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The case of Dr. Maggie Carpenter: The Dobbs extradition crisis is here

A constitutional crisis is unfolding as Louisiana seeks to extradite a New York doctor for providing abortion pills via telemedicine, highlighting the growing legal conflict between states with different abortion laws three years after the Supreme Court's Dobbs decision.

By Caleb Mason

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It's been three years since the *Dobbs* decision, in which the Supreme Court overturned *Roe v. Wade* and held that that there is no constitutional right to abortion. After *Dobbs*, abortion was quickly banned or significantly restricted in a dozen states, both through the recrudescence of never-repealed pre-*Roe* bans, and through newly enacted statutes, including criminal laws that specifically targeted medical providers.

Dobbs portended a coming legal crisis over interstate extradition, because today, in marked contrast to the situation pre-*Roe*, abortion is no longer, in most cases, a surgical procedure performed in hospitals. It's overwhelmingly done medically rather than surgically, using mifepristone in pill form, which is typically taken at home and which can be prescribed in a telemedicine appointment and sent to the patient by mail. Patients in states with criminal prohibitions (which I will call here "Prohibition States") can consult with doctors in "Free States" via telemedicine consultations, then obtain the medication through the mail.

From the perspective of the patients and their doctors, and the state governments of the Free States, this is the lawful provision of badly needed medical care. From the perspective of the governments of the Prohibition States, if a Free State doctor prescribes mifepristone via a telemedicine consultation, and the Prohibition State patient then uses the medication to terminate her pregnancy, that's a homicide, and the Free State doctor's actions support Prohibition State indictments regardless of whether the doctor ever set foot in the Prohibition State. The doctrinal underpinnings of such long-arm criminal jurisdiction are well-settled, thanks largely to the war on drugs.

Three years ago, I predicted in the Daily Journal ("What happens when Alabama indicts a California doctor for prescribing abortion medication?" May 18, 2022) that before too long a Prohibition-state prosecutor would indict a free-state doctor who had never set foot in the Prohibition State, and whose Free State government protects the right to abortion and considers the doctor's conduct to be lawful and ethical. I predicted that a Prohibition State would send a formal extradition request to the Free State, demanding that the free state arrest and hand over the doctor.

One response I heard back then was, "Come on, they're not actually going to indict out-of-state doctors." But now they have. Dr. Maggie Carpenter, a New York physician, has been indicted by the state of Louisiana for prescribing mifepristone to a Louisiana resident during a telemedicine appointment. The Louisiana attorney general has served a formal extradition request on the governor of New York, Kathy Hochul. Hochul responded as follows: "Not now, not ever." And the New York state legislature passed a law barring state law enforcement from cooperating with extradition requests from other states relating to healthcare provision that is legal in New York. (NY Pen. L. § 570.17.)

This is a real constitutional crisis. In today's article, I'm going to explain why it's a crisis. Tomorrow, in Part 2, I'll discuss in more detail what I think the next steps are going to be and how they might be evaluated legally.

Extradition between states is a routine part of our legal system. The Constitution itself includes an Extradition Clause, and Congress passed the Extradition Act, in 1793. The rule is clear: When one state submits a formal extradition demand to another state, the receiving state must hand over the person to the demanding state. Any litigation over the merits of the underlying charge must take place in the demanding state. *See, e.g.*, 18 U.S.C. sec. 3182; Cal. Pen. Code secs. 1547-1558; *Puerto Rico v. Branstad*, 483 U.S. 219 (1987); *California v. Superior Court* (Smolin), 482 U.S. 400 (1987).

States have adhered to this system without too many hiccups since

the founding. The one exception was slavery. The seminal case on the Extradition Clause, *Kentucky v. Dennison*, 65 U.S. 66, was decided in March 1861, less than a month before the start of the Civil War. The issue in *Dennison* was whether the governor of Ohio (a free state) was constitutionally obligated to honor an extradition request submitted to him by the governor of Kentucky (a slave state), seeking the extradition of an Ohio citizen on the Kentucky charge of aiding and abetting the escape of an enslaved person. The Ohio citizen had helped the enslaved person cross the river into Ohio. Ohio Gov. William Dennison refused the request, arguing that he should not be required to honor the extradition request because Ohio was a free state, helping a slave escape is not a crime in Ohio, and slavery itself is a moral affront to civilized nations.

The Supreme Court *rejected* Gov. Dennison's argument and held, in the first part of its decision, that the Constitution obligated him to honor the extradition request and hand over the Ohio citizen to Kentucky. In the second part of the decision, though, the Court held that the extradition obligation was unenforceable - a holding generally thought to be a recognition of the fact that in 1861, when the decision was issued, the country had already broken in two.

The Civil War ended slavery. And you might have thought that after the war, courts would look back at the Dennison case and recognize that Gov. *Dennison* was right to refuse Kentucky's extradition request, because slavery is *wrong*.

In fact, in 1987, in *Branstad v. Puerto Rico*, the Supreme Court said the exact *opposite*: it affirmed the first half of Dennison and reversed the second half. The Court "reaffirm[ed] the conclusion that the commands of the Extradition Clause are mandatory, and afford no discretion to the executive officers or courts of the asylum state," 483 U.S. at 227– in other words: Gov. Dennison *was* obligated to hand over his citizen back in 1861, and there is no exception for "laws that are a moral affront to civilized nations." The Court then turned to the enforceability question, and held, emphatically, that the Extradition Act is enforceable, and states may "invoke the power of federal courts to enforce against state officers rights created by federal statutes, including equitable relief to compel performance of federal statutory duties." *Id*. at 230.

Branstad emphasized that *Dennison* was decided when the Union was falling apart, the initial wave of secessions had already occurred, and "the practical power of the Federal Government [was] at its lowest ebb since the adoption of the Constitution." *Id*. at 225. *Branstad*'s central theme is that times have changed: "*Kentucky v. Dennison* is the product of another time." *Id*. at 230. So what was that "another time," as compared to 1987?

First: In the decades before the Civil War, the nation was divided over slavery, an issue with such a strong moral component that there was no possibility of compromise. There was no comparable issue, from the *Branstad* Court's perspective in 1987. The country did not face such an existential internal division–an irreconcilable conflict between the values, ideals, and rights of different states that goes to the very definition of personhood and liberty. In 1987, abortion did not present such a conflict, nor would it be expected to. In 1987, the right to abortion was settled by *Roe*, and stare decisis was still enshrined among the Court's cardinal jurisprudential virtues. Moreover, in 1987, abortion was still an in-office surgical procedure, and the internet was still a decade away, meaning that the legal basis for the Louisiana indictment of Dr. Carpenter would be scarcely conceivable. The *Branstad* Court had no reason to anticipate *Dobbs*, or to anticipate the Louisiana Carpenter indictment or New York's response. If the *Branstad* Court looked back on *Dennison* as "the product of another time," it's reasonable to ask whether a court in 2025 should look back on Branstad as "the product of another time," as well.

Second: That "another time" gave us President Jackson's perhaps apocryphal comment about the Supreme Court's ruling in *Worcester v. Georgia*, 31 U.S. 515, in 1832: "Justice Marshall has made his decision, now let him enforce it." In 1987, it would have been inconceivable for national elected leaders to cite that comment approvingly, or to seek to emulate it.

The background political and jurisprudential context today is not what it was in 1987. Today, high-ranking officials in the current administration have sung the praises of President Jackson's comment, and spoken openly about disregarding court orders they don't like. It's worth recalling, therefore, what *Worcester* was about. *Worcester* was not a case in which the Court gave the President an order and the President told the Court to go pound sand. Rather, *Worcester* is about what happens when a state ignores an order from a federal court. It was a challenge to the constitutionality of a Georgia criminal statute, brought by two defendants, Samuel Worcester and Elizur Butler, serving sentences in Georgia. The Court ruled that the statute was unconstitutional, but Georgia ignored the ruling and refused to release Worcester and Butler.

President Jackson watched Georgia defy the Court. He declined to do anything to enforce the order and mocked the Court as powerless. Other states took note: six months later, South Carolina enacted its "Ordinance of Nullification," proclaiming its right to nullify federal laws, starting with federal tariffs that were raising the price of imported goods. Jackson did not like that at all, but the "let him enforce it" bell was good and rung, and continued to echo thirty years later, when the *Dennison* Court threw up its hands and gave up on enforceability altogether. The apocryphal Jackson comment would have been a good epigram for the *Dennison* opinion.

The analogy to today's political context is apparent. The more the executive branch talks about disregarding court orders, the more it opens up rhetorical and political space for free-state governors to say "No" to extradition requests on abortion indictments–and in court, to revisit the argument made by Ohio Gov. Dennison in refusing to hand over a man accused of helping an enslaved person escape: that a state does not have an "obligation to surrender its citizens or residents to any other State, on the charge that they have committed an offence not known to the laws of the former, nor affecting the public safety, nor regarded as malum in se by the general judgment and conscience of civilized nations." *Dennison*, 65 U.S. 66, 69.

Does Governor Dennison's argument translate to today's abortion divide? There's a strong historical case that one of drivers of the collapse of the "two systems" compromise model of a nation with half free states and half slave states was the slave states' insistence on reaching into the free states to compel enforcement of the slave system nationwide–just as Kentucky did with Ohio in *Dennison*. If the free states are commandeered to be enforcers of the slave system, then they're not really free anymore, and slavery is the law of the land everywhere. In hindsight, this is obvious: "half slaveholding, half free" was never going to work. Is "half medical care, half murder" going to work any better?

Attempts by anti-abortion states to extradite free-state doctors suggest that it won't. From the perspective of the Prohibition States, telemedicine mifepristone prescriptions written by Free State doctors render their abortion bans functionally useless. And from the perspective of the Free States, the attempts by Prohibition States to extradite Free State doctors to face felony charges and long sentences in Prohibition State prisons is an outrageous assault on Free State sovereignty and the moral principles of Free State citizens–and, as a practical matter, will impede access to abortion in the Free States, because many doctors will decline to provide abortion care at all out of fear of Prohibition State indictments.

In short, from both sides' perspectives, there is no "just leave it up to the states" option. And we can no longer avoid facing the constitutional consequences of this impasse, Louisiana has indicted a New Yorker, and is seeking to extradite her. There will be more such cases, and they will likely be coming to California. In tomorrow's essay, I'll consider the potential next steps for Louisiana, New York, and the doctor, and how they might play out.

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