rightly focuses attention on whether strong countervailing interests justify particular restrictions on bodily autonomy.

† Sherry F. Colb was C.S. Wong Professor, Cornell Law School. She died in August 2022, leaving behind a partial and preliminary draft of this Article. Michael C. Dorf is Robert S. Stevens Professor of Law, Cornell Law School, and was married to Professor Colb from 1991 until her death. Because readying this Article for publication required a substantial amount of further research, writing, and editing, Professor Dorf has chosen to identify himself as a co-author to make clear that he bears responsibility for any errors that Professor Colb would have corrected if she had had the opportunity. Elizabeth Anker, Susan Appleton, Emad Atiq, Sandra Babcock, John Blume, Mary Anne Case, Yun-Chien Chang, Dawn Chutkow, Jessica Clarke, Robert Hillman, Aziz Huq, Sheri Johnson, Daniel Klerman, Alexandra Lahav, Mitchel Lasser, Chan Tov McNamarah, Jeffrey Rachlinski, Brian Richardson, Zalman Rothschild, Nomi Stolzenberg, Kristen Underhill, Eleanor Wilking, and Ezra Young provided extremely helpful comments on earlier drafts of this Article. Nathanael Lo supplied excellent research assistance. The research for this Article was supported by the Milton and Eleanor Gould Fund. Professor Dorf also wishes to thank the Cornell Law Review, Rutgers School of Law, and the co-organizers of the symposium at which this Article was presented: Vera Bergelson, Andrew Gelfand, John Leubsdorf, Anna Mehrabyan, Steve Mirsen, Hafsa Oksuz, Josh Roth, Gigi Scerbo, and Penny Venetis.

INTRODUCTION

Before the Supreme Court overruled *Roe v. Wade*,[1] one could fairly characterize constitutional doctrine as placing a heavy burden on government to justify laws or policies that substantially infringe personal autonomy, especially when the infringement implicates bodily integrity.[2] *Dobbs v. Jackson Women's Health Organization*[3] worked a substantial change. Although the Court purported not to endanger unenumerated rights other than abortion,[4] the history-focused methodology the majority employed leaves little room to argue that new constitutional rights should be recognized based simply on the magnitude of the intrusion. Bodily autonomy rights the Court has already rejected—such as abortion itself as well as the putative right to aid in dying[5]—are probably off the table.

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1 410 U.S. 113 (1973).

2 *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 857 (1992) (allowing that the abortion right "may be seen . . . as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection").

3 597 U.S. 215 (2022).

4 *Id.* at 2277 ("our decision concerns the constitutional right to abortion and no other right").

5 In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court rejected a right to what the Court called assisted suicide. The *Glucksberg* Court's methodology presaged the approach of the *Dobbs* Court, but in so doing, it was an outlier that subsequent cases sought to distinguish. *See* Obergefell v. Hodges, 576 U.S. 644, 671 (2015) (stating that although the *Glucksberg* "approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy"). Even while purporting not to disturb precedents outside the abortion context, the *Dobbs* Court fully endorsed

So too, one might worry, are new applications of the broad rights to personal autonomy and bodily integrity that laws proscribing abortion and assisted suicide infringe. Thus, invoking the historical methodology of *Dobbs* and *Washington v. Glucksberg*,[6] and in the context of reviewing the grant of preliminary injunctive relief, the Sixth and Eleventh Circuits rejected federal substantive due process challenges to laws banning gender-affirming care for minors.[7] These courts also rejected equal protection challenges.[8] As this Article goes to press, the Supreme Court has on its plenary docket an equal protection challenge to Tennessee's prohibition on gender-affirming care for minors, and, depending on the outcome of that case, might eventually face a substantive due process challenge to the same law or a similar one from another state.[9] Accordingly, we think it useful to scrutinize arguments that will likely continue to be offered in defense of such bans.[10]

Laws banning[11] abortion, gender-affirming care, and aid in dying do not merely prevent people from undertaking certain conduct. They also effectively *mandate* forms of conduct:

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the *Glucksberg* methodology. 597 U.S. 215 *passim* (favorably citing *Glucksberg* repeatedly).

6 521 U.S. 702 (1997).

7 L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 472–79 (6th Cir. 2023), *cert. granted sub nom.* United States v. Skrmetti, 144 S.Ct. 2679 (2024) (No. 23-477), 2024 WL 3089532 (citing *Dobbs*, *Glucksberg*, and other precedents before concluding that there is no deeply rooted historical tradition warranting a right to autonomy with respect to gender-affirming care or other medical treatment); Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1219–24 (11th Cir. 2023) (same).

8 *L.W.*, 83 F.4th at 479–89; *Eknes-Tucker*, 80 F.4th at 1226–31.

9 *See Skrmetti*, 144 S.Ct. 2679, 2024 WL 3089532, at *1. The Solicitor General's certiorari petition presents the following question: "Whether Tennessee Senate Bill 1 (SB1), which prohibits all medical treatments intended to allow 'a minor to identify with, or live as, a purported identity inconsistent with the minor's sex' or to treat 'purported discomfort or distress from a discordance between the minor's sex and asserted identity,' Tenn. Code Ann. § 68-33-103(a)(1), violates the Equal Protection Clause of the Fourteenth Amendment." Petition for Writ of Certiorari at I, *Skrmetti*, 144 S.Ct. 2679 (2024) (No. 23-477), 2024 WL 3089532.

10 We think such bans are unconstitutional, but a comprehensive argument for that conclusion is beyond the scope of this Article. For persuasive arguments, see generally Jessica A. Clarke, *Scrutinizing Sex*, 92 U. CHI. L. REV. (forthcoming January 2025), available at https://ssrn.com/abstract=4787833 [https://perma.cc/F6R2-VMD9] (explaining that such bans trigger heightened scrutiny because they use expressly sex-based classifications); Lewis A. Grossman, *Criminalizing Transgender Care*, 110 IOWA L. REV. (forthcoming 2024), available at https://ssrn.com/abstract=4765290 [https://perma.cc/NKJ9-S96P] (demonstrating a historical tradition of patient access to standard-of-care medical treatment).

11 For simplicity, throughout this Article we use the term "ban" to refer to laws that very substantially restrict access to the asserted right, as well as outright bans.

to gestate and deliver a fetus; to inhabit a body that does not match one's gender; and to continue to live, often in agony. And under U.S. law, *mandates*—especially ones that involve the human body—are typically treated differently from mere prohibitions.

For example, *Winston v. Lee*[12] held that nonconsensual surgery to recover a bullet is an unreasonable "intrusion on . . . bodily integrity"[13] and thus violates the Fourth Amendment absent "a compelling need"[14] for the evidence the surgery could be expected to produce. One might say that because *Winston* construed an enumerated right, it does not stand for a broader principle of bodily autonomy under the rubric of substantive due process, but *Rochin v. California*,[15] which invalidated involuntary stomach pumping, was decided under that rubric. More recently, in resolving COVID-19 cases on the Court's emergency docket, several Justices called into question a broad reading of *Jacobson v. Massachusetts*,[16] which, at the dawn of the twentieth century, had applied a deferential standard of review to uphold a local program of mandatory smallpox vaccination.[17] Given their druthers as expressed in other contexts, it is plausible to suppose that the more libertarian-inflected conservative Justices would be inclined in a future case to limit *Jacobson* so that it does not undercut at least some right to bodily integrity.[18]

To see why, consider that in a case that did not even involve a substantive due process claim of bodily integrity but instead concerned the scope of congressional power under the Commerce Clause, Chief Justice Roberts treated the possibility of forcible intrusions into the body as a kind of *reductio ad absurdum* of government run amuck. He regarded a hypothetical

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12 470 U.S. 753 (1985).

13 *Id.* at 764.

14 *Id.* at 766.

15 342 U.S. 165 (1952).

16 197 U.S. 11 (1905).

17 *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2608 n.3 (2020) (Alito, J., joined by Thomas and Kavanaugh, JJ., dissenting) (describing the *Jacobson* Court's rejection of various challenges to mandatory vaccination as unduly cavalier); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) (stating that "*Jacobson* pre-dated the modern tiers of scrutiny" and suggesting that its application of what amounted to rational basis scrutiny was outdated).

18 *Cf.* Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 BUFF. L. REV. 131, 135–36 (2022) (criticizing subsequent judicial expansions of *Jacobson* to "support forcible intrusions onto bodily autonomy").

federal statute "ordering everyone to buy vegetables," which might be defended on the grounds that "many Americans do not eat a balanced diet," as self-evidently unconstitutional.[19] Given that the government can effectively order everyone to buy (through their taxes) such goods as fighter jets, postal vehicles, and dairy milk,[20] why did the Chief Justice assume that his readers would agree that an obligation to buy vegetables is impermissible? The answer—readily apparent to anyone who followed the public battle over the Patient Protection and Affordable Care Act (ACA) at issue in the case—is that the Chief Justice was playing on a fear promoted by the ACA's critics that an obligation to *buy* vegetables was just one step removed from an obligation to *eat* vegetables,[21] which would entail a profound violation of bodily autonomy: a totalitarian state literally forcing things down the throats of the people.

We think there are important distinctions between purchase mandates and consumption mandates as a constitutional matter.[22] We also hold views about many other constitutional issues implicated by the bans we consider in this Article. Yet, while we discuss various constitutional cases at some length, we do not take or defend a position on the proper interpretation of any constitutional provision or doctrine. Considerations of text, history, precedent, and prudence bear on constitutional

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19 *See* Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius, 567 U.S. 519, 553–54 (2012) (opinion of Roberts, C.J.).

20 *See* Press Release, USDA, USDA Announces Additional Assistance for Dairy Farmers (Jan. 23, 2023), https://www.usda.gov/media/press-releases/2023/01/ 23/usda-announces-additional-assistance-dairy-farmers [https://perma.cc/LRU9-65Z2]; *see also* Notice of Funds Availability for the Organic Dairy Marketing Assistance Program, 88 Fed. Reg. 33,562 (Dep't of Agric. May 24, 2023).

21 *See* Michael C. Dorf, *Commerce, Death Panels, and Broccoli: Or Why the Activity/Inactivity Distinction in the Health Care Case Was Really About the Right to Bodily Integrity*, 29 GA. ST. U. L. REV. 897, 900–01 (2013) (describing the law's "constitutional challengers' effective use of the fear that upholding the [health insurance purchase] mandate would permit the government to require people to eat broccoli").

22 *See* Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part I: The Misguided Libertarian Objection*, FINDLAW (Oct. 21, 2009), https://supreme.findlaw.com/legal-commentary/the-constitutionality-of-health-insurance-reform-part-i-the-misguided-libertarian-objection.html [https://perma.cc/GPD3-D4PU] (arguing that health insurance purchase mandate is no more intrusive than other government mandates); Michael C. Dorf, *The Constitutionality of Health Insurance Reform, Part II: Congressional Power*, FINDLAW (Nov. 2, 2009), https://supreme.findlaw.com/legal-commentary/the-constitutionality-of-healt h-insurance-reform-part-ii-congressional-power.html [https://perma.cc/HU96-HDNG] (contending that a mandate to purchase health insurance is sufficiently closely related to regulation of the interstate market to fall within the scope of congressional power to regulate interstate commerce).

issues in ways that they do not necessarily bear (or do not necessarily bear in the same way) on the normative and policy questions—and it is the latter that chiefly concern us. We take it as indisputable that some substantial number of people (mostly but not exclusively on the ideological right) favor a right to personal autonomy and bodily integrity that protects against forcible intrusions from the outside but offers no protection against legal prohibitions that have the effect of controlling the body from the inside. We consider constitutional cases and rhetoric as exemplars of that juxtaposition, not qua constitutional interpretation.

Suppose that we view the critics of the health-care purchase mandate in the ACA as making a purely normative objection to government mandates. Seen from that perspective, they were not wrong that unconditional affirmative legal mandates are unusual.[23] Most of the legal obligations that federal, state, and local governments in the United States directly impose are negative rather than positive. Laws forbid murder, embezzlement, and other forms of harmful conduct. By contrast, affirmative obligations are typically conditional: you must pay income tax, but only if you earn money; you must have a driver's license, but only if you drive; etc. Indeed, the law protects against many affirmative obligations. The government that tries to force Americans to eat or even to purchase broccoli, to aid a drowning stranger,[24] or to donate blood or other bodily material to an ailing patient[25] will confront some combination of

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23 Jury duty and conscription in wartime are rare exceptions that prove the rule that pure affirmative obligations are, well, exceptional.

24 Traditionally, the common law imposed no duty to rescue a stranger, even when doing so entailed no risk to the rescuer's safety. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 37 (AM. L. INST. 2012); *see, e.g.*, Yania v. Bigan, 155 A.2d 343, 346 (Pa. 1959). People who voluntarily undertook a rescue could nonetheless be held liable for harm resulting from their doing so negligently. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 42 (AM. L. INST. 2012). To remove the resulting disincentive for altruistic rescues, the law in many jurisdictions now shields rescuers from such liability in various circumstances. *See* Barry Sullivan, *Some Thoughts on the Constitutionality of Good Samaritan Statutes*, 8 AM. J.L. & MED. 27, 27 n.1 (1982) (listing state Good Samaritan laws). However, most jurisdictions still impose no affirmative duty to rescue, see RESTATEMENT (SECOND) OF TORTS § 314 rep.'s note (AM. L. INST. 1965), and those that do typically enforce the duty through modest penalties. *See* Eugene Volokh, *Duty to Rescue/Report Statutes*, THE VOLOKH CONSPIRACY (Nov. 3, 2009, 12:24 AM), https://volokh.com/2009/11/03/duty-to-rescuereport-statutes/ [https://perma.cc/SNJ2-GP7F] (listing state affirmative duty statutes and penalties).

25 *See* Curran v. Bosze, 566 N.E.2d 1319, 1345 (Ill. 1990) (declining to compel twin minors to donate bone marrow to their leukemia-stricken half-brother);

countervailing norms, traditions, and rights. American law often gives effect to a prohibition/obligation distinction, thereby reflecting a libertarian default.[26]

How then, do supporters (as a policy matter) and defenders (as a constitutional matter) of laws banning abortion, gender-affirming care, and aid in dying reconcile their views on these matters with their background hostility to affirmative mandates, especially those infringing bodily integrity? They might resort to formalism. After all, in form, the laws in question *forbid* abortion, gender-affirming care, and aid in dying. They do not *mandate* anything—at least not formally.

But the formal structure of the laws in question can hardly justify treating them as *functionally* only prohibitory. After all, it is almost always possible to restructure a mandate as a nominally conditional prohibition. Consider the following challenge for supporters of bans on abortion, gender-affirming care, and/or aid in dying who also oppose mask or vaccine mandates on libertarian grounds: would such (halfway) libertarians withdraw their opposition if, instead of mandating masks and vaccines, the government forbade going to retail stores, factories, or restaurants if one is unmasked or unvaccinated? We know the answer is no, because many of the key federal, state, and local public health orders during the COVID-19 pandemic did in fact operate conditionally in just that way,[27] and yet they

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see also Bonnie Steinbock, *Maternal-Fetal Conflict and In Utero Fetal Therapy*, 57 ALB. L. REV. 781, 790–91 (1994) (noting that courts refuse to compel unwanted medical procedures, including blood donations).

26 In recent years, at least some version of libertarianism has been associated with the political right. *See* ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM 15–16, 100, 109 (2013) (describing conservatives' efforts to invalidate the ACA as implementing "Tough Luck Libertarianism"). However, left/liberal civil libertarians (such as the present authors) share many of the commitments of conservative libertarians. In observing a libertarian default in American law, we mean neither critique nor endorsement.

27 *See, e.g.*, OSHA Covid-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (federal regulation mandating employers with more than one hundred employees to require employees to undergo Covid-19 vaccination or take a weekly Covid-19 test at their own expense and wear a mask at work), *invalidated by* Nat'l Fed'n of Indep. Bus. (NFIB) v. Dep't of Labor, 567 U.S. 519 (2022); CMS Omnibus Covid-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555 (Nov. 5, 2021) (federal regulation providing that facilities receiving Medicare and Medicaid funding must ensure that staff are vaccinated against Covid-19), *upheld by* Biden v. Missouri, 595 U.S. 87 (2022); Office of Governor Jared Polis, Exec. Order D 2020 138 (July 16, 2020) [https://perma.cc/4259-DD28] (requiring individuals in Colorado to wear a mask "when entering or moving within any Public Indoor Space"); Office of Governor Phil Murphy, Exec. Order No. 253 (Aug. 23, 2021) [https://perma.cc/8H9B-FYML] (instituting a Covid-19 vaccine or testing requirement for all state workers, including school

came in for substantial libertarian criticism.[28] Accordingly, the nominal phrasing of a mandate as a conditional prohibition cannot explain support for or acceptance of bans on abortion, gender-affirming care, and/or aid in dying.

And indeed, we do not believe that our hypothetical interlocutors who support bans on abortion, gender-affirming care, and/or aid in dying but oppose mask and vaccine mandates would rely solely on the formal structure of the relevant laws as prohibitions or mandates. What kinds of arguments do proponents and defenders of the former sorts of bans offer?

In part, they rely on claims specific to each domain. They say that the state interest in the life of a fetus outweighs the imposition on the pregnant person bearing that fetus, that minors are insufficiently mature to make decisions concerning their gender, or that legalizing aid in dying would result in undue pressure on patients who do not wish to die. We think that such considerations do not justify the bans on any of the activities under consideration, but for present purposes, we bracket both the domain-specific grounds for supporting the bans and our responses to them.[29]

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personnel); Office of the Mayor, City of Atlanta, Exec. Order 2020-113 (July 8, 2020) [https://perma.cc/QJW9-BXRM] (requiring individuals in Atlanta to wear a mask or face covering "when inside a commercial entity or other building or space open to the public, or when in an outdoor public space, wherever it is not feasible to maintain appropriate social distancing"); Key to NYC: Requiring Covid-19 Vaccination for Indoor Entertainment, Recreation, Dining and Fitness Settings, Emergency Exec. Order No. 225 (Aug. 16, 2021) [https://perma.cc/A5JY-VKW6] (requiring individuals in New York City to show proof of vaccination to enter, work in, or patronize certain indoor premises).

28 *See, e.g.*, Jeffery A. Singer, *President Biden's New Vaccine Mandate Might Have Unintended Consequences*, CATO INST.: CATO AT LIBERTY (Sept. 9, 2021, 05:21 PM), https://www.cato.org/blog/president-bidens-new-vaccine-mandate-might-have-unintended-consequences [https://perma.cc/N4YU-V5UP] (arguing that the OSHA vaccine mandate ignored the potential role of natural immunity in alleviating the pandemic and that it could cause the vaccine-resistant to seek black market vaccination cards); Nicholas Bogel-Burroughs & Campbell Robertson, *While Virus Surges, Georgia Governor Sues Atlanta Mayor to Block Mask Rules*, N.Y. TIMES (July 21, 2020), https://www.nytimes.com/2020/07/17/us/brian-kemp-georgia-keisha-lance-bottoms-atlanta.html [https://perma.cc/YL7Z-KKA7] (quoting Governor Kemp stating that he was "confident that Georgians don't need a mandate to do the right thing" and worrying "about people, particularly young people, relying too much on the government to tell them what to do").

29 For purposes of this Article, we need not persuade readers of the inadequacy of arguments asserting countervailing interests sufficient to justify bans on abortion, gender-affirming care, and aid in dying. For completeness, however, we will note the reasons why we think such domain-specific arguments fail. (1) We think that once a developing fetus is sentient, abortion raises serious moral concerns but that for familiar libertarian and egalitarian reasons, addressing

In this Article, we focus on one common line of argument offered in defense of bans on abortion, gender-affirming care, and aid in dying—that in each instance, the government does not, in fact, mandate any conduct but merely forbids people from interfering with *nature taking its course* (hereafter "NTIC"). Thus, because the immediate cause of distress originates within rather than outside the body, some of the laws' proponents and defenders conceptualize the bans merely as prohibiting ostensibly wrongful acts, not as government imposition of affirmative obligations.

To be clear, our point is not that to be consistent one must either support all purported exercises of a right to bodily integrity or oppose them all. No sensible person would take either extreme view. Our concern is with the particular lines drawn. We aim to elucidate a specific juxtaposition of beliefs. We hope to shed light on how someone like the author of the *Dobbs* opinion—which will result in some substantial number of people enduring unwanted pregnancies and then involuntarily becoming parents—could have regarded pandemic public health orders as imposing "previously unimaginable restrictions on individual liberty."[30]

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those concerns should be left to private conscience. *See* SHERRY F. COLB & MICHAEL C. DORF, BEATING HEARTS: ABORTION AND ANIMAL RIGHTS 77 (2016) (describing the "decision to have an abortion as the sort of sometimes immoral choice that [people] are entitled to make for themselves"). (2) We acknowledge that minors typically lack sufficiently mature judgment to make important medical decisions for themselves, but that fact does not suffice to justify bans on gender-affirming care; it argues for requirements of parental consent and the possibility of a judicial override where such consent is unreasonably withheld, as with abortion in the *Roe* era. *See*, *e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 441 (1983) (invalidating parental consent requirement for a minor seeking an abortion because it did not contain a suitable judicial bypass option). (3) We acknowledge the risk of undue pressure in a regime of legal aid in dying; it calls for reasonable regulation, not prohibition. *See* Brief Amicus Curiae of State Legislat[ors] in Support of Respondents, Vacco v. Quill, 521 U.S. 793 (1997) (No. 95-1858), Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 709339, at *21–23 (brief written by current authors acting as *pro bono* attorneys).

30 Samuel Alito, Associate Justice, U.S. Supreme Court, Speech at The Federalist Society annual convention, at 06:03, (Nov. 12, 2020) (transcript available online), https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society [https://perma.cc/G5MJ-BT8U]; *see also* Arizona v. Mayorkas, 143 S. Ct. 1312, 1314 (2023), (Statement of Gorsuch, J.) (deeming COVID restrictions "the greatest intrusions on civil liberties in the peacetime history of this country"). Even if we were to grant, strictly *arguendo*, that the kind of reproductive servitude that was effectively authorized by the Court's overruling of the right to abortion does not impinge on liberty as much as mandatory vaccination or limits on gatherings for worship and other purposes, the claim by Justices Alito and Gorsuch that COVID restrictions were unprecedented affronts to liberty is facially absurd, given that for more than the

In explaining NTIC, we do not mean to provide a justification for it. On the contrary, our deeper goal is to show how it depends on unspoken and largely unjustified assumptions about what does and does not count as NTIC. To foreshadow an example we develop below with respect to the infamous Tuskegee syphilis study, it would be monstrous to suggest that a government that denies people lifesaving antibiotics does not wrong them on the ground that the denial merely allows nature, in the form of bacteria, to take its course. The question of what to attribute to nature versus what to attribute to the acts of humans and their institutions is irreducibly normative.[31]

The balance of this Article proceeds in four substantive Parts. Part I shows that bans on abortion, gender-affirming care, and aid in dying act as *de facto* mandates that impose very substantial affirmative obligations. Part II documents how supporters and defenders of such bans aim to deflect responsibility for the resulting burdens by relying on the NTIC claim. Part III explains why NTIC has apparent force even for people who lack the religious commitments of the most prominent thinkers who advance it: it both trades upon a psychological tendency to regard natural phenomena as good and negates responsibility by human agents.[32] Part IV argues that NTIC is nonetheless unpersuasive. Part IV also considers whether our argument entails the uncomfortable proposition that the concept of disease is entirely socially constructed or that there is no such thing as nature. (Spoiler alert: it does not.)

I
The Affirmative Obligations the Prohibitions Entail

In an insightful article he wrote before joining the legal professoriate, Jed Rubenfeld articulated an important justification for what was then called a constitutional right to privacy.[33] Laws forbidding contraception, abortion, and other

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first three-quarters of a century of the American republic, millions of human beings were lawfully enslaved.

31 Thus, our argument against the NTIC logic is general. We do not claim that the three kinds of bans we discuss in this Article are the only legal prohibitions that impose *de facto* affirmative obligations, or that they are the only sort that proponents justify through the NTIC logic. We do think that wherever that logic is deployed, it is flawed.

32 These two appeals of NTIC arguments correspond roughly to what Professor Elizabeth Emens aptly calls "normative nature" and "guiltless nature." Elizabeth F. Emens, *Against Nature*, *in* Nomos LII: Evolution and Morality 293, 295–96 (James E. Fleming & Sanford Levinson eds., NYU Press 2012).

33 Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989).

rights deemed fundamental under then-prevailing Supreme Court jurisprudence, Rubenfeld argued, are problematic not because of "what the law proscribes," but because of "what the law imposes."[34] In this Part we expand on Rubenfeld's analysis with respect to abortion[35] and then extend it to gender-affirming care and aid in dying.

A. Abortion

A strong normative argument for the right to abortion begins by recognizing what bans on abortion compel: pregnancy, birth, and parenthood.[36] Because compelled parenthood does not directly implicate bodily integrity or NTIC, we do not focus on it here. Still, we nonetheless pause to reject a suggestion Justice Amy Coney Barrett made during the oral argument in *Dobbs*—that the possibility of placing a newborn for adoption means that abortion bans do not compel parenthood.[37]

As Solicitor General Elizabeth Prelogar stated in response to Justice Barrett, abortion bans force upon a pregnant person the excruciating choice "whether to give a child up for adoption. That itself is a monumental decision . . . ."[38] Pregnancy creates bonds with the gestating fetus that relinquishment of the baby for adoption painfully severs.[39] Laws that ban abortion and thus mandate that pregnancies be taken to term even if the biological parents lack the capacity to care for a child might

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34 *Id.* at 739.

35 *See id.* at 789–90 ("[A]nti-abortion laws produce . . . compulsion to carry a fetus to term, to deliver the baby, and to care for the child in the first years of its life. All of these processes, in their real daily effects, involve without question the most intimate and strenuous exercises of the female body. The woman's body will be subjected to a continuous regimen of diet, exercise, medical examination, and possibly surgical procedures.").

36 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care.")

37 Transcript of Oral Argument at 56–57, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392) (asking whether state laws that permit a person to "terminate parental rights by relinquishing a child after" birth "take care of th[e] problem" of parental obligations).

38 *Id.* at 109–10.

39 *See* Sherry F. Colb, *"Never Having Loved at All": An Overlooked Interest that Grounds the Abortion Right*, 48 CONN. L. REV. 933, 941–49 (2016) (describing the bonding that occurs, especially in late pregnancy, and the harm that severing the bond can inflict).

increase the supply of adoptable babies, but they create what is often a no-win situation for pregnant people themselves.[40]

Accordingly, we think that the abortion right could be justified based on the interest in not being compelled to make the lose-lose choice between placing a newborn for adoption and assuming all of the obligations of parenthood. However, that interest does not directly implicate NTIC, and so we focus our attention on the physical burdens abortion prohibitions compel: those associated with continued pregnancy and birth.

At the risk of stating the obvious, pregnancy often entails pain, discomfort, nausea, insomnia, an increased likelihood of various medical conditions—including gestational diabetes, placental abruption, placenta previa, and preeclampsia—and an increased risk of permanent disability and even death.[41] Giving birth is extremely painful and carries additional medical risks that are generally more grave than the risks of abortion.[42] Or, if the delivery that follows an unwanted pregnancy is by Caesarian section (as nearly a third of deliveries in the United States are),[43] the government has effectively compelled unwanted surgery. And hardly minor surgery. A C-Section temporarily disables the patient, carries the usual risks of major operations, and inflicts additional pain beyond what the pregnancy inflicted.[44] Moreover, even patients who do not seek elective abortions face potentially life-threatening risks in jurisdictions with abortion bans due to medical providers'

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40 *Cf. id.* at 947 (rejecting the claim that adoption is a "win/win" alternative to abortion).

41 *See generally* F. Gary Cunningham et al., Williams Obstetrics (22nd ed. 2022); Mount Sinai Expert Guides: Obstetrics and Gynecology (Rhoda Sperling ed., 2020). *See also* Caitlin Gerdts, Loren Dobkin, Diana Greene Foster & Eleanor Bimla Schwarz, *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth after an Unwanted Pregnancy*, 26 Women's Health Issues 55, 57 (2016) (gathering data on health problems reported by women who continued to carry their pregnancies after being turned away by abortion providers for various reasons).

42 *See, e.g.*, Gerdts, Dobkin, Foster & Schwarz, *supra* note 41, at 55; *see also* The Nat'l Acads. of Scis., Eng'g, and Med., The Safety and Quality of Abortion Care in the United States (2018).

43 Michelle J.K. Osterman, Changes in Primary and Repeat Cesarean Delivery: United States, 2016–2021 1 (2022), https://www.cdc.gov/nchs/data/vsrr/vsrr021.pdf [https://perma.cc/5JRB-VCDA].

44 *See generally* Jane Sandall et al., *Short-term and Long-term Effects of Caesarian Section on the Health of Women and Children*, 392 Lancet 1349, 1350–52 (2018).

understandable reluctance to provide treatment that could be deemed to violate abortion prohibitions.[45]

Putting all these symptoms and risks together, it would be reasonable to classify pregnancy as constituting an illness and abortion bans as compulsion to suffer its full effects.[46] Of course, many people want a child and therefore welcome pregnancy notwithstanding the risks and burdens that come with it. But for the many other people who do not,[47] the physical burdens of pregnancy simply compound the emotional toll. Understanding pregnancy as a kind of illness that abortion bans forbid patients from treating enables us to see more clearly how those bans infringe autonomy and bodily integrity.

In Part III we return to the notion of pregnancy as illness to explain why NTIC proves too much: it would justify such outrageous assaults on liberty as the Tuskegee study. For now, however, we offer a more hypothetical comparison.

Suppose that a previously unknown sexually transmitted disease emerges. We will call it uterine expansion syndrome

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45 *See, e.g.*, Selena Simmons-Duffin, *In Oklahoma, a Woman was Told to Wait until She's 'Crashing' for Abortion Care*, NPR (Apr. 25, 2023), https://www.npr.org/sections/health-shots/2023/04/25/1171851775/oklaho ma-woman-abortion-ban-study-shows-confusion-at-hospitals [https://perm a.cc/V9WD-FQUD] (reporting that an Oklahoma hospital told a woman with a molar pregnancy that she had to wait in the parking lot until she started "crashing" or "fixing to have a heart attack" before she could receive a surgical abortion); Pam Belluck, *They had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. TIMES (July 17, 2022), https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html [https://perma.cc/CA37-7CR9] (reporting that a Texas hospital sent a woman experiencing a miscarriage home "with instructions to return only if she was bleeding so excessively that her blood filled a diaper more than once an hour"); *see also* DANIEL GROSSMAN ET AL., ADVANCING NEW STANDARDS IN REPRODUCTIVE HEALTH: CARE POST-ROE: DOCUMENTING CASES OF POOR-QUALITY CARE SINCE THE DOBBS DECISION (May 2023), https://sites.utexas.edu/txpep/files/2023/05/ANSIRH-Care-Post-Roe-Report-Embargoed-until-15-May-23.pdf [https://perma.cc/B2YD-345Q] (collecting incidents of healthcare providers waiting for their patients' conditions to deteriorate to the point where pregnancy could be terminated within the narrow exceptions permitted by state law).

46 *See, e.g.*, Sheila Taylor Myers & Harold G. Grasmick, *The Social Rights and Responsibilities of Pregnant Women: An Application of Parson's Sick Role Model*, 26 J. APPLIED BEHAV. SCI. 157 (1990) (suggesting that reluctance to classify pregnancy as illness creates a social barrier to adequate care); Warren M. Hern, *The Illness Parameters of Pregnancy*, 9 SOC. SCI. & MED. 365 (1975) (arguing that pregnancy fits within the traditional cognitive framework of illness).

47 During the last two decades, the ratio of abortions to live births has exhibited modest fluctuations, hovering around roughly one to five. Rachel K. Jones, Marielle Kirstein & Jesse Philbin, *Abortion Incidence and Service Availability in the United States, 2020*, 54 PERSPS. ON SEXUAL & REPROD. HEALTH 128, 131 tbl.1 (2022). A substantial decline in that ratio in the coming years, if it occurs, will likely be attributable to abortion restrictions post-*Dobbs* rather than a substantial diminution in the fraction of total pregnancies that are unwanted.

(UES). UES results in a benign uterine tumor that grows enormously over the course of nine months, at which point it causes painful contractions that eventually lead to vaginal expulsion or else requires surgical extraction. If there were a safe and effective pill that could cure UES if diagnosed early on and a minor surgical procedure that could cure it a little later in its course, surely everyone would recognize that a ban on the pill or the procedure would effectively compel people who contracted UES to suffer the extreme bodily consequences. But, of course, that is exactly what abortion bans do.

To be sure, one might think that abortion bans are nonetheless justified because the state has compelling interests in fetal life but not in tumors.[48] However, that distinction has nothing to do with the scope of the infringement on bodily integrity. Seen through the lens of bodily integrity, unwanted pregnancy is a disease and abortion is the cure. Banning the cure for a disease effectively mandates that persons with the disease suffer its symptoms.

But wait. Isn't there a difference between the government forbidding treatment for some disease and the government affirmatively mandating that people suffer the disease? Perhaps, but only if NTIC is persuasive. We contend below in Parts III and IV that it is not. For now, we ask readers to accept only that abortion bans have the practical effect of compelling the burdens and risks associated with pregnancy and birth.

B. Gender-Affirming Care

In February 2023, the Florida Boards of Medicine and Osteopathic Medicine—under the influence of Governor Ron DeSantis—banned gender confirmation surgery (which is not generally performed on minors anyway)[49] and two of the most

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48 Even people who oppose abortion sometimes allow that treating a cancerous growth with the side effect of killing a gestating fetus is morally justified. *See* PATRICK LEE & ROBERT P. GEORGE, BODY-SELF DUALISM IN CONTEMPORARY ETHICS AND POLITICS 142 (2007) (discussing and endorsing casuistic justification); John T. Noonan, Jr., *An Almost Absolute Value in History*, *in* THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 58 (John T. Noonan, Jr. ed., 1970) (same). *A fortiori*, they (and everybody else) would allow removal of the tumor in UES.

49 Robin Respaut & Chad Terhune, *Putting Numbers on the Rise in Children Seeking Gender Care*, REUTERS INVESTIGATES, (Oct. 6, 2022), https://www.reuters.com/investigates/special-report/usa-transyouth-data/[https://perma.cc/VZZ9-PHCA] (finding that gender-affirming surgery is "uncommon in patients under age 18"); *see also* Wylie C. Hembree et al., *Endocrine Treatment of Gender Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRIN. & METAB. 3869, 3894 (2017) (advising that clinicians delay

common forms of gender-affirming care for transgender minors: puberty blockers and hormone replacement therapy.[50] Just a few months later, the Florida legislature put those bans (and additional enforcement mechanisms) into a statute.[51] By spring 2024, nearly half of the states had adopted similar restrictions.[52] Supporters of such measures claim that the banned treatments are ineffective and harmful,[53] but the leading U.S. medical organizations disagree[54]—and of course,

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gender-affirming genital surgery until the patient is at least age eighteen or the legal age of majority).

50 Florida Board of Medicine Rule 64B8-9.019 ("Standards of Practice for the Treatment of Gender Dysphoria in Minors") provides (subject to an exception for transgender youth whose treatment began prior to the rule's adoption):

> (1) The following therapies and procedures performed for the treatment of gender dysphoria in minors are prohibited.
>
> (a) Sex reassignment surgeries, or any other surgical procedures, that alter primary or secondary sexual characteristics.
>
> (b) Puberty blocking, hormone, and hormone antagonist therapies.

FLA. ADMIN. CODE ANN. r. 64B8-9.019 (2023). The Florida Board of Osteopathic Medicine Rule 64B15-14.014 is identical. *See* FLA. ADMIN. CODE ANN. r. 64B15-14.014 (2023).

51 Civil Liability for Provision of Sex-Reassignment Prescriptions or Procedures to Minors, FLA. STAT. ANN. § 766.318 (West 2023) (signed into law on May 17, 2023).

52 *See Map: Attacks on Gender-Affirming Care by State*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map [https://perma.cc/4A6L-3FCP] (last visited May 16, 2024) (map showing twenty-five states with law or policy banning gender-affirming care); Sophie Putka, Rachael Robertson & Kristina Fiore, *These States Have Banned Youth Gender-Affirming Care*, MEDPAGE TODAY, https://www.medpagetoday.com/special-reports/exclusives/104425 [https://perma.cc/K7PY-ZH6G] (last visited July 28, 2024) ("A total of [twenty-five] states now have restrictions on gender-affirming care.").

53 The "Fact Check" document prepared by Florida Governor DeSantis and Florida State Surgeon General Joseph A. Ladapo is a good example of the genre. It purports to undercut the basis for federal standards more favorable to gender-affirming care by selectively highlighting gaps and uncertainties in the data. *See Treatment of Gender Dysphoria for Children and Adolescents Fact Check*, FLA. DEP'T OF HEALTH (Apr. 20, 2022), https://www.floridahealth.gov/_documents/newsroom/press-releases/2022/04/20220420-gender-dysphoria-fact-sheet.pdf?utm_source=floridahealth.gov&utm_medium=referral&utm_campaign=newsroom&utm_content=article&url_trace_7f2r5y6=https://www.floridahealth.gov/newsroom/2022/04/20220420-gender-dysphoria-press-release.pr.html. [https://perma.cc/6JR3-FRPV]. For a critical assessment of the Fact Check, see *The Facts: Rebutting the Florida Department of Health Memo Misleading the Public on the Science behind Gender-Affirming Care*, HUM. RTS. CAMPAIGN FOUND. (Apr. 21, 2022) [https://perma.cc/J8SR-VQDL].

54 *See, e.g.*, Press Release, Endocrine Soc'y, AMA Strengthens Its Policy on Protecting Access to Gender-Affirming Care (June 12, 2023), https://www.endocrine.org/news-and-advocacy/news-room/2023/ama-gender-affirming-care [https://perma.cc/G43D-358V] (reporting that the American Medical Association adopted an Endocrine Society resolution to protect access to evidence-based

where it is not forbidden by law, treatment in any individual case cannot proceed without approval by medical professionals after extensive consultation with patients.[55]

Denial of gender-affirming care does not directly impact all transgender youth. DSM-5-TR, which is the current version of the *Diagnostic and Statistical Manual of Mental Disorders*, "defines gender dysphoria in adolescents and adults as a marked incongruence between one's experienced/expressed gender and their assigned gender, lasting at least [six] months, as manifested by at least two of" a list of experiences.[56] The definition of gender dysphoria in pre-adolescent children is similar, although it requires that the incongruence be "manifested by at least six" of a slightly longer list of experiences and feelings.[57] Notably, someone can experience gender dysphoria without experiencing physical or emotional distress, as the criteria for diagnosis include the "desire" to be, act, or look in a way that does not match a person's sex assigned at birth.[58] And thus for some youth, treatment may consist of therapy,

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gender-affirming care for transgender and gender-diverse individuals, co-sponsored by the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, the American Urological Association, the American Society for Reproductive Medicine, the American College of Physicians, the American Association of Clinical Endocrinology, GLMA: Health Professionals Advancing LGBTQ+ Equality and AMA's Medical Student Section). A government-commissioned review in the United Kingdom reached a more skeptical conclusion. *See Independent Review of Gender Identity Services for Children and Young People: Final Report*, CASS REV. (Apr. 2024), https://cass.independent-review.uk/wp-content/uploads/2024/04/CassReview_Final.pdf [https://perma.cc/UE9H-8AR6] (while not recommending banning gender-affirming care for minors, urging extreme caution in light of weak evidence). *But see* Meredithe McNamara et al., *An Evidence-Based Critique of the Cass Review* 2, https://law.yale.edu/sites/default/files/documents/i ntegrity-project_cass-response.pdf [https://perma.cc/WH92-L8DP] (concluding that the Cass "Review repeatedly misuses data and violates its own evidentiary standards by resting many conclusions on speculation[,]" that "[m]any of its statements . . . reveal profound misunderstandings of the evidence base and the clinical issues at hand[,]" and that it "subverts widely accepted processes for development of clinical recommendations and repeats spurious, debunked claims about transgender identity and gender dysphoria").

55 Jason Rafferty, et al. *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, AM. ACAD. OF PEDIATRICS at 4 (Oct. 1, 2028), https://publications.aap.org/pediatrics/article/142/4/e20182162/37381/Ensuring-Comprehensive-Care-and-Support-for [https://perma.cc/343L-2W94] ("Pediatric providers have an essential role in assessing gender concerns and providing evidence-based information to assist youth and families in medical decision-making.").

56 AM. PSYCHIATRIC ASS'N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS code F64.0 (5th ed. text revision 2022) (ebook).

57 *Id.* at code F64.2.

58 *See id.*; *see also supra* note 56.

social transition, or other steps that do not require medication, much less surgery. For them, the primary (and non-trivial) impact of state bans on gender-affirming care is the pretty clearly intended stigmatic harm but not a bodily mandate.[59]

Yet to quote the overruled-but-still-trenchant Supreme Court opinion in *Planned Parenthood v. Casey*,[60] "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects."[61] Not just for consistency with the Constitution. For burdensomeness as well. A law forbidding the distribution of insulin imposes no burden at all on people who do not have diabetes. That fact does not speak at all to the very large burden such a law would impose on people who do. So too here, the way to measure the bodily burden of laws forbidding minors from receiving puberty blockers and hormone replacement therapy is by examining their impact on minors who, in the judgment of the medical professionals with whom they have consulted at length, need such care.

For those minors, the burden is very substantial and directly affects bodily integrity. A transgender girl who is denied puberty blockers and hormone replacement therapy will develop characteristics—such as enlarged male genitals, facial hair, and a deeper voice—that can heighten emotional distress, complicate social transition, and make further transition as an adult more difficult; transgender boys experience similarly substantial harms.[62]

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59 We recognize that reliance on the DSM risks pathologizing and stigmatizing transgender persons. We cite it chiefly for the same reason that the American Psychiatric Association (which publishes the DSM) includes an entry for gender dysphoria: because, in light of current practices within medicine and health insurance, some diagnosis is needed "to preserve access to gender transition-related health care while also minimizing the degree to which such diagnostic categories stigmatize the very people that physicians are attempting to help." *Gender Dysphoria Diagnosis: History*, AM. PSYCHIATRIC ASS'N. (Nov. 2017), https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis [https://perma.cc/PA2J-Q3S9]. Even so, we believe it ought to be possible for care to be delivered without pathologization. *See* Amets Suess Schwend, *Trans Health Care from a Depathologization and Human Rights Perspective*, PUB. HEALTH REVS. (Feb. 19, 2020), at 3–4, https://publichealthreviews.biomedcentral.co m/articles/10.1186/s40985-020-0118-y [https://perma.cc/TVF7-KRPU] (literature review of the depathologization perspective).

60 505 U.S. 833 (1992).

61 *Id.* at 894 (opinion of the Court).

62 *See* Florence Ashley, *Adolescent Medical Transition is Ethical: An Analogy with Reproductive Health*, 32 KENNEDY INST. ETHICS J. 127, 138 (2022)

> The irreversibility of transition-related interventions is often overstated, whereas the irreversibility of withholding them is routinely

From the perspective of a transgender minor, the bodily impact of bans on gender-affirming care can be comparable to what a cisgender minor or adult would experience if forced to transition. Imagine that state agents inject a cisgender man with estrogen, introduce testosterone blockers into his bloodstream, and insert breast implants. He would surely be distraught, and not only (or chiefly) because someone touched him without his consent, thereby committing a common-law battery. His warranted outrage would, in significant part, come from having been forced into a body that is, to paraphrase the DSM, incongruent with his experienced gender.

C. Aid in Dying

That the denial of a right to aid in dying entails a bodily imposition hardly requires argument. Even so, it is worth emphasizing just what that imposition entails. Accordingly, we quote the description by the district court of the circumstances confronted by one of the patient plaintiffs in a May 1994 ruling in a case challenging the Washington law forbidding aid in dying:

> Jane Roe is a [sixty-nine]-year-old retired pediatrician who has suffered since 1988 from cancer, which has now metastasized throughout her skeleton. Although she tried and benefitted temporarily from various treatments including chemotherapy and radiation, she is now in the terminal phase of her disease. In November of 1993, her doctor referred her to hospice care. Only patients with a life expectancy of less than six months are eligible for such care.

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understated. Endogenous puberty is difficult to reverse, and many trans individuals undergo lengthy and expensive interventions to alter the sexual characteristics they developed during puberty. By contrast, puberty blockers are far more reversible, whereas hormone therapy is of comparable reversibility—essentially inducing puberty. Nonetheless, few would claim that youths should be disallowed from undergoing endogenous puberty on account of irreversibility.

(citations omitted); Danielle M. Wenner & B. R. George, *Not Just a Tragic Compromise: The Positive Case for Adolescent Access to Puberty Blocking Treatment*, 35 BIOETHICS 925, 929 (2021) ("Physical characteristics attendant on endogenous puberty are only partially reversible, and frequently only with expensive, time-consuming, and invasive procedures. Allowing puberty to progress unimpeded thus represents a partially irrevocable decision."); *id.* ("[C]isgender youth are implicitly presumed competent to consent to the irreversible or incompletely-reversible effects of endogenous puberty from an early age, . . . accounts of (in) capacity to consent will need to justify any departures from an analogous presumption of competence in the case of [transgender, non-binary, and gender questioning] youth.").

> Jane Roe has been almost completely bedridden since June of 1993 and experiences constant pain, which becomes especially sharp and severe when she moves. The only medical treatment available to her at this time is medication, which cannot fully alleviate her pain. In addition, she suffers from swollen legs, bed sores, poor appetite, nausea and vomiting, impaired vision, incontinence of bowel, and general weakness.
>
> Jane Roe is mentally competent and wishes to hasten her death by taking prescribed drugs with the help of [additional] plaintiff Compassion in Dying. In keeping with the requirements of that organization, she has made three requests for its members to provide her and her family with counseling, emotional support and any necessary ancillary assistance at the time she takes the drugs.[63]

Because Roe was forbidden any assistance in ending her life, the effect of the Washington statute was to condemn her to the prolonged physical and emotional agony that virtually anyone in her condition would suffer.[64] And needless to say, Roe's condition near life's end was hardly unique. Indeed, one of the current authors experienced much the same fate: her cancer had also metastasized throughout her skeleton; she also achieved some benefit from chemotherapy, radiation, and other medical interventions before they lost their efficacy; she also endured poor appetite, nausea, and other symptoms; and once she entered hospice, the pain medications were only partially effective and also caused serious side effects.

D. Some But Not All Prohibitions Are De Facto Mandates

We imagine that some skeptical readers might concede that laws banning abortion, gender-affirming care for minors, and aid in dying impose *de facto* mandates but object that all prohibitions operate in this manner. If all prohibitions entail *de facto* mandates but we retain the intuition that, other things being equal, mandates are more burdensome than prohibitions, then

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63 Compassion in Dying v. State of Washington, 850 F. Supp. 1454, 1456 (W.D. Wash. 1994).

64 Nonetheless, the Supreme Court in *Glucksberg* reversed the *en banc* decision of the U.S. Court of Appeals for the Ninth Circuit, which had affirmed the district court's grant of summary judgment on behalf of the plaintiffs. Compassion in Dying v. State of Washington, 850 F. Supp 1454 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *aff'd en banc*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.* Washington v. Glucksberg, 532 U.S. 702 (1997).

perhaps we were too quick (in the Introduction) to reject the claim that the form of a law matters.

The objection fails, however, because in fact most prohibitions do not operate as *de facto* mandates, much less as mandates that interfere with bodily integrity. As we noted above in discussing the potential formalist effort to ignore the mandatory effects of nominal prohibitions, almost any affirmative obligation can be reframed as a conditional prohibition. However, the converse is not true.

Most prohibitions entail few or no complementary obligations. An ordinance forbidding motor vehicles on a park path does not obligate anyone to walk, run, or ride a bicycle on park paths. A regulation forbidding the hunting of grizzly bears[65] does not obligate anyone to hunt other kinds of animals. Respectively, the ordinance and regulation merely remove driving on a park path and hunting grizzly bears from the nearly infinite list of activities in which one might engage on any given day. Thus, in saying that laws banning abortion, gender-affirming care, and aid in dying have the consequence of imposing very substantial affirmative obligations involving the human body, we are making statements specific to the particular sorts of laws at issue.

II
Nature Taking Its Course

In this Part we identify the role of NTIC in policy and constitutional arguments for enacting and upholding bans on abortion, gender-affirming care, and aid in dying. We acknowledge that proponents and defenders of such laws do not rely exclusively on NTIC. Our goal in this Part is simply to illustrate that NTIC figures prominently in the promotion and defense of the bans at issue.

A. Abortion

Abortion rights proponents frequently make arguments that abortion bans do not simply allow nature to take its course but, in one popular phrase, convert biology into destiny.[66] But

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65 50 C.F.R. § 17.40(b).

66 *See, e.g.*, Meghan Boone, *Lactation Law*, 106 Calif. L. Rev. 1827, 1848 2018) (observing that, in promoting reproductive rights, "feminists have actively resisted the idea that 'biology is destiny'"); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 Harv. L. Rev. 1, 15 (1989) (arguing that abortion and abortion funding restrictions foster

do proponents and defenders of abortion bans actually argue that the burdens of pregnancy are not attributable to the law because they simply reflect NTIC? The short answer is yes.

For example, consider the preface by Pope Francis to a recent book titled *Il Miracolo Della Vita*[67] ("The Miracle of Life"). As translated from Italian by an official Vatican news outlet and appearing under a headline reminding readers of the Catholic Church's opposition to abortion, the Pope writes that "the spectacle of nature taking its course instills wonder and calls for care, protection, and welcome."[68]

Even when abortion opponents do not expressly use the phrase "nature taking its course," they often deploy NTIC. Unsurprisingly, the clearest examples can be found in the writings of opponents of abortion who subscribe to some version of natural law.

Currently, the two leading natural-law philosophers are John Finnis of Oxford and Robert George of Princeton. Together, they authored an *amicus* brief in *Dobbs* urging the overruling of the abortion right.[69] Given that current critiques of substantive due process build on Justice Hugo Black's condemnation of the enterprise as illegitimately relying on natural law,[70] the Finnis/George brief's extensive invocation of natural law is somewhat jarring, even if they nominally cited it only for the purpose of expounding the

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inequality by "translating biology into social destiny, thereby denying women power over both their bodies and their futures"); *see also* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 317 (1993) (noting that government failure to fund abortions for those who cannot afford them does "not simply let 'nature' take its course").

67 GABRIELLE SEMPREBON, LUCA CRIPPA & ARNOLDO MOSCA MONDADORI, IL MIRACOLO DELLA VITA (2023).

68 *Pope: May we Hear the Voice of the Unborn Through Science*, VATICAN NEWS (May 21, 2023), https://www.vaticannews.va/en/pope/news/2023-05/pope-may-we-hear-the-voice-of-the-unborn-through-science.html [https://perma.cc/7NT6-H2CM].

69 The brief was published with some edits as a law review article. John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A Dobbs Brief*, 45 HARV. J.L. & PUB. POL'Y 927 (2022).

70 *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 516 (1965) (Black, J., dissenting) (decrying "natural law due process philosophy"). The skepticism of natural law and natural justice as a basis for judicial review runs deep in American constitutional law. *See* Calder v. Bull, 3 U.S. 386, 399 (1798) (Iredell, J., concurring in the judgment) (arguing that the Court cannot invalidate a law "merely because it is, in the[] judgment [of the Justices], contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature . . . had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice").

views of the framers and ratifiers of the Fourteenth Amendment.[71] In light of the awkward place of natural law in American constitutional jurisprudence—especially among critics of substantive due process—it is thus not surprising that the *Dobbs* opinion did not expressly endorse natural law. Nor did the opinion go as far as Finnis and George urged.[72] The Court eliminated a constitutional right to abortion but did not find a constitutional right to life of fetuses that laws permitting abortions infringe.[73]

In an important respect, however, *Dobbs* followed the path laid down by natural law-inflected opponents of abortion: the opinion echoed their tendency to erase the work of pregnancy. Justice Alito's opinion opens by stating that people who favor abortion rights "feel . . . that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality."[74] Yet by the time one comes to the end of the lengthy opinion,[75] one wonders why people feel that way, because the Court says virtually nothing about the hardships that result from forcing someone to continue a pregnancy and give birth.

In that respect, *Dobbs* is of a piece with much natural law thinking regarding abortion. Consider how George and another of his co-authors, Patrick Lee, conceptualize pregnancy.[76] They say the fetus's "growth is internally directed to its own survival and maturation."[77] "The human embryo, from conception onward," they continue, "is fully programmed actively to develop himself or herself to the mature stage of a human being, and,

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71 Finnis & George, *supra* note 69, at 932 (describing the natural law "backdrop of established common-law principles, legal treatises, and statutes recognizing unborn children as persons" against which the Fourteenth Amendment was adopted).

72 *See id.* at 930 (contending "that prohibitions of elective abortions are constitutionally obligatory because unborn children are persons within the original public meaning of the Fourteenth Amendment's Due Process and Equal Protection Clauses").

73 *See* Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 338 (2022) (Kavanaugh, J., concurring) ("On the question of abortion, the Constitution is . . . neither pro-life nor pro-choice.")

74 *Id.* at 223 (opinion of the Court).

75 Seventy-nine pages in the slip opinion, not counting appendices. Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 1–79 (U.S. June 24, 2022) (opinion of the Court).

76 *See* Patrick Lee & Robert P. George, *The Wrong of Abortion*, *in* CONTEMPORARY DEBATES IN APPLIED ETHICS 13 (Andrew I. Cohen & Christopher H. Wellman eds., 2005).

77 *Id.* at 14.

unless prevented by disease or violence, will actually do so, despite possibly significant variation in environment (in the mother's womb)."[78] They thus reduce the pregnant person to a passive vessel, part of the "environment."

To be sure, Lee and George acknowledge as a possible motive for abortion that "a woman may dread the discomforts, pains, and difficulties involved in pregnancy,"[79] but they say almost nothing about why that might be. More directly to the present point, in their telling, fetal development simply happens, at most *to* a pregnant person, not *through,* much less *by*, that person. Likewise, John Noonan, in an influential essay he wrote long before becoming a federal judge, described an embryo developing into a baby as an abstract statistical likelihood,[80] without any recognition of the demands for work (*labor* in both senses[81]) on the person in whose body the process occurs.

B. Gender-Affirming Care

NTIC rhetoric and logic pervade laws and support for laws forbidding gender-affirming care for minors. For example, the text of the Alabama law banning such care states as one of its legislative findings that "puberty blockers . . . inhibit . . . the natural process of sexual development."[82] To similar effect, the Florida statute banning gender-affirming care for minors that was signed into law by Governor Ron DeSantis in May 2023

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78 *Id.* (emphasis removed). *See also* ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE 79 (2008) ("[E]arly human beings . . . are members of a natural kind, the human species, whose embryonic, fetal, and infant members, if not prevented by some extrinsic cause, develop in due course and by intrinsic self-direction the immediately exercisable capacities for characteristically human functions.").

79 Lee & George, *supra* note 76, at 21.

80 Noonan, *supra* note 48, at 56 (stating that, absent abortion, an average of four out of every five zygotes will eventually lead to live births).

81 *See generally* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990) (arguing that abortion bans violate the Thirteenth Amendment).

82 Alabama Vulnerable Child Compassion and Protection Act, ALA CODE § 26-26-2(10) (2023). Many of the findings in the Alabama law are dubious. *See* Susan D. Boulware et al., *Biased Science: The Texas and Alabama Measures Criminalizing Medical Treatment for Transgender Children and Adolescents Rely on Inaccurate and Misleading Scientific Claims*, YALE SCH. OF MED. DEAN'S ADVISORY COUNCIL ON LGBTQI+ AFFS. 2 (Apr. 28, 2022), https://medicine.yale.edu/lgbtqi/research/gender-affirming-care/report%20on%20the%20science%20of%20gender-affirming%20care%20final%20april%2028%202022_442952_55174_v1.pdf [https://perma.cc/E7YG-QWN6] ("[T]he Alabama Law's findings ignore established medical authorities and repeat discredited, outdated, and poor-quality information").

defines "sex" in part by reference to "naturally occurring sex hormones."[83] The Texas law uses the word "normal" instead of "natural" but says much the same thing when it forbids "puberty suppression or blocking prescription drugs to stop or delay normal puberty."[84]

We could adduce more examples, but we think it obvious that nature themes—especially the contention that sex assigned at birth and the resulting physical changes at puberty absent intervention are *natural*—play a central role in support for laws forbidding transgender care for minors and transphobia more broadly. Indeed, the resort to naturalness is so pervasive in transphobic rhetoric that some proponents of trans rights have taken to questioning the normative value of nature[85] (as do we in Part III(A) below).

For now, we simply note that NTIC is baked into the ideology of opposition to gender-affirming care in a way that is even more fundamental than it is with respect to abortion. It is possible, after all, to support abortion bans strictly on fetal protection grounds, even while recognizing the extraordinary bodily and emotional burdens mandating continued pregnancy and birth entail. By contrast, it is difficult to articulate any ground for supporting bans on gender-affirming care that does not rely on some version of NTIC.

To be sure, proponents of the bans often talk about protecting children from decisions they might come to regret.[86]

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83 FLA. STAT. ANN. § 456.001(8) (West 2023); *see also* Treatment for Sex Reassignment, Ch. 2023-90, 2023 Fla. S.B. 254, 2, www.flsenate.gov/Session/Bill/2023/254/BillText/er/HTML [https://perma.cc/HDC3-69AB].

84 Prohibitions on the Provision to Certain Children of Procedures and Treatments for Gender Transition, Gender Reassignment, or Gender Dysphoria and on the Use of Public Money or Public Assistance to Provide Those Procedures and Treatments, S.B. 14, 2023 Leg., 88th Sess. (Tex. 2023), https://capitol.texas.gov/billlookup/history.aspx?LegSess=88R&Bill=SB14 [https://perma.cc/97C3-2K7Q].

85 *See, e.g.*, Nour Abi Nakhoul, *What's So Good About Being Natural?*, XTRA (June 11, 2021), https://xtramagazine.com/power/transness-naturalism-transphobia-200915 [https://perma.cc/JWE3-3WG6] (observing the ubiquity of the claim that it is "unnatural" to be transgender but questioning the tactical impulse to respond by pointing to evidence of trans naturalness).

86 For example, a memorandum issued by Texas Attorney General Ken Paxton claims that children who experience gender dysphoria "have a high rate of natural resolution, with 61–98% of children reidentifying with their [sex assigned at birth] during puberty" as one of many asserted grounds to protect minors from ostensible harms of gender-confirming care. Memorandum from Ken Paxton, Att'y Gen. of Tex., to Hon. Matt Krause, Chair, Tex. House Comm. on Gen. Investigating (Feb. 18, 2022), https://texasattorneygeneral.gov/sites/default/files/global/KP-0401.pdf [https://perma.cc/6FLD-DRXL] (on file with author) (regarding whether certain medical procedures performed on children constitute child abuse). *But see*

And perhaps some supporters of such bans do not harbor transphobic feelings towards transgender adults. Even so, it is hardly a coincidence that the bans on gender-affirming care for minors "are part of a broader wave of anti-trans legislation that has been proposed and passed across the United States."[87]

Furthermore, if the bans' backers were chiefly interested in preventing regret, they would not include puberty blockers—which enable a minor to delay the decision whether to proceed with a transition—among the forbidden treatments. After all, a transgender minor could regret the transition that "nature" imposes via puberty at least as much as they could regret a transition from their sex assigned at birth.[88] By forbidding puberty blockers along with other treatments, the bans manifest their backers' belief that "natural" transitions do not "count" because the bodily changes that occur at puberty (absent intervention) are merely nature taking its course.

The asymmetrical treatment of bodily impositions attributed to nature versus those attributed to interventions parallels the anti-abortion rhetoric of regret. A decade and a half before it entirely eliminated the constitutional right to abortion, and even while acknowledging the absence of "reliable data to measure the phenomenon," the Supreme Court upheld a federal ban on "partial-birth" abortions partly on the ground that "some women come to regret their choice to abort the infant life they once created and sustained."[89] Yet

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Boulware et al., *supra* note 82, at 17 ("As authority for the claimed 61–98% figure, the AG Opinion does not cite reputable scientific evidence. Instead, it cites a biased source" that itself "badly mischaracterizes the underlying source that it cites for the 61–98% figure."); *and* Heather Boerner, *What the Science on Gender-Affirming Care for Transgender Kids Really Shows*, SCI. AM. (May 12, 2022), https://www.scientificamerican.com/article/what-the-science-on-gender-affirming-care-for-transgender-kids-really-shows [https://perma.cc/8PNL-9J8K] (collecting data and studies that consistently show that access to gender-affirming care is associated with better mental health outcomes).

87 Francesca Paris, *Bans on Transition Care for Young People Spread Across U.S.*, N.Y. TIMES: THE UPSHOT (Apr. 15, 2023), https://www.nytimes.com/2023/04/15/upshot/bans-transgender-teenagers.html [http://perma.cc/9VSU-WBG9], *accord* Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965, 969 (2024) ("[S]cholarship and litigation tend to analyze each piece of [anti-trans] legislation in isolation, understating the all-encompassing, cumulative impact of the laws on transgender lives and the motivation behind them.")

88 *See supra* note 62.

89 Gonzales v. Carhart, 550 U.S. 124, 159 (2007). For criticism, see Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) (chronicling the

the Court did not consider that many other people might regret *continuing* a pregnancy.[90] Just as a genuine concern for avoiding regret with respect to bodily transitions would logically lead to allowing rather than banning puberty blockers, so too a genuine concern for regret with respect to pregnancy outcomes should lead at most to requirements of genuinely informed consent to either abortion or continuing a pregnancy through birth. In each context, concern for regret is either pretextual or at best misguided because it biases the choices based on the unacknowledged NTIC assumption with respect to one branch of the decision tree.

C. Aid in Dying

NTIC logic appears unmistakably in one key argument that figures in support for laws forbidding aid in dying. At the very outset of the Supreme Court opinion in *Washington v. Glucksberg*,[91] Chief Justice Rehnquist drew a contrast between (what the Court called) assisting suicide, which the state of Washington forbade, and withholding or withdrawing life-sustaining medical treatment, which the state permitted pursuant to its tellingly named "Natural Death Act."[92] As one Justice had noted seven years earlier in *Cruzan v. Director, Missouri Dep't of Health*,[93] as of 1990, "40 states and the District of Columbia ha[d] enacted natural death Acts" permitting such withholding or withdrawal.[94] In *Cruzan*, the Court assumed *arguendo* that such state laws were constitutionally required.[95]

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emergence and spread of woman-protective rhetoric, including claims of regret, in the anti-abortion movement).

90 Recent studies in Poland produced results similar to those in other countries, finding that approximately 17–18 percent of parents regretted having children. Konrad Piotrowski, *How Many Parents Regret Having Children and How it is Linked to Their Personality and Health: Two Studies with National Samples in Poland*, PLoS ONE (July 21, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8294566/pdf/pone.0254163.pdf [perma.cc/FM8A-LR4Z]. Many parents who regret having children may be reluctant to say so, even in response to an anonymous survey, as doing so could be taken to imply that they do not love their children. Thus, survey results should probably be interpreted as setting a lower bound.

91 521 U.S. 702 (1997).

92 *Id.* at 707 (citing Wash. Rev. Code § 70.122.070(1)).

93 497 U.S. 261 (1990).

94 *Id.* at 312 n.11 (Brennan, J., dissenting, but not with respect to this factual statement).

95 *Id.* at 279 (opinion of the Court) ("[F]or purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.").

Thus, a key question in *Glucksberg* was how to distinguish between affirmative aid in dying (via prescribing lethal medication) and the refusal or withdrawal of medical treatment.

The Court's answer in *Glucksberg* was partly historical. Presaging the turn to (law-office) history as the ostensibly exclusive test of unenumerated rights that the *Dobbs* Court would later adopt,[96] the *Glucksberg* opinion rejected a constitutional right to aid in dying lest it "reverse centuries of legal doctrine and practice."[97] In addition, the *Glucksberg* majority cited various prudential and policy grounds for forbidding aid in dying.[98] Yet some of the state's concerns—such as the risk that untreated depression or the pressure that might be applied to vulnerable patients could motivate them to seek aid in ending their lives—seem equally applicable to the assumed right to refuse or withdraw lifesaving medical treatment. Thus, the factors the *Glucksberg* Court identified do not necessarily distinguish the latter.

The key distinction can be found in the companion case to *Glucksberg*, *Vacco v. Quill*.[99] There the Court used NTIC to reject an equal protection challenge to New York's ban on aid in dying. The plaintiffs argued that by permitting refusal or withdrawal of life-sustaining medical treatment but forbidding active assistance to dying patients who were not receiving such treatment, the state denied the latter equal protection.[100] As its first response, the Court asserted that "when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication."[101] Among other sources, it cited and quoted

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96 Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 215–88 (2022) (citing *Glucksberg* eleven times). As the *Dobbs* dissent noted, between *Glucksberg* in 1997 and *Dobbs* in 2022, the Court had stated that the *Glucksberg* history-only methodology was not universally appropriate. *See id.* at 374, 375 n.4 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (citing Obergefell v. Hodges, 576 U.S. 644, 671 (2015)); *see supra* note 5.

97 *Glucksberg*, 521 U.S. at 723.

98 *Id.* at 728–35 (validating asserted state interests in life *simpliciter*, preventing suicide among persons suffering from treatable depression, protecting the integrity of the medical profession, protecting vulnerable groups from pressure, and avoiding a slippery slope to involuntary euthanasia).

99 521 U.S. 793 (1997).

100 *Id.* at 798 (plaintiffs "urged that because New York permits a competent person to refuse life-sustaining medical treatment, and because the refusal of such treatment is [equivalent to] physician-assisted suicide, New York's assisted-suicide ban violates the Equal Protection Clause").

101 *Id.* at 801.

a decision of the Supreme Court of Washington stating that "death which occurs after the removal of life sustaining systems is from natural causes."[102]

In the years since *Glucksberg* and *Quill*, the District of Columbia and nine other states (including Washington) joined Oregon in permitting aid in dying.[103] Meanwhile, however, in various other states, the Natural Death Acts that the Court cited in *Cruzan* and that were initially enacted to liberalize state laws to permit refusal or withdrawal of unwanted life-sustaining medical treatment, have sometimes been invoked—as in *Glucksberg* itself—as a *limit* on the provision of affirmative aid in dying.[104]

That legal development is of a piece with cultural developments. At the risk of picking on Pope Francis (whom we like and respect, really[105]), we would note that he frequently preaches the importance of valuing human life "from conception to natural death"[106] as a means of encapsulating opposition to

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102 *Id.* (quoting *In re* Colyer, 99 Wash. 2d 114, 123, 660 P.2d 738, 743 (1983)).

103 *See* Oregon Death with Dignity Act, 13 OR. REV. STAT. §§ 127.800–127.897 (2023); D.C. Death with Dignity Act, D.C. CODE § 7661 (2023); Washington Death with Dignity Act, WASH. REV. CODE § 70.245 (2023); Baxter v. State, 224 P.3d 1211 (Mont. 2009) (holding that physician aid in dying provided to terminally ill, mentally competent adult patient was not against public policy for purposes of exception to consent defense); Patient Choice at End of Life Act, VT. STAT. ANN. tit. 18 §§ 5281–5293 (2023); End of Life Option Act, CAL. HEALTH & SAFETY CODE § 443 (West 2023); End-of-Life Options Act, COLO. REV. STAT. §§ 25-48-101–25-48-123 (2023); Our Care, Our Choice Act, 19 HAW. REV. STAT. § 327L (2023); Medical Aid in Dying for the Terminally Ill Act, N.J. STAT. ANN. § 26:16 (West 2023); Maine Death with Dignity Act, ME. STAT. tit. 22, § 2140 (2023); Elizabeth Whitefield End-of-Life Options Act, N.M. STAT. ANN. §§ 24-7c-1–24-7c-8 (2023).

104 *See, e.g.*, Morris v. Brandenburg, 2016-NMCA-027, 376 P.3d 836, 849 ("We agree that the UHCDA, the Right to Die Act, and the Pain Relief Act support the conclusion that New Mexico has historically placed great importance on patient autonomy and dignity in end-of-life decision-making. However, Section 24-7A-13(C) of the UHCDA expressly disavows *assisted suicide*, undercutting Petitioners' assertion that the interests of patient dignity and autonomy protected by the UHCDA also extend to physician aid in dying."); Woods v. Commonwealth, 142 S.W.3d 24, 42 (Ky. 2004) (finding that the Kentucky Living Will Directive Act "recognizes a distinction between an affirmative intent to kill and a passive decision to allow a natural death to occur in accordance with a patient's constitutional liberty interest and common law right of self-determination").

105 Liking and respecting Pope Francis does not mean we cannot criticize him. *See* Sherry F. Colb, *The Pope and Pets*, DORF ON LAW (Jan. 13, 2022), http://www.dorfonlaw.org/2022/01/the-pope-and-pets.html [https://perma.cc/U8QU-SEWH] (critiquing the Pope's condemnation of childless couples who have pets for their supposed selfishness).

106 *See, e.g.*, Vatican Radio, *Pope Francis: Human Dignity from Conception to Natural Death*, FÉDÉRATION INTERNATIONALE DES ASSOCIATIONS DE MÉDECINS CATHOLIQUES [CATH. PHYSICIANS THROUGHOUT THE WORLD], https://www.fiamc.org/bioethics/pope-francis-human-dignity-from-conception-to-natural-death/

abortion and aid in dying, respectively. The state or religious authorities may ban aid in dying because doing so, proponents and defenders of the bans contend, merely relegates people to the course followed by nature.

The foregoing suffices to show the role of NTIC in laws and support for laws forbidding aid in dying. Before concluding this sub-Part, however, we should say a word about the doctrine of double effect (DDE)—which features in religion, moral philosophy, and law regarding aid in dying. DDE "permits an action that causes foreseeable and harmful, even dire, collateral consequences, so long as the actor merely foresees but does not intend them and the harms are proportional to the benefit."[107] Pursuant to a widely accepted application of DDE, a physician may prescribe or administer to a dying patient a lethal dose of narcotic if that dosage is needed to adequately treat the patient's pain, so long as the goal is pain control, with death as a mere unintended but foreseen side effect.[108]

Why, one might ask, do many opponents of physician aid in dying nonetheless consider such lethal palliation permissible? After all, one could readily say that the pain and discomfort of dying are simply nature taking its course. Does the fact that theologians, lawmakers, and others who oppose physician aid in dying permit lethal palliation mean that they do not actually rely on NTIC in opposing the former?

Yes and no. On one hand, the examples adduced in this Part make clear that opponents of abortion, gender-affirming care for minors, and aid in dying routinely deploy NTIC. On the other hand, as the example of lethal palliation and our earlier discussion of the hypothetical uterine expansion

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[https://perma.cc/26TK-2GZB] (last visited Aug. 14, 2023); Mary Farrow, *Bishop Wall: Pope Francis 'Passionate About Life' from Conception to Natural Death*, CATH. NEWS AGENCY (Feb. 20, 2020), https://www.catholicnewsagency.com/news/43621/bishop-wall-pope-francis-passionate-about-life-from-conception-to-natural-death [https://perma.cc/5SSE-PGBS]; @Pontifex, X (formerly known as TWITTER) (Jan. 19, 2018), https://twitter.com/Pontifex/status/954341423033143299 [https://perma.cc/5UMG-TYBC] ("Every life counts: from the beginning to the end, from conception to natural death."); *accord* Elisabetta Povoledo, *Vatican Reiterates Its Opposition to Euthanasia and Assisted Suicide*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/09/22/world/europe/pope-francis-euthanasia-assisted-suicide.html [https://perma.cc/WR6G-A4N5] ("The Vatican . . . reiterated the Roman Catholic Church's opposition to assisted suicide and euthanasia, which it called 'intrinsically evil' acts, 'in every situation or circumstance.'").

107 Sherry F. Colb, *A New and Improved Doctrine of Double Effect: Not Just for Trolleys*, 55 CONN. L. REV. 533, 533 (2023).

108 *See id.* at 539–40 (describing DDE's application to end-of-life palliative care).

syndrome underscore, people do not apply NTIC everywhere they plausibly could.

What accounts for the difference? As we argue in Part IV, NTIC disguises normative claims as factual ones. Before critiquing NTIC in that way, however, we should acknowledge the appeal of NTIC. The next Part explains why appeals to nature have power.

III
Nature as Blessing and Alibi

The thinkers we cited in Part II who espouse NTIC are, without exception, Catholic. Astute readers will regard that fact as no mere coincidence. After all, natural law teaching has been at the heart of Catholic doctrine for centuries.[109]

However, natural law is hardly the exclusive domain of Catholicism. Consider Thomas Jefferson, whose own religious views were barely Christian,[110] much less those of the Roman Catholic Church. Nonetheless, he included in the opening sentence of the Declaration of Independence an invocation of "the Laws of Nature and of Nature's God."[111] Although *judicial* reliance on natural law as a source of constitutional limits has been controversial since the early Republic,[112] as the Declaration shows, appeals to nature's

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109 *See generally* Stephen J. Pope, *Natural Law in Catholic Social Teachings*, *in* Modern Catholic Social Teaching: Commentaries and Interpretations 43, 43–65 (Kenneth R. Himes et al. eds., 2d ed. 2018) (tracing the history and influence of natural law teachings from the early church on modern Catholic doctrine).

110 *See, e.g.*, Letter from Thomas Jefferson to Benjamin Rush (Apr. 21, 1803), *in* 40 The Papers of Thomas Jefferson 4 March–10 July 1803, 251, 251–52 (Barbara B. Oberg ed., 2013) ("To the corruptions of Christianity, I am indeed opposed; but not to the genuine precepts of Jesus himself. I am a Christian, in the only sense in which he wished any one to be; sincerely attached to his doctrines, in preference to all others; ascribing to himself every human excellence, & believing he never claimed any other."), *reprinted in* Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/01-40-02-0178-0001 [https://perma.cc/MF45-DV9L] (last visited Aug. 14, 2023). For a broad overview of Jefferson's unorthodox relationship with Christianity and religion generally, see Eugene R. Sheridan, Jefferson and Religion (Univ. of N.C. Press 2002) (1998).

111 The Declaration of Independence para. 1 (U.S. 1776). This language appeared as well in Jefferson's first draft. *See* Jefferson's "original Rough draught" of the Declaration of Independence, para. 1, *in* 1 The Papers of Thomas Jefferson 1760–1776 243, 243 (Julian P. Boyd ed., 1950), *reprinted in* Lib. Cong., https://www.loc.gov/exhibits/declara/ruffdrft.html [https://perma.cc/B86C-NDKT] (last visited Aug. 14, 2020).

112 *See supra* note 71.

ostensible normativity have also been widespread among people of all faiths.

What about people who espouse no faith at all? Are they immune to NTIC's appeal? Hardly. As we explain in this Part, NTIC trades on two kinds of intuitions that need not be rooted in or connected to religion: the tendency to associate naturalness with goodness; and the act/omission distinction. We attempt to make sense of both sorts of intuition, even as we note their flaws as grounds for relying on NTIC in support of the laws we critique throughout this Article.

A. Belief in Nature's Goodness

We do not deny that NTIC may be especially appealing to people of faith. If one believes that a benevolent deity created the world, and especially if one pairs that belief with a theodicy that accounts for evil as the product of poor choices by humans with free will, then one will tend to equate nature with goodness as the product of God's creation.[113]

To be sure, this view has difficulties even on its own terms. Nature produces not only beautiful sunsets and lovely flowers but also toxic mushrooms, flesh-eating bacteria, and deadly tsunamis. The very term "natural disasters" acknowledges that nature is not wholly benevolent. Accordingly, the Panglossian contention that everything is for the best in this best of all possible worlds, even in the face of such catastrophes as the devastating Lisbon earthquake of 1755, is at best fatuous and arguably grotesque.[114]

Nonetheless, the tendency to associate naturalness with goodness is deeply rooted. As David Hume observed, although "is" never by itself implies "ought," there is a pronounced human inclination to think that it does.[115]

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113 *See* Michael C. Dorf, *Liberalism's Errant Theodicy*, 93 B.U. L. Rev. 1469, 1469 (2013) (explaining that "theodicy" refers "to an argument that attempts to reconcile God's omnipotence, omniscience, and goodness with the existence of evil").

114 *See* Voltaire, Candide, or Optimism, *passim* (Burton Raffel trans., Yale Univ. Press 2005) (1759) (in which Pangloss repeatedly asserts that ours is the "best of all possible worlds").

115 David Hume, A Treatise of Human Nature 302 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1739) (observing the near-universality of the is-implies-ought fallacy but objecting "that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason").

Contemporary psychology confirms Hume's observation. Jeffrey Rachlinski and Andrew Wistrich summarize an extensive body of research when they write:

> People dislike products and devices seen as "artificial" and prefer otherwise identical products and devices perceived as "natural," thereby expressing a naturalness bias. . . . [P]roducers of a variety of products, including food, medicine, and vitamin supplements, fight for the right to use terms such as "natural," "organic," and "non-GMO" in describing their products. . . . People report that water tastes better when it contains naturally occurring mineral content than when minerals are said to be added, even when the water is identical. People read faster under light they believe to be filtered sunlight than under light they believe to be artificial—even when they experience it in a controlled setting in which the light is identical. People rate drugs as more potent and effective when extracted from plants than when produced in a laboratory—even when they are identical chemicals. In one study, most preferred a natural drug to an equally effective and safe artificial one, and some preferred a natural drug to a more effective and safer synthetic one."[116]

We agree with the evaluation implicit in the terminology of Rachlinski and Wistrich: the preference for naturalness is a "bias." As their examples show, that bias is very often unjustified. Natural disasters and other extremely harmful natural phenomena render not only the religious version of the naturalness bias highly problematic; the problem is the same for people who harbor the naturalness bias for reasons unrelated to religion.

That is not to say, however, that the naturalness bias is never justified. Other things being equal, evolutionary biology sometimes provides a sound basis for a naturalness bias. Diet provides a useful illustration.

Human beings evolved in conditions of relative food scarcity.[117] For our ancestors, craving fatty, sweet, and salty foods

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116 Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging Autonomous Vehicles*, 24 YALE J.L. & TECH. 706, 724–26 (2022) (citations omitted).

117 *See* Katharine Milton, *Primate Diets and Gut Morphology: Implications for Hominid Evolution*, *in* FOOD AND EVOLUTION 93, 105–107 (Marvin Harris & Eric B. Ross eds., 1987) (stating that that high quality foods "are more patchily distributed" in the savanna-mosaic setting where early humans developed, affecting human social and dietary behaviors).

provided a survival advantage.[118] By eating as much of such foods as they could when they encountered them, our ancestors increased the odds that they would survive the lean times[119] and reproduce—thereby passing along to subsequent generations a taste for fat, sugar, and salt. However, in modern industrialized societies in which food is plentiful, succumbing to our cravings is often unhealthy.[120] Highly processed foods that concentrate fat, sugar, and salt in quantities that would have been unavailable to our hunter-gatherer ancestors are tempting but harmful.[121] We do better to eat so-called "whole foods"[122] that more closely approximate the natural diet that our paleolithic ancestors ate.

Yet if the previous paragraph highlights how a naturalness bias can be beneficial, its last sentence also gestures at ways in which it can be misleading. Aiming to capitalize on the naturalness bias, an entire grocery chain (now owned by Amazon) goes by the name "Whole Foods," even though many of the foods it sells are highly processed; meanwhile the paleo diet fad encourages the consumption of much greater quantities of meat and smaller quantities of unprocessed plant foods than our ancestors ate or that promote contemporary health.[123]

To the extent that there is some good sense in the naturalness bias, we regard it as a version of the *precautionary principle*. The precautionary principle places the burden of proving safety on those who would introduce a new technology,

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118 *See* Paul A.S. Breslin, *An Evolutionary Perspective on Food and Human Taste*, 23 CURRENT BIOLOGY R409, R415–16 (2013) (reviewing how taste associations which signaled the nutrient load of certain foods guided human food tastes and played a role in the evolution of early humans as they adapted to new terrain and ecological niches).

119 *See id.*

120 *See, e.g.*, *id.* at R416 ("[O]besity and over nourishment are a modern problem and evolution would not necessarily have selected against such an epidemic. In the developed world obesity is caused, in part, by the creation of foods that are hyper-appealing—foods high in salt, glutamate, sugar and fat.").

121 *See id.*

122 For a helpful explainer, see *Whole Foods*, NYC HEALTH, https://www.nyc.gov/site/doh/health/health-topics/whole-foods.page [https://perma.cc/5CXY-UJC6] (last visited Aug. 14, 2020).

123 *See* Rob Dunn, *Human Ancestors Were Nearly All Vegetarians*, SCI. AM. (July 23, 2012), https://www.scientificamerican.com/blog/guest-blog/human-ancestors-were-nearly-all-vegetarians/ [https://perma.cc/B4EJ-D6HC]; *see also*, Michael Greger, *The Real Paleo Diet*, NUTRITIONFACTS.ORG, https://nutritionfacts.org/blog/the-real-paleo-diet/ [https://perma.cc/VWA9-3E8Y] (last updated Aug. 28, 2022).

chemical, or other innovation.[124] Avoiding novel interventions biases choices in favor of the status quo, which includes nature. For example, we know that humans have survived for millennia eating naturally occurring foods, while the long-term health impacts of various laboratory-generated food additives are unknown. Likewise, with the notable exception of mass extinction events separated by tens of millions of years, the Earth has hospitably supported complex life;[125] how it will fare in response to human-generated climate change and other environmental stresses is at best unknown. Applied to favor nature over unknown risks, some version of the precautionary principle amounts to simple prudence.

However, as critics of the precautionary principle point out, few important decisions pose a binary choice between unknown risks and known risk-free options.[126] Often one faces choices among a variety of unknown risks, each of uncertain magnitude.[127] Moreover—and more directly to the point here—in some circumstances we have good evidence that the risk of harm likely to ensue from the "natural" course exceeds the risk from the intervention. For example, the most widely cited study found that the risk of death from a full-term pregnancy is an

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124 *See, e.g.*, Evanthia Diamanti-Kandarakis et al., *Endocrine-Disrupting Chemicals: An Endocrine Society Scientific Statement*, 30 ENDOCRINE REVS. 293, 326 (2009) (invoking the precautionary principle in recommending that The Endocrine Society lobby for regulations seeking to decrease human exposure to endocrine-disrupting chemicals during ongoing research to better understand their effect on humans); David Kriebel et al., *The Precautionary Principle in Environmental Science*, 109 ENV'T HEALTH PERSPS. 871, 875 (2001) ("The precautionary principle . . . is meant to ensure that the public good is represented in all decisions made under scientific uncertainty."); Kenneth R. Foster, Paolo Vecchia & Michael H. Repacholi, *Science and the Precautionary Principle*, 288 SCIENCE 979, 981 (2000) (advocating guidelines for the use of the precautionary principle "in a politically transparent process, while emphasizing the need for a careful review of scientific data").

125 *See generally Mass Extinction Events*, AM MUSEUM OF NAT. HIST., https://www.amnh.org/exhibitions/dinosaurs-ancient-fossils/extinction/mass-extinction [https://perma.cc/SS2Z-TWNE] (last visited Aug. 18, 2023) (listing Earth's mass extinction events); Andrew J. Watson, *Coevolution of the Earth's Environment and Life: Goldilocks, Gaia and the Anthropic Principle*, 150 GEOLOGICAL SOC. LONDON (SPECIAL PUBLICATION) 75 (1999) (suggesting that the relationship between the Earth and life is that of a complex system inherently difficult to model or predict).

126 *See, e.g.*, CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005).

127 *See id.* at 57–58 ("The Precautionary Principle cannot plausibly be defended as a form of balancing alongside risk aversion, simply because it is possible to be averse only to some risks, not to the full universe of risks.").

order of magnitude greater than from abortion.[128] In the face of such data, neither the precautionary principle nor any other form of the naturalness bias can justify abortion restrictions on the ground that nature taking its course in pregnant people is good for them. We can (and below we do) make the same observation with respect to gender-affirming care and aid in dying.

B. Acts and Omissions

Each of the three primary topics discussed in this Article—abortion, gender-affirming care, and aid in dying—implicates medical professionals in prescribing medication, performing surgery, and/or providing other sorts of care. Where those medical professionals are doctors, the Hippocratic proposition "first do no harm"[129] appears to support NTIC. By *not* participating in abortions, gender-affirming care, or aid in dying, a doctor could be thought to do no harm, even as nature takes its course.

However, medical ethicists commonly challenge the wisdom of "first do no harm." If the "diagnosis is clear," and "there's an effective treatment available that carries only minor risks, . . . 'first, do no harm' is not particularly relevant or useful."[130] The critique of "first do no harm" closely parallels the critique of the precautionary principle. Sensible decision makers balance risks of action against risks of inaction. Both the precautionary principle and "first do no harm" over-emphasize the risks from acting and pay insufficient attention—or worse, no attention—to the risks from failing to act.

That said, we might understand "first do no harm" in a different way, albeit one not ordinarily associated with Hippocrates. It is possible to make sense of "first do no harm" and the NTIC intuition as rooted in the act/omission distinction.

Law and conventional morality frequently distinguish culpable acts from innocent omissions. Intentionally taking

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

129 The phrase does not appear in the original or most contemporary versions of the Hippocratic Oath, although, depending on the translation, it can be found in another work of Hippocrates, *Of the Epidemics*. *See* Robert H. Shmerling, *First, Do No Harm*, HARV. HEALTH BLOG (June 22, 2020), https://www.health.harvard.edu/blog/first-do-no-harm-201510138421 [https://perma.cc/32KM-VDNR].

130 *Id.*; *see also* Daniel K. Sokol, *"First Do No Harm" Revisited*, 347 BMJ, Oct. 25, 2013, at 1 (critiquing "first do no harm" as a crude piece of advice given that most attempts to benefit a patient involve harm or risks of harm and as such, a literal reading would "lead the clinician to do nothing at all").

a life is murder; indifferently failing to rescue a dying person is not even a misdemeanor in most jurisdictions.[131] Likewise, a doctor who prescribes a lethal medication to end a patient's life does harm even if that harm—ending the patient's life—comes with a benefit—ending the patient's suffering. By contrast, a doctor who merely *omits* to assist in hastening death, prescribe medication for or perform an abortion, or provide gender-affirming care does nothing. In omitting to do anything, the doctor merely allows nature to take its course and thus does no harm. Or at least so the argument would appear to go.

We have no quarrel with many invocations of the act/omission distinction. Indeed, we think it would be nearly impossible to construct a practicable moral guide or set of legal limits on human conduct without drawing any distinctions between acts and omissions. There are so very many human (and other sentient) beings in need that no one but a saint could be expected to spend every ounce of their energy providing aid to prevent or alleviate the kinds of harms—including death—that they have moral and legal duties not to actively cause. That is why law and conventional morality generally regard the provision of aid to strangers as supererogatory—commendable but not obligatory.[132]

Further, we acknowledge that the act/omission distinction has some purchase on the practice of medicine. State and federal law protect against adverse consequences to doctors and other medical professionals who, as a matter of conscience, refuse to perform abortions and some other procedures.[133] We do not endorse all

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131 *See supra* note 24.

132 *See* COLB & DORF, *supra* note 29, at 38 ("We applaud the person who performs the supererogatory act of aiding strangers in need, but we would not say that anyone who fails to aid a person in need has thereby wronged that person.").

133 *See Refusing to Provide Health Services*, GUTTMACHER INSTITUTE, https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services [https://perma.cc/A93S-WYGU] (last updated Aug. 31, 2023) (tracking state laws and policies that allow health care providers to refuse abortion, contraception, and sterilization services); *see also Your Rights Under the Federal Health Care Provider Conscience Protection Laws*, U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. FOR CIV. RTS. (May 2012), https://www.hhs.gov/sites/default/files/ocr/civilrights/provider_conscience_factsheet.pdf [https://perma.cc/WYU5-DRFP] (summarizing federal laws prohibiting "recipients of certain HHS Federal financial assistance (FFA) from discriminating against certain health care providers because of the provider's refusal or willingness to participate in sterilization procedures or abortions contrary to or consistent with the provider's religious beliefs or moral convictions").

such opt-out provisions. If alternative providers are not readily available within a reasonable distance or where the denial of care by a particular medical professional causes stigmatic harm (as it often will with respect to gender-affirming care), the costs to patients should be weighed against the value of conscience exemptions.[134] However, for present purposes, we need not defend any particular position regarding the proper scope of conscience objections. We assume *arguendo* that an individual medical professional who refuses to provide some form of care but takes no steps to block other competent professionals from providing it has engaged in an omission, not an act, and thus does not bear responsibility for subsequent consequences.

We can make that assumption because the act/omission distinction bears on the decisions of *individual* medical professionals whether to provide care. Crucially, it does not bear on *lawmakers'* decision to ban a form of care. Enforcement of a law forbidding abortion, gender-affirming care, aid in dying, or, for that matter, anything else, is not an omission; it is an act. Not for nothing are statutes routinely officially denominated "Acts," even when they take the form of prohibitions—i.e., even when they demand omissions.

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The naturalness bias and the act/omission distinction give NTIC a superficial plausibility and may explain its appeal even to people who do not share the theological suppositions of NTIC's chief advocates. As we have seen in this Part, however, the appeal is not ultimately justified. The next Part aims to undercut NTIC further by showing that even NTIC's proponents invoke it only selectively.

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134 In this context, as in other settings in which conscience claims are offered as a basis for exemptions from general norms, people differ about where the law does and should draw the line. *Compare* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (opinion of the Court) (holding that application of a state public accommodation to a designer of custom wedding websites would violate her constitutional right to free speech in light of her opposition to expressing support for same-sex marriage), *with id.* at 628 (Sotomayor, J., dissenting) (arguing that some regulations of even pure speech are valid, not because of that speech's content, but because such speech is an *act* of discrimination against individuals of a protected class, thereby making its regulation an issue of equal access rather than expressive conscience).

IV
NATURE'S NORMATIVITY

The observation that biology need not be destiny unless the law or other social institutions make it so has frequently been made with respect to gender equality, as when Laurence Tribe, in discussing the Supreme Court's equal protection and abortion cases, aptly described the Justices as falling for and perpetuating "the illusion of the 'natural.'"[135] Our aim in this Part is to further dispel the illusion and thus undercut NTIC by juxtaposing those circumstances in which NTIC is invoked with those in which it is not. We do so in sub-Part A, below. To preview and summarize, to attribute forced pregnancy and the denial of gender-affirming care or aid in dying to nature, while rightly treating the Tuskegee study of untreated syphilis as a monstrous intervention by humans, is to shroud a normative judgment made on other grounds.

Yet by observing the normative element in selective invocations of NTIC, we arguably venture into problematic territory. Do we really want to say that the classification of syphilis or, for that matter, schizophrenia, as a disease is a wholly normative judgment? That sort of relativism would apparently open the door towards the view championed by Thomas Szasz, who contended that mental illness is a myth,[136] and whose work played a role in sparking the deinstitutionalization movement that has had problematic results for a great many people with severe mental illness.[137] Indeed, our critique of NTIC would seem to go even further than Szasz went. Szasz thought there was an objective basis for physical illness.[138] Our objection to NTIC logic could call into question the objective reality of *all* illness.

Accordingly, in sub-Part B, we reconcile our critique of NTIC with our acceptance of the proposition that some conditions can fairly be characterized as disease. To preview and summarize, setting aside NTIC enables an honest discussion about issues of medical authority, individual autonomy, and external normative considerations (such as moral concern

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135 LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 238 (1985).

136 *See generally* THOMAS S. SZASZ, THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT (1961).

137 *See* Arthur R. Williams & Arthur L. Caplan, *Thomas Szasz: Rebel with a Questionable Cause*, 380 LANCET 1378, 1378 (2012) (attributing substantial increase in unhoused persons with mental illness and other harms to the influence of Szasz).

138 *See* SZASZ, *supra* note 136, *passim* (contrasting ostensible mental illnesses with physical "disease" and "sickness").

for fetuses). We do not attempt to resolve those issues in any particular context. But nothing is lost and much gained by discarding arguments that misleadingly disguise the relevant considerations under the rubric of nature.

A. Letting Syphilis Take its Course

As the story is usually told, beginning in the 1930s, the federal government and the Tuskegee Institute (later renamed Tuskegee University) studied the course of untreated syphilis in hundreds of African American men, preventing them from receiving treatment even long after penicillin became known as an effective cure.[139] That account may not be entirely accurate. Susan Reverby argues that the study was more a matter "of 'maltreatment' and 'undertreatment' rather than 'no treatment.'"[140] Even so, as Reverby herself documents, doctors and others conducting the study repeatedly told participants that they were receiving treatment when they were not.[141] Nor can there be any doubt of the pervasive racism underpinning the Tuskegee study. After all, its designers and indeed the elite (and white) medical establishment were hardly "immune from the prevailing cultural and scientific assumptions that shaped beliefs about race and disease. Indeed, they helped create them."[142]

Under either the conventional account or Reverby's somewhat more nuanced view, what happened in the Tuskegee study was outrageous. Tuskegee's primary relevance to our thesis concerns the role of the government in engineering medical professionals' blatant violation of patients' right to informed consent. However, no discussion of the Tuskegee study would be remotely accurate without observing the critical role that the race of the study's involuntary subjects played. Although the U.S. government has conducted

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139 *See* THE TUSKEGEE STUDY: A REPORT OF THE ALABAMA COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS 1 (1973) (stating the federal government "initiated a research study" in order "to observe the effects of syphilis on the human body when the disease is left untreated"); SUSAN M. REVERBY, EXAMINING TUSKEGEE: THE INFAMOUS SYPHILIS STUDY AND ITS LEGACY 1–2 (Waldo E. Martin, Jr. & Patricia Sullivan eds., 2009).

140 REVERBY, *supra* note 139, at 8.

141 *See*, *e.g.*, *id.* at 2 ("There absolutely *is* evidence that the [federal government] tried, yet *not always* successfully, to keep the men from extensive treatment."); *id.* at 45 (recounting how study subjects were told that a diagnostic spinal tap was a form of treatment).

142 *Id.* at 22.

unethical medical experimentation on subjects of all races,[143] racism undoubtedly facilitated the Tuskegee study. In that respect, the study was of a piece with the extremely troubled history of nonconsensual medical experimentation on human subjects deemed "inferior"—including the grotesque surgeries that "father of modern gynecology" J. Marion Sims performed on enslaved women,[144] the appropriation of the cells of Henrietta Lacks,[145] and the barbaric experiments of Nazi doctor Josef Mengele.[146] Ongoing racial and other disparities in health care[147] and health outcomes[148] give these historical injustices current salience.

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143 *See* STEPHEN KINZER, POISONER IN CHIEF: SIDNEY GOTTLIEB AND THE CIA SEARCH FOR MIND CONTROL 34–47 (2019) (describing the deceptions used to enlist involuntary subjects in government-sponsored research on LSD); Viet. Veterans of America v. Central Intelligence Agency, 811 F.3d 1068, 1071–72 (2016) ("From . . . World War I until the mid-1970s, the United States military conducted chemical and biological weapons experiments on . . . tens of thousands of members of the United States armed services[.]").

144 Monica Cronin, *Anarcha, Betsey, Lucy, and the Women Whose Names Were Not Recorded: The Legacy of J Marion Sims*, 48 ANAESTHESIA AND INTENSIVE CARE 6, 8–10 (2020) (describing how Sims performed dozens of experimental operations on enslaved women for obstetric fistulas without anesthesia, including at least thirty such operations on the same woman, Anarcha); *see also* Keith Wailoo, *Historical Aspects of Race and Medicine: The Case of J. Marion Sims*, 320 J. AM. MED. ASSOC. 1529, 1529 (2018) (reconsidering Sims's legacy).

145 *See generally* REBECCA SKLOOT, THE IMMORTAL LIFE OF HENRIETTA LACKS (2010) (documenting the life of Henrietta Lacks, a Black woman from Maryland, and the history of how her cervical cancer cells (HeLa cells) were harvested without her consent and became the workhorse cells in cancer research around the world). Notably, Lacks's descendants recently reached a settlement with biotechnology company Thermo Fisher Scientific for an undisclosed amount and agency in the use of HeLa cells, marking a watershed moment in the history of race and medical ethics. Anil Oza & Mariana Lenharo, *How the 'Groundbreaking' Henrietta Lacks Settlement Could Change Research*, NATURE NEWS (Aug. 3, 2023), https://www.nature.com/articles/d41586-023-02479-8 [https://perma.cc/8NUL-FVG2].

146 *See generally* Siuart Hadaway, *Dr. Josef Mengele: Auschwitz's 'Angel of Death'*, 112 HIST. OF WAR, Oct. 2022, https://link.gale.com/apps/doc/A723241329/HRCA?u=cornell&sid=ebsco&xid=58c19bef [https://perma.cc/T53D-FEFU] (describing Mengele's "barbarity" in experimenting on Jewish children, particularly twins, in furtherance of the ideology of Aryan "genetic superiority"); DAVID G. MARWELL, MENGELE: UNMASKING THE "ANGEL OF DEATH" 83–116 (2020).

147 *See, e.g.*, Jennifer I. Manuel, *Racial/Ethnic and Gender Disparities in Health Care Use and Access*, 53 HEALTH SERVS. RSCH. 1407, 1422–24 (2018) (finding different patterns of health service use and access by race/ethnicity and gender after the Affordable Care Act went into effect, particularly that non-Hispanic whites had the most consistent gains while Black women and men "fared the worst with respect to changes in health care access").

148 *See, e.g.*, *Racial/Ethnic Disparities in Pregnancy-Related Deaths–United States, 2007–2016*, U.S. CTR. FOR DISEASE CONTROL (Apr. 13, 2022), https://www.cdc.gov/reproductivehealth/maternal-mortality/disparities-pregnancy-related-deaths/Infographic-disparities-pregnancy-related-deaths-h.pdf [https://perma.

While we would not claim that the ethical issues raised by laws banning abortion, gender-affirming care, and aid in dying are the same as those raised by the Tuskegee study, we do note important parallels.[149] As in Tuskegee, so in each of these three contexts, a person seeks treatment from an otherwise willing provider but the government blocks access to that treatment. And as in Tuskegee, in two of the three primary examples we have addressed in this Article, the targets are members of a disadvantaged group: African American men in Tuskegee; women in the case of abortion;[150] and transgender persons in the case of gender-affirming care.[151]

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cc/5EUY-4QMZ] (infographic showing that Native and Black women are two to three times as likely to die from a pregnancy-related cause than white women); Zinzi D. Bailey et al., *Structural Racism and Health Inequities in the USA: Evidence and Interventions*, 389 LANCET 1453, 1455 tbl. (2017) (showing social and health inequities across race).

149 *See* Sherry F. Colb, *Decoding "Never Again"*, 16 RUTGERS J. L. & RELIG. 254, 265 (2015) (noting the importance of contextualizing comparisons between contemporary injustices and historical injustices "because drawing [an] analogy without elaboration can give an audience the impression that the [analogizer] is actually indifferent to the Holocaust, to slavery, or to" any other historical injustice to which comparison is made).

150 We recognize that some non-binary individuals and some transgender men can become pregnant and seek an abortion. Nonetheless, the vast majority of pregnant persons and of persons seeking abortions are women. Moreover, given that anti-abortion views tend to correlate with bias against LGBTQIA+ persons, it would be especially perverse to deem abortion bans unrelated to sex-based discrimination on the ground that people who do not share that bias aim to be inclusive in accounting for the impact of abortion bans. Accordingly, we think it fair to discuss abortion bans as a form of sex discrimination. *But see* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022) (citing the obtuse decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974), for the proposition that discrimination based on pregnancy is not sex discrimination).

151 *Bostock v. Clayton County*, 590 U.S. 644 (2020), held that discrimination on the basis of transgender status is a form of sex discrimination within the meaning of Title VII. We do not claim that the Supreme Court as currently constituted would necessarily extend that holding to constitutional equal protection. It is clear, however, at least to us, that the logic of *Bostock* should be applicable to equal protection. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020) (applying heightened scrutiny to a public school board policy forbidding a transgender boy from using the boys' restroom, and finding that, even apart from whether anti-trans animus counts as sex discrimination, it should trigger heightened equal protection scrutiny in its own right); Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 551–67 (2016) (arguing that transgender status satisfies the criteria the Court has used for determining whether a group should receive heighted scrutiny as a protected class under the equal protection clause). In any event, as we noted in the Introduction, this Article is not chiefly about constitutional law. For our purposes, it suffices to note that just as the Tuskegee study targeted a vulnerable and innocent minority, so do gender-affirming care bans.

Indeed, one might also plausibly describe people suffering from terminal illness as comparable in some respects to other disadvantaged groups. True, as a matter of constitutional doctrine, neither age nor disability is a suspect classification.[152] And because everyone dies eventually, one might think that the political system would not be systematically biased against people who are suffering at life's end. Yet people very commonly engage in various forms of denial and self-deception, preferring not to think about the fate they may share with those at death's door. Accordingly, although the sorts of people who present sympathetic cases for a right to aid in dying are not exactly a discrete and insular minority, there is something to be said for the proposition that they are a disadvantaged group.

We have noted how the Tuskegee study was an exercise in white supremacy and, in that respect, has connections to the inegalitarian aspects of laws banning abortion, gender-affirming care, and arguably aid in dying. However, our primary reason for focusing on Tuskegee is that it was also a grotesque violation of individual liberty. The liberty denied was the freedom to prevent nature from taking its course. In denying or diverting patients from the most effective treatment for syphilis, the government was imposing the full "natural" impact of syphilis on those patients.

Crucially, the Tuskegee study was an instance of the government blocking access to treatment. It achieved through deception what an outright ban on treating syphilis would have accomplished directly. In that sense, it was like laws banning abortion, transgender care, and aid in dying; as a purely formal matter, none of them *mandates* anything. And yet, no one could plausibly defend the Tuskegee study on the ground that the government was simply allowing nature to take its course.

Nor can the Tuskegee study be distinguished on the ground that the people in the study did not give their consent to be human research subjects. They *did not* give such consent, of course, but neither do people who are harmed by bans on abortion, gender-affirming care, or aid in dying. Admittedly, the government does not impregnate people, induce anyone to need gender-affirming care, nor cause the illnesses that immiserate the people who seek aid in dying. But neither did it infect the

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152 *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976) (age); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (same); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (disability); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (same).

men in the Tuskegee study with syphilis.[153] That fact in no way exonerates those who designed and carried out the Tuskegee study. No one could fairly deem consent to sex consent to a sexually transmitted infection, much less to letting nature in the form of the bacteria that causes syphilis take its course.

Likewise, neither should consent to sex be deemed consent to carry a pregnancy to term. *A fortiori*, people who find themselves in need of gender-affirming care or aid in dying—and who have not undertaken any voluntary activity that could even give rise to a far-fetched claim that they assumed the risk of their condition—should not be relegated to suffering whatever harms "nature" has in store for them.[154]

We can see the selectiveness with which the NTIC logic is invoked especially clearly by considering medical treatment for people who are terminally ill. We noted above the role that NTIC logic plays in efforts to distinguish physician aid in dying from the withdrawal of medical treatment.[155] Even the majority of states that forbid affirmative aid in dying permit such withdrawal because then death is not attributable to a physician's act; instead, it is said that nature takes its course to end the patient's life. But that's hardly a justification for banning affirmative aid in dying. The state does not, after all, forbid palliative care, much less life-extending or lifesaving treatment for patients who, if allowed such treatment, would die less painfully, more slowly, or only after many more satisfying years of life. Allowing interventions to treat pain but not to end life—when the natural, i.e., untreated, course of a disease would result in both continued pain and death—reflects a relative normative judgment about pain treatment and hastening death. That judgment may be right or wrong, but it is not attributable to nature.

That conclusion applies more broadly. The decision to deploy NTIC reflects a normative judgment; it is not, though it purports to be, simply an inference from any facts about nature.

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153 *See* REVERBY, *supra* note 139, at 2 ("There is absolutely *no* evidence . . . that the men were injected by the [government] with the difficult-to-culture bacteria that causes syphilis.") (emphasis in original).

154 To be clear, we do not mean to imply that voluntary actions that do play some causal role in misfortune should be the basis for banning needed care. Smoking, alcohol consumption, driving much faster than the speed limit, and numerous other activities increase the likelihood that one will need medical care. Yet, quite appropriately, neither medical ethics nor law denies people who have engaged in risk-increasing activities the care they need on the ground that the resulting illness or injury is the "natural" consequence of voluntary actions.

155 *Supra* Part II(C).

B. What's Left When We Discard NTIC?

In saying that NTIC masks normative claims, we are not saying that those claims are necessarily wrong. There are circumstances in which the law justifiably forbids interventions that a medical professional or other actor might be willing or eager to provide. We happen to think that the interests typically advanced in support of restrictions on abortion, gender-affirming care, and aid in dying do not suffice to justify banning these practices, but at least express advocacy for those interests focuses attention on the real issue: whether they are sufficiently weighty to compel very substantial impositions on the bodily integrity and autonomy of the bans' targets. NTIC, by contrast, obscures or denies the state's role in those impositions.

We have not, however, explained in detail why we think the countervailing interests offered in support of the bans fail to justify them.[156] And for purposes of this Article, it is not important that we do so. A reader could think that countervailing interests justify banning abortion, gender-affirming care for minors, and/or aid in dying, yet still be persuaded by our critique of NTIC.

Nonetheless, we do need to consider one kind of countervailing consideration in some greater detail, lest our critique of libertarians' reliance on NTIC as selective and thus pretextual be misread as endorsement of full-throated medical libertarianism. Accordingly, we acknowledge that genuine concern for health and safety may sometimes suffice to override individual autonomy even with respect to medical decisions.

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156 To be more precise, we have not laid out those arguments *in this Article*. We set out our views regarding abortion in COLB & DORF, *supra* note 29, *passim* (arguing that abortion before fetal sentience raises no serious moral questions, while abortion of a sentient fetus should, as a moral matter, require a good reason, even though it should not be forbidden by law). Meanwhile, the views we expressed on behalf of our clients in the constitutional litigation over aid in dying also reflected our own view. *See* Brief *amicus curiae*, *supra* note 29 (arguing that the risks of undue pressure in the aid-in-dying context do not appreciably differ from those in the discontinuation-of-life-support context and can, in any event, be addressed adequately through regulation, so that prohibition is excessive). We have not previously written about bans on gender-affirming care for minors, but our support for transgender rights is longstanding. *See* Sherry F. Colb, *The Perceived Threat of Trans Identity*, VERDICT (May 23, 2018), https://verdict.justia.com/2018/05/23/the-perceived-threat-of-trans-identity [https://perma.cc/S92X-M83H] (arguing that feminists and libertarians should, but often do not, support transgender rights); Michael C. Dorf, *In Praise of the Insincere Trans Debate*, DORF ON LAW (May 30, 2016), http://www.dorfonlaw.org/2016/05/in-praise-of-insincere-trans-debate.html [https://perma.cc/N9TN-A793] (critiquing the safety rationale for restricting restroom access to transgender women and doubting the sincerity of those who make it).

Consider *United States v. Rutherford*,[157] in which the Supreme Court rejected an interpretation of the Food, Drug, and Cosmetic Act that would have required the Food and Drug Administration (FDA) to approve medication to treat incurable conditions—Laetrile as a treatment for terminal cancer patients in the particular case—without regard to the safety and efficacy standards applicable to other drugs. *Rutherford* was a statutory case and thus did not involve a claimed constitutional right to treatment. Even if it had, however, we think that concerns about safety and efficacy should suffice to uphold the Act. As the *Rutherford* Court explained, "[f]or the terminally ill, as for anyone else, a drug is unsafe if its potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit."[158] The FDA may legitimately worry that desperate patients will try unproven drugs that do no good and may do harm, and consequently reject established effective, albeit ultimately non-curative, therapies.

More broadly, medical libertarianism in the United States has at best a checkered history.[159] Much of the population remains susceptible to claims of miracle cures—such as the anti-malaria drug hydroxychloroquine[160] or the horse de-wormer ivermectin[161] as COVID-19 treatments. Thus, we hesitate to endorse a right to medical choice that would permit individuals or judges with allied ideological leanings[162] to substitute quackery for science.

At the same time, however, we also recognize that just as NTIC logic disguises the real reasons people may have for wishing to ban abortion, gender-affirming care for minors, and aid in dying, so too it is relatively common to see ideologically driven

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157 442 U.S. 544 (1979).

158 *Id.* at 555–56.

159 For the definitive account, see LEWIS A. GROSSMAN, CHOOSE YOUR MEDICINE: FREEDOM OF THERAPEUTIC CHOICE IN AMERICA (2021).

160 *See* Álvaro Avezum et al., *Hydroxychloroquine Versus Placebo in the Treatment of Non-hospitalised Patients with COVID-19 (COPE–Coalition V): A Double-blind, Multicentre, Randomised, Controlled Trial*, 11 LANCET REG'L HEALTH–AMERICAS, Mar. 31, 2022, at 2, https://doi.org/10.1016/j.lana.2022.100243 [https://perma.cc/Z2RD-EXWV] (finding no benefit from hydroxychloroquine).

161 *See* Susanna Naggie et al., *Effect of Higher-Dose Ivermectin for 6 Days vs Placebo on Time to Sustained Recovery in Outpatients With COVID-19: A Randomized Clinical Trial*, 329 J. OF AM. MED. ASSOC. 888, 888, 895 (2023) (finding no benefit from ivermectin).

162 *See* Michael C. Dorf, *Justice Gorsuch's Conspiracy-Theory-Adjacent Rant About COVID Restrictions*, DORF ON LAW (May 22, 2023), http://www.dorfonlaw.org/2023/05/justice-gorsuchs-conspiracy-theory.html [https://perma.cc/JL55-F8ET] (criticizing the relative weighting of individual liberty and public health in *Arizona v. Mayorkas*, No. 22-592 (May 18, 2023), https://www.supremecourt.gov/opinions/22pdf/22-592_5hd5.pdf [https://perma.cc/68UB-52YD] (Statement of Gorsuch, J.)).

opposition to a practice dressed up as a concern for health and safety. Abortion opponents routinely feign concern about health and safety.[163] Opponents of transgender rights dress their animus in pseudo-scientific garb.[164] Efforts along these lines sometimes come from state-sanctioned professional bodies pursuing an ideological agenda in the guise of medical science.[165]

Thus, Szasz was not wrong to worry about the abusive deployment of medical science to persecute vulnerable minorities and non-conformists.[166] From its inception in 1952 and for more than two decades thereafter, the DSM described same-sex attraction as a mental illness, abandoning that invidious classification only in response to the concerted efforts of social and political activists.[167] We expect and support further progress towards depathologization of transgender status.[168]

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163 *See*, *e.g.*, Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 608–15 (2016) (describing district court findings that a law requiring doctors performing abortions to have admitting privileges at a local hospital and that was justified on ostensible health and safety grounds provided no such benefit while substantially curtailing abortion access).

164 *See* Boulware et al., *supra* note 82.

165 Although some states that ban gender-affirming care for minors do so through legislation, one of the most high-profile examples initially came from state medical boards. *See* text accompanying notes 50–51 (discussing Florida boards acting under influence of Governor DeSantis). Meanwhile, post-*Dobbs*, an obstetrician in Indiana was disciplined by the state's medical board, ostensibly for violating patient privacy, when she publicized the fact that she had performed an abortion for a ten-year-old rape victim from Ohio, even though the doctor's employer found that she had complied with relevant law by not revealing the patient's name or identifying information. Ava Sasani, *Indiana Reprimands Doctor Who Provided Abortion to 10-Year-Old Rape Victim*, N.Y. Times (May 26, 2023), https://www.nytimes.com/2023/05/26/us/indiana-doctor-abortion-reprimand.html [https://perma.cc/FN3G-RBJY].

166 *See also* Michel Foucault, Madness and Civilization: A History of Insanity in the Age of Reason 3–84 (Richard Howard trans., Vintage Books 1988) (1965) (tracing the evolution of the meaning of "madness" from the closing of the leprosaria at the end of the Middle Ages to "the great confinement" of beggars, the idle, and persons who might now be described as suffering from mental illness in the seventeenth century).

167 *See* Ray Levy Uyeda, *How LGBTQ+ Activists Got "Homosexuality" Out of the DSM*, JSTOR Daily (May 26, 2021), https://daily.jstor.org/how-lgbtq-activists-got-homosexuality-out-of-the-dsm/ [https://perma.cc/332S-7AT7] (chronicling, briefly, the campaign to reverse the classification of homosexuality as a mental disorder in the DSM); Sara E. McHenry, *"Gay is Good": History of Homosexuality in the DSM and Modern Psychiatry*, Am. J. Psychiatry Residents' J., Sept. 8, 2022, at 1, https://ajp.psychiatryonline.org/doi/10.1176/appi.ajp-rj.2022.180103 [https://perma.cc/FNE3-M5L4] (summarizing the history of pathologizing homosexuality in the DSM, activists' efforts to remove such pathologization, and the impact on the LGBTQ+ population).

168 *See supra* note 60.

Indeed, as we noted in the introduction to this Part, in one respect we go further than Szasz, who focused his critique on mental illness only. We acknowledge that contests over what counts as ill health concern the body, not just the mind—which, because we are not Cartesian dualists or mystics, we recognize to be rooted in the body, in any event. Thus, most physical conditions that conventionally count as disabilities do so in substantial part because of social norms and practices. "In a society of wheelchair users, stairs would be nonexistent, and the fact that they are everywhere in our society seems an indication only that most of our architects are able-bodied people who think unseriously about access."[169] Some deaf adults and parents of deaf children who, with substantial effort, could be "made to hear" with cochlear implants, nonetheless choose to avoid them because they value being part of the Deaf community.[170] Because human beings are social creatures, what counts as illness of almost every sort necessarily has a social dimension.

So, are we saying that there is no such thing as illness? In short, no. Recognizing the normative and social dimensions of judgments about illness, health, and disability need not lead to utter relativism or skepticism about physical reality.

To understand the health risks of taking mifepristone and misoprostol early in pregnancy, having a surgical abortion somewhat later, or carrying a pregnancy to term, one would sensibly consult reports of empirical studies, which reflect facts, not just values. In jurisdictions that do not ban abortion, pregnant people deciding among their options weigh the medical risks against the benefits—which are largely social, personal, and/or economic, along with any additional risks and costs,

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169 Tobin Siebers, *Disability in Theory: From Social Constructionism to the New Realism of the Body*, 13 AM. LITERARY HIST. 737, 740 (2001).

170 *See, e.g.*, LAURA MAUDLIN, COCHLEAR IMPLANTS AND RAISING DEAF CHILDREN 155–56 (2016) (contrasting the views of persons who value Deaf culture with the medical interventionist approach and noting that those "who adhere to the Deaf cultural script are less likely to support the use of [cochlear implants], while those who adhere to the medical script of deafness are more likely to support them"); Sara Novic, *A Clearer Message on Cochlear Implants*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/opinion/deaf-cochlear-implants-sign-language.html [https://perma.cc/E4DN-7UT6] (explaining that the choice to receive a cochlear implant is nuanced and that the implant is often misrepresented as a miracle cure); Caroline Praderio, *Why Some People Turned Down a 'Medical Miracle' and Decided to Stay Deaf*, BUS. INSIDER (Jan. 3, 2017), https://www.insider.com/why-deaf-people-turn-down-cochlear-implants-2016-12 [https://perma.cc/9D23-CESR] ("Many in the deaf community don't want to be 'fixed' to become more like hearing people. In fact, because implanted children usually don't learn ASL, some feel that implants represent a loss for Deaf culture.").

which might be moral, religious, and/or social. A similar mix of factors goes into decisions about gender-affirming care and aid in dying. In saying that none of these decisions—much less the decision of lawmakers to restrict individuals' autonomy to make them—is the product of nature taking its course, we are saying that nature *alone* is not responsible for the fate that befalls people whose bodily autonomy the state overrides.

We need not and do not deny that nature—in the sense of physical reality at least partly independent of individual perception and social construction—plays a substantial role in the progress of pregnancy, bodily changes during puberty, or the process of dying. In other words, our quarrel is only with the claim that nature alone bears responsibility for the fate of those denied the interventions they seek. We have no quarrel with well-grounded scientific claims about nature itself.[171]

Our argument against NTIC is similar to a well-known critique of libertarian economics that treats market ordering as a natural baseline. Right-leaning policy makers and legal scholars frequently object to what they deem inefficient regulation of markets that, they claim, would produce socially optimal results if only left to the magic of the invisible hand.[172] The critique contests the assumption that, in a reasonably complex

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171 We do quarrel with some of the means by which science tests those claims. Notably, the Tuskegee study was a key impetus for the statutory requirement (codified at 42 U.S.C. § 289) of Institutional Review Board approval of the ethics of federally funded research on human subjects. *See* Larry I. Palmer, *Paying for Suffering: The Problem of Human Experimentation*, 56 MD. L. REV. 604, 607 (1997) (observing that the Tuskegee study "was a stimulus to the current model of regulating human experiments—the 'institutional review board'"). Federal law nominally requires "humane" treatment of animals used in experiments, 7 U.S.C. § 2143, but nonetheless permits lethal and invariably non-consensual use of non-human animals in experiments that would be categorically impermissible if performed on humans. Nearly all such animal experimentation would be morally problematic even if it provided substantial benefits for humans, but much animal experimentation is worse than useless, because animal experiments frequently fail to predict effects in humans. *See* AYSHA AKHTAR, ANIMALS AND PUBLIC HEALTH: WHY TREATING ANIMALS BETTER IS CRITICAL TO HUMAN WELFARE 134 (2012) (documenting "a growing recognition that there is an incongruity between understanding mechanisms in animals and understanding an actual human disease").

172 *See, e.g.*, Richard A. Epstein, *The Excessive Ambitions of Stakeholder Ideology*, 77 BUS. LAW. 755, 756–57 (2022) (arguing that the corporate environmental-social-governance approach to growing social welfare creates insuperable conflicts-of-interest that are better addressed by the "invisible hand" of the traditional shareholder primacy rule); Richard A. Epstein, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (critiquing, on libertarian and efficiency grounds, the entire range of employment discrimination laws as ineffective and contrary to the goals of personal autonomy and economic advancement). For a layperson's summary of the libertarian argument for market "magic," see DAVID BOAZ, THE LIBERTARIAN MIND: A MANIFESTO FOR FREEDOM 85–102 (2015).

society, markets can even exist without a very substantial body of law that constructs them. As Cass Sunstein described the fallacy at the root of the libertarian view, "[m]arket ordering under the common law was understood to be part of nature rather than a legal construct . . . ."[173] The question is never really *whether* to regulate markets but *how* to do so.[174]

One could make a similar point about nature itself. Some scientists describe our current epoch as the "Anthropocene" in recognition of the impact of human activity on all aspects of the Earth's climate and ecosystems.[175] In these circumstances, there may be no phenomena that can be attributed to nature in the sense of the world as humans find rather than make it. And if there is no nature, then there can be no NTIC.

Yet while we think there is good reason to conclude that we are living in the Anthropocene, our critique of NTIC does not depend on that characterization. We can concede *arguendo* that nature accounts for *some* of the burdens and misfortunes that befall humans. However, some does not mean all. At the very least, nature should be acquitted of causing the hardships that result from bans on abortion, gender-affirming care for minors, and aid in dying. They are man-made.[176]

CONCLUSION

Many otherwise-libertarian theorists, policy makers, and jurists who disfavor mandates on the human body nonetheless support or accept the validity of prohibitions of conduct that, in effect, mandate extreme bodily impositions, including bans on

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173 Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

174 *See* Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 612 (2021) ("All economic transactions will be negotiated and consummated in the shadow of a legal regime that creates and enforces laws relating to property, contracts, torts, crime, and so on."); LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 7–11 (2002) (explaining that taxation facilitates government, which creates stable markets, thus rendering the claim that taxation is theft incoherent).

175 *See generally* Simon L. Lewis & Mark A. Maslin, *Defining the Anthropocene*, 519 NATURE 171, 171–72, 177 (2015) (reviewing the historical genesis of the concept of the Anthropocene and suggesting certain geologic signatures to mark its beginning).

176 Double meaning intended. Although the percentage of women in state legislatures has risen steadily from just under 11 percent in 1980, even in 2024 they comprised fewer than a third of the total. *See Women in State Legislatures 2024*, CTR. FOR AM. WOMEN AND POLS., https://cawp.rutgers.edu/facts/levels-office/state-legislature/women-state-legislatures-2024 [https://perma.cc/H9DL-C3K9] (graph) (last visited Sept. 10, 2024).

abortion, gender-affirming care for minors, and aid in dying. To distinguish the mandates that such people disapprove from the latter sorts of impositions, which they approve or accept, they commonly assert that bans on abortion, gender-affirming care for minors, and aid in dying merely permit nature to take its course. This claim—NTIC—has superficial appeal because of the tendency to associate naturalness with goodness and because it seemingly invokes the act/omission distinction. However, on inspection, neither of those rationales justifies NTIC. Moreover, the selective and inconsistent invocation of NTIC indicates that it merely masks unspoken normative claims that should be evaluated on their own merits.