

Curbing Reversals of Non-Textual Constitutional Rights

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CURBING REVERSALS OF NON-TEXTUAL CONSTITUTIONAL RIGHTS*

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Abstract

With the June 2022 issuance of Dobbs v. Jackson Women’s Health Organization, one of the most impactful cases in U.S. history, the Supreme Court renounced nearly a half-century of constitutional guarantees to abortion access. The Court’s stunning “rights reversal,” justified by the majority’s originalist assessment that prior jurisprudence was imprudently decided, places at immediate risk other non-textual rights—including access to contraceptives, privacy in sexual intimacy, and marriage equality. These privacy interests are already under political and legal attacks in several jurisdictions. As illustrated in response to Dobbs, neither the President, Congress, nor progressive states are willing, well-positioned, or poised to ameliorate existing or future judicial reversals of rights. Who then can allay the threat of diminishing privacy interests or other non-textual rights? Why, the Supreme Court itself. Under principles of “constitutional cohesion,” which recognize the close interplay of rights and structural components (e.g., separation of powers, federalism, and preemption) within the U.S. Constitution, the Dobbs Court’s “rights-centric” approach to withdrawing non-textual rights faces

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significant challenges. Ultimately, structural norms set definitive limits on additional judicial reversals of non-textual rights as well as opportunities for their partial reinstatement through the Court.

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INTRODUCTION

The abolition of the constitutional right to abortion by the United States Supreme Court in *Dobbs v. Jackson Women’s Health Organization* on June 24, 2022,¹ seriously threatens access to reproductive health services in over half the states.² As the Court explicated in its majority opinion, state-based abortion restrictions are now lawful so long as they meet a “rational basis” test under substantive due process.³ Almost any determination by state, tribal, or local law and policy-makers limiting abortion access may pass this minimal standard in the wake of the Court’s overruling of *Roe v. Wade*⁴ nearly fifty years after its issuance.

¹ 142 S. Ct. 2228 (2022).

² See *infra* Part I.B.

³ *Dobbs*, 142 S. Ct. at 2283 (displacing former strict levels of scrutiny to assess abortion-related restrictions under prior Court decisions); see *infra* note 83 and accompanying text.

⁴ 410 U.S. 113 (1973).

As explained in Part I, the Supreme Court’s “rights reversal”—i.e., stripping a previously-bestowed individual right by overruling precedent—in *Dobbs* is astonishing and impactful,⁵ even if it was expected.⁶ Among immediate concerns are what other existing freedoms the Court may seriously reconsider under similar logic espoused in *Dobbs*.⁷ Other extant liberties previously affirmed by the Court may be on the “cutting board,” specifically rights to contraception, intimacy, and marriage equality.⁸ Like abortion, these “non-textual” rights are not based on explicit constitutional language or deeply-held historical concepts.⁹ Rather, they are constructs from relatively modern Court decisions centered on liberty;¹⁰ in other words, they exist largely because Justices agreed they exist.¹¹ Lacking express language, as noted in Part II,

⁵ See, e.g., Jennifer L. Piatt et al., *State-Based Abortion Protections*, NETWORK FOR PUB. HEALTH L. (Oct. 5, 2022), <https://www.networkforphl.org/resources/state-based-abortion-protections/> (documenting an array of state-based anti-abortion laws and policies taking effect post-*Dobbs* resulting in diminutive losses of access to abortion and reproductive health services).

⁶ Many predicted the Supreme Court would reach this decision following the oral arguments before the Court in December 2021, and specifically after the infamous leak of an early draft of the *Dobbs* majority opinion on May 2, 2022 (nearly 7 weeks prior to its formal issuance). Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.

⁷ The Supreme Court may not have issued its last word on abortions. Future judicial recognition of concepts of “fetal personhood,” intimated by a minority of the Court, may abolish access to nearly all abortions. See Mary Ziegler, *The Abortion Fight Has Never Been About Just Roe v. Wade*, THE ATLANTIC (May 20, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/abortion-fight-roe-v-wade/618930/> [hereinafter Ziegler I] (“[S]ome abortion-rights opponents are quite literally looking for a *Roe* of their own, asking the Court to recognize fetal rights under the Fourteenth Amendment.”).

⁸ See *infra* Part II.B.

⁹ Professor Lawrence Sager classifies these specific interests, among others, as falling within the “liberty-bearing provisions of the Constitution—provisions concerned not so much with the structure of government as with the substance of governmental behavior and its relationship to the legitimate demands of members of our political community that they be treated justly.” LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 3 (2004).

¹⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2247 (2022) (describing liberty as a “capacious term.”).

¹¹ As Professor Cass Sunstein recognizes, “[t]he Constitution means what the Supreme Court says that it means[.]” Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 5 (2005). He further notes how “the American Constitution has come to be interpreted in ways that depart from its original meaning.” *Id.* at 11. By no means are constitutional principles static: “the meaning of the American Constitution changes because of new interpretations. If the Constitution meant, in all respects, what it originally meant, American constitutional rights would be thin indeed.” *Id.* at 19. See also Philip B. Kurland, *A Changing Federalism: American Systems of Laws and Constitutions*, in *AMERICAN CIVILIZATION: A PORTRAIT FROM THE TWENTIETH CENTURY* 141 (Daniel J. Boorstin ed., 1972) (suggesting the Constitution means “whatever the Justices of the Supreme Court want it to mean . . . subject to the acquiescence of the American people.”).

originalists on the Court may now seek to void other non-textual rights, despite assurances from the Court’s majority in *Dobbs* that its decision applies only to abortion.¹²

Palpable fears over additional “rights reversals” and concomitant social costs, gross inequities, and extensive public health impacts led to urgent, national calls for public and private sector efforts to obviate the loss of rights going forward.¹³ Yet who will stop the current Supreme Court from curtailing other rights bestowed by its predecessors? Congress? That is unlikely. On sensitive issues like reproductive rights, Congressional members’ views and votes do not necessarily align with popular support among Americans for these freedoms.¹⁴ In fact, decades

¹² *Dobbs*, 142 S. Ct. at 2277-78 (“And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”); *id.* at 2309 (Kavanaugh, J., concurring) (“*First* is the question of how this decision will affect other precedents involving issues such as contraception and marriage . . . I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.”).

¹³ Karin Brulliard, *The Supreme Court Prompts the Question: Who Gets Rights in America?*, WASH. POST (June 25, 2022, 7:37 PM), <https://www.washingtonpost.com/politics/2022/06/25/abortion-constitutional-rights/> (describing how many Americans “saw in [*Dobbs*] a watershed that could trigger the repeal of a host of other protections — for racial and ethnic minorities, gay people and others — that were established on similar legal grounds as *Roe*.”); Morgan Marietta, *‘A Revolutionary Ruling – and Not Just for Abortion’: A Supreme Court Scholar Explains the Impact of Dobbs*, THE CONVERSATION (June 24, 2022, 9:24 PM), <https://theconversation.com/a-revolutionary-ruling-and-not-just-for-abortion-a-supreme-court-scholar-explains-the-impact-of-dobbs-185823> (“Questions of rights not explicitly protected by the Constitution – and therefore now in the hands of state legislatures – will rely much more heavily in the future on local democracy.”); Editorial, *After Dobbs, Same-Sex Marriage Could be Threatened. Congress Is Right to Codify It.*, CHI. TRIB., July 24, 2022 (§ 1), at 16 (“The broadside delivered by the overturning of *Roe* . . . was to signal the imperilment of other rights and freedoms long taken for granted. Congress is absolutely right to shield them through legislative action . . .”).

¹⁴ Domenico Montanaro, *Poll: Two-Thirds Say Don’t Overturn Roe; The Court Leak Is Firing Up Democratic Voters*, NPR (May 19, 2022, 5:00 AM), <https://www.npr.org/2022/05/19/1099844097/abortion-polling-roe-v-wade-supreme-court-draft-opinion> (“About two-thirds of Americans say they do not support overturning *Roe v. Wade* . . .”). Congress has consistently rejected the use of federal funding directly for most abortions through the Hyde Amendment. Alina Salganicoff et al., *The Hyde Amendment and Coverage for Abortion Services*, KAISER FAM. FOUND. (Mar. 5, 2021), <https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/> (“Congress enacted the Hyde Amendment [initially in 1976], which blocks federal funds from being used to pay for abortion outside of the exceptions for rape, incest, or if the pregnancy is determined to endanger the woman’s life, resulting in dramatically limited coverage of abortion under Medicaid and other federal programs.”). Congress has also rejected recent bills introduced to nationalize access to abortions. See Amanda Hollis-Brusky, *Can Congress Resurrect Roe If It’s Overturned? Well, It Could Try.*, WASH. POST (May 4, 2022, 11:12 AM), <https://www.washingtonpost.com/politics/2022/05/04/roe-overturned-congress-abortion-law/> (assessing the potential pitfalls of Congressional support and authority via interstate commerce

of Congressional inaction on issues like these are partly responsible for the nation's current predicament.¹⁵

Might the President come to the rescue? President Joe Biden's administration promptly objected to the Court's removing constitutional protections from abortion access,¹⁶ later issuing an Executive Order laying out a mild series of strategic objectives¹⁷ and creating the Reproductive Rights Task Force within the Department of Justice.¹⁸ Yet it failed

powers to pass the Women's Health Protection Act to "codify *Roe*."); Deepa Shivaram, *A Bill to Codify Abortion Protections Fails in the Senate*, NPR (May 11, 2022, 4:54 PM), <https://www.npr.org/2022/05/11/1097980529/senate-to-vote-on-a-bill-that-codifies-abortion-protections-but-it-will-likely-f> ("The Women's Health Protection Act, a Democrat-led bill that would effectively codify a right to an abortion, failed to pass, as expected, after it did not reach the Senate's 60-vote threshold.").

¹⁵ See David French, *The Constitution Isn't Working*, THE ATLANTIC (July 12, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/congress-inaction-partisanship/670486/>.

¹⁶ Kathryn Watson, "This is Not Over," *Biden Says After Supreme Court Overturns Roe v. Wade*, CBS NEWS (June 24, 2022, 2:04 PM), <https://www.cbsnews.com/live-updates/biden-roe-v-wade-supreme-court-decision-dobbs/> ("Mr. Biden said he cannot unilaterally keep the protections under *Roe* – only Congress can. And Congress, he said, doesn't appear to have the votes to do that now. 'This fall, *Roe* is on the ballot,' Mr. Biden said. 'Personal freedoms are on the ballot. The right to privacy, liberty, equality, they're all on the ballot. Until then, I will do all in my power to protect a woman's right in states where they will face the consequences of today's decision.'"). President Biden's initial counteractions in response to *Dobbs* on June 24, 2022, were limited to two essential objectives: (1) protecting movement across state lines to seek lawful abortions in available states, and (2) directing the Secretary of Health and Human Services (HHS) to help assure access to abortion medications approved by the Food and Drug Administration (FDA). *FACT SHEET: President Biden Announces Actions in Light of Today's Supreme Court Decision on Dobbs v. Jackson Women's Health Organization*, WHITE HOUSE (June 24, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/24/fact-sheet-president-biden-announces-actions-in-light-of-todays-supreme-court-decision-on-dobbs-v-jackson-womens-health-organization/>.

¹⁷ President Biden issued Executive Order 14076 on July 8, 2022, setting forth an array of relatively non-controversial objectives. Exec. Order No. 14,076, 87 Fed. Reg. 42,053 (July 13, 2022). He issued an additional Executive Order on August 3, 2022, directing further action from HHS' Secretary including inviting potential Medicaid waivers to enable out-of-state abortions, assessing potential actions to aid compliance with nondiscrimination laws in ensuring that "women receive medically necessary care," and improving maternal health informational gathering. See also Tyler Pager, *Biden Signs Executive Order Aimed at Helping Patients Travel for Abortions*, WASH. POST (Aug. 3, 2022, 3:09 PM), <https://www.washingtonpost.com/politics/2022/08/03/biden-abortion-travel-executive-order/>; Exec. Order No. 14,079, 87 Fed. Reg. 49,505 (Aug. 11, 2022).

¹⁸ Hannah Rabinowitz & Shawna Mizelle, *Justice Department Announces Reproductive Rights Task Force*, CNN (July 12, 2022, 7:09 PM), <https://www.cnn.com/2022/07/12/politics/department-of-justice-abortion-rights-task-force/index.html> (explaining task force objectives to include assessing "state and local legislation and enforcement that might infringe on a person's ability to seek reproductive care, ban abortion-inducing drugs[,] or impose criminal or civil consequences on federal employees who provide reproductive health services that are legal under federal law.").

to take other immediate steps,¹⁹ such as declaring a public health emergency,²⁰ which may have more effectively countered the Court's ruling. Besides, a future election may place a President into the White House whose politics are antithetical to reproductive services or LGBTQ+ protections.²¹

What about the states? Liberal jurisdictions like California,²² Illinois,²³ and New York²⁴ are initially holding the line against abortion and reproductive health restrictions, providing critical options for individuals seeking these services.²⁵ States like Massachusetts are crafting explicit protections for those living in anti-abortion states who may face

¹⁹ Congress members called on the President to preserve rights to access abortions via executive and legislative action. *See, e.g.*, Letter from Elizabeth Warren et al., U.S. Senators, to Joseph R. Biden, President of the U.S. (June 7, 2022), <https://www.warren.senate.gov/imo/media/doc/2022.06.07%20Letter%20to%20POTUS%20on%20Abortion%20EO.pdf> (“Americans across the nation and at every level of government must stand up against this unprecedented assault on women and their right to make decisions about their own bodies and lives. But as President of the United States, you have the unique power to marshal the resources of the entire federal government to respond. . . . We urge you to immediately issue an executive order instructing the leaders of every federal agency to submit their plans to protect the right to an abortion within 30 days.”).

²⁰ *See, e.g.*, Shira Stein, *Biden Team Weighed Emergency Declaration Over Roe Decision* (2), BLOOMBERG L. (July 8, 2022, 1:36 PM), <https://news.bloomberglaw.com/health-law-and-business/biden-team-rejected-emergency-declaration-over-roe-decision>; Mabinty Quarshie, *Exclusive: Black Congresswomen Urge Biden to Declare Public Health and National Emergency Around Abortion*, USA TODAY (June 24, 2022, 9:04 AM), <https://www.usatoday.com/story/news/politics/2022/06/24/abortion-black-congresswomen-ask-biden-declare-national-emergency/7712543001/>; Lawrence O. Gostin & James G. Hodge, Jr., *Opinion, An Emergency Declaration on Abortion Rights Could Do More Harm Than Good*, WASH. POST (July 15, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/07/15/biden-abortion-public-health-emergency-risks/>.

²¹ *See* Gostin & Hodge, Jr., *supra* note 20.

²² Alexei Kosef, *‘When You Don’t Know Where to Go, You Come Here:’ California Preps to Be a Haven for Abortion Rights*, CAL MATTERS (May 2, 2022), <https://calmatters.org/politics/2022/04/california-abortion-rights/>.

²³ Sarah Fentem, *Illinois Prepares to Help Thousands of Abortion Patients if Roe v. Wade Is Overturned*, ST. LOUIS PUB. RADIO (May 11, 2022, 2:50 PM), <https://news.stpublicradio.org/health-science-environment/2022-05-11/illinois-prepares-to-help-thousands-of-abortion-patients-if-roe-v-wade-is-overturned>.

²⁴ Anna Gronewold, *Abortion Protections in New York Fortified Ahead of SCOTUS Ruling*, POLITICO (June 13, 2022, 1:55 PM), <https://www.politico.com/news/2022/06/13/abortion-new-york-scotus-00039191>.

²⁵ In other states where abortion restrictions are due to take effect, “[a] blizzard of litigation has ensued.” Neelam Bohra & Shawn Hubler, *State Battles Are Defining the Shifting Abortion Landscape*, N.Y. TIMES (June 28, 2022), https://www.nytimes.com/2022/06/28/us/texas-ro-abortion-ban-blocked.html?campaign_id=2&emc=edit_th_20220629&istance_id=65303&nl=todaysheadlines®i_id=72831090&sement_id=97097&user_id=3030eb2f30a2a78dd0d19041cb80308c.

prosecution for obtaining out-of-state abortions.²⁶ These and other states may wield masterful legal options against the backdrop of errant federal and state policies,²⁷ but their ability to timely assure reproductive services or protections is tenuous at best.²⁸ A patchwork of state-based fixes is no substitute for the loss of the federal constitutional right to abortion or threatened diminutions of rights of contraception, sexual intimacy, or marriage equality.²⁹

If Congress, the President, and states are ill-equipped, unwilling, or poorly-positioned to counter denials of at-risk freedoms unmoored from constitutional text, who is left to stymie ongoing and future attempts to reverse non-textual rights? The answer is clear: “*the Supreme Court itself*.”³⁰ As examined in Part III, the Court took a narrow, linear

²⁶ An Act Affirming Protections for Reproductive and Gender-Affirming Care, ch. 127, 2022 Mass. Acts, <https://malegislature.gov/Laws/SessionLaws/Acts/2022/Chapter127>; Colin A. Young & Chris Lisinski, *Mass. House Passes Sweeping Reproductive Rights Bill*, NBC BOS. (June 29, 2022, 11:34 PM), <https://www.nbcboston.com/news/local/mass-house-passes-sweeping-reproductive-rights-bill/2760608/> (“The bill . . . would declare that access to both reproductive health care and gender-affirming care is a ‘right secured by the constitution or laws’ of Massachusetts and it would shield providers of reproductive and gender-affirming care and their patients from out-of-state legal action.”).

²⁷ Aaron Tang, Opinion, *There’s a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/opinion/supreme-court-guns-religion.html> (“Sometimes, the best way to protect against overreaching by the conservative court is through good old-fashioned lawmaking[.]” specifically state-based legislative fixes to override Supreme Court judgments).

²⁸ State-based interventions can be purposeful and restorative of individual interests but face significant limits. James G. Hodge, Jr., *Stemming Supreme Court Rights Reversals*, HARV. L. PETRIE-FLOM CTR.: BILL OF HEALTH (June 21, 2022), <https://blog.petrieflom.law.harvard.edu/2022/06/21/stemming-supreme-court-rights-reversals/>. For example, states’ unique constitutional language may be interpreted by their own courts to bestow rights, including access to abortion, that the federal Supreme Court denies. *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17, 19 (Minn. 1995) (“[W]e have interpreted the Minnesota Constitution to afford broader protection than the United States Constitution of a woman’s fundamental right to reach a private decision on whether to obtain an abortion . . .”). These decisions, however, apply only in jurisdictions where they are issued. Furthermore, if the U.S. Supreme Court later determines that all abortions are unconstitutional under a theory of “fetal personhood,” see Ziegler I, *supra* note 7, inapposite state court decisions would run afoul of federal constitutional law.

²⁹ See generally Elyssa Spitzer & Maggie Jo Buchanan, *2022 State Abortion Bans Are a Patchwork of Increasingly Extreme Laws*, CTR FOR AM. PROGRESS (May 20, 2022), <https://www.americanprogress.org/article/2022-state-abortion-bans-are-a-patchwork-of-increasingly-extreme-laws/>.

³⁰ See Hodge, Jr., *supra* note 28. Primary arguments underlying this observation do not include (1) base-level observations on how the members of the Court may change over time (leading to renewed views of discarded rights, see Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 Nw. U. L. REV. 1483, 1484-87 (2007)); (2) proposals to pack the Court with new members as multiple Presidents, including President Biden, have considered, see Charlie Savage, ‘Court Packing’ Issue Divides Commission Ap-

view of its role in assessing and reversing rights in *Dobbs*.³¹ In five distinct opinions, the Justices tended to focus almost exclusively on analyzing whether the Constitution authorizes specific rights.³² Few dispute the Justices' preeminent role in ascertaining constitutionally-grounded freedoms; the Court is the final and supreme arbiter of constitutional questions.³³ While its opinions on constitutional inquiries may be supreme, the Court's "rights-centric" focus on display in *Dobbs* is subject to its own shortcomings.³⁴ Its power to interpret rights is, in fact, limited by the Constitution's design.³⁵

Like individual rights, structural principles including separation of powers,³⁶ federalism,³⁷ and preemption³⁸ are part of the fabric of the

pointed by Biden, N.Y. TIMES (Dec. 7, 2021), <https://www.nytimes.com/2021/12/07/us/politics/supreme-court-packing-expansion.html>; or (3) post-*Dobbs* suggestions to impeach Justices who promised during their confirmation hearings to leave *Roe v. Wade* intact or avoid overturning precedence generally, see Ed Shanahan, *Ocasio-Cortez Wants Two Justices Impeached for 'Lying Under Oath.'*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/27/us/aoc-roe-abortion-scotus.html>.

³¹ See *infra* Part III.

³² *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240, 2242 (2022); *id.* at 2300-01 (Thomas, J., concurring); *id.* at 2304 (Kavanaugh, J., concurring); *id.* at 2310 (Roberts, C.J., concurring); *id.* at 2317 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

³³ Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1459 (2017) ("'Judicial supremacy' is the idea that the Supreme Court should be viewed as the authoritative interpreter of the Constitution and that we should deem its decisions as binding on the other branches and levels of government, until and unless constitutional amendment or subsequent decision overrules them."); see also LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 47-48 (2008) (arguing the judiciary's primary role in interpreting the Constitution is grounded in both its capacity to assess the constitutionality of statutes and regulations, as well as its supremacy related to interbranch conflicts over constitutional issues).

³⁴ See generally SAGER, *supra* note 9, at 15-21.

³⁵ See, e.g., *id.* at 11 ("[T]he reach of the constitutional judiciary is finite indeed, and almost no one holds otherwise."); ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* 17-26 (1989) (discussing generally the underlying bases for how constitutional principles guide and limit judicial oversight and interpretations).

³⁶ Separation of powers limits the domain of each branch of government—legislative, executive, and judicial. Consequently, courts are empowered to interpret constitutions or statutory or regulatory provisions, but not create, execute, or enforce laws. *Separation of Powers*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/separation_of_powers_0 (last visited Oct. 24, 2022).

³⁷ See *What is Federalism?*, STATE POL'Y NETWORK: SPN BLOG (June 11, 2021), <https://spn.org/blog/what-is-federalism/>; *Federalism*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/federalism> (last visited Oct. 24, 2022). To the degree federalism divides powers among national and state governments, manifold state-based matters are out of the Supreme Court's reach. *Id.*

³⁸ Principles of federal supremacy, including sound Supreme Court interpretations, are expressly reflected in the Constitution, lending to preemption of conflicting or contrary state laws. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 412 (5th ed. 2015)

Constitution.³⁹ Many incorrectly view structural and rights components of the Constitution distinctly,⁴⁰ as if one can be interpreted to the exclusion of the other. However, rights and structure are core components of the Constitution's cohesive whole, designed to limit governmental powers or intrusions on individuals and groups.⁴¹ Consequently, as the Supreme Court has repeatedly acknowledged, structural principles set definitive boundaries on its own jurisdiction, role, and interpretations in the constitutional scheme.⁴² Under this framework, the Court's assessment of specific rights must invariably match the Constitution's comprehensive design to survive long-term scrutiny.⁴³

In the endgame explored in Part IV, the Court's originalist assessments of highly-valued rights intended to protect against government interference of intensely personal interests⁴⁴ may be flanked by its own decisions assessing structural limits.⁴⁵ Specific arguments raising

("Article VI of the Constitution contains the supremacy clause, which provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land. If there is a conflict between federal and state law, the federal law controls and the state law is invalidated because federal law is supreme."); *see also* JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER (2019).

³⁹ *See* James G. Hodge, Jr. et al., *Constitutional Cohesion and the Right to Public Health*, 53 U. MICH. J.L. REFORM 173, 180-81 (2019) ("Historic and modern conceptions of *constitutional cohesion* support how structural facets and rights-based principles are interwoven within the fabric of federal or state constitutions[.]") (emphasis in original).

⁴⁰ *See id.* at 180 (citing Ozan O. Varol, *Structural Rights*, 105 GEO. L.J. 1001, 1004 (2017)); J. Harvie Wilkinson, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1691, 1707 (2004) (arguing that structural components of the Constitution are largely disregarded under a rights-centric focus).

⁴¹ *See* Hodge Jr. et al., *supra* note 39, at 182 ("The intersection of constitutional structural foundations and rights is undeniable because they are designed to accomplish primarily the same end: *protect individuals and groups from identifiable government vices.*"); STEPHEN BREYER, ACTIVE LIBERTY 56 (2005) ("In one sense the Constitution's federal structure helps to protect modern liberty."). Despite some similarities, these concepts are not to be confused with "structuralism," which generally purports to assess the Constitution holistically. *See* SOTIRIOUS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 117 (2007).

⁴² *See infra* Part III.B; *see, e.g.*, NAGEL, *supra* note 35, at 64 (describing how "many jurists and scholars tend to envision constitutional values mainly in terms of individuals' rights and to undervalue judicial protection of principles that allocate decision-making responsibilities among governmental units.").

⁴³ *See* NAGEL, *supra* note 35, at 17 ("The Constitution was written down so that its words would provide reasonably certain and permanent constraints.").

⁴⁴ As noted by former President Barack Obama on Twitter on June 24, 2022, in response to the issuance of *Dobbs*: "[t]oday, the Supreme Court not only reversed nearly 50 years of precedent, it relegated the most intensely personal decision someone can make to the whims of politicians and ideologues—attacking the essential freedoms of millions of Americans." Barack Obama (@BarackObama), TWITTER (June 24, 2022, 10:26 AM), <https://mobile.twitter.com/BarackObama/status/1540340642848690176>.

⁴⁵ *See infra* Part IV.A.

structural violations in response to *Dobbs* are already percolating nationally.⁴⁶ Countering current and future “rights reversals” include strategic options grounded in structural legal concepts that either (1) re-characterize reversed rights or interests beyond restrictive interpretations, or (2) partially reinstate dispossessed rights.⁴⁷ Ultimately, “rights reversals” framed around specious, textual limitations tied to historic perceptions of the Constitution may be curbed by structural protections designed by the Framers and properly applied by the Supreme Court.⁴⁸

I. REVERSING RIGHTS TO ABORTION: *DOBBS*

The Supreme Court’s capacity to reconsider and withdraw previously-recognized rights is not new.⁴⁹ The Court’s “rights reversals,” however, arguably reached their zenith in *Dobbs* with the rescission of long-standing, constitutional abortion protections.⁵⁰ The case began with the 2018 passage of Mississippi’s Gestational Age Act,⁵¹ prohibiting abortions at fifteen weeks with few exceptions.⁵² The Act directly countered long-standing abortion rights, initially affirmed by the Supreme Court in *Roe* in 1973 and re-affirmed in 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁵³ Constitutional protections ensconced in *Roe* expressly forbade states from fully banning pre-viability abortions (i.e., before an embryo can survive outside the womb).⁵⁴ *Casey* allowed state pre-viability abortion regulations that

⁴⁶ See *infra* Part IV.A.

⁴⁷ See *infra* Part IV.B.

⁴⁸ See *infra* Part IV.A.

⁴⁹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2263-64 (2022) (citations omitted) (“On many other occasions, this Court has overruled important constitutional decisions. . . . Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country.”); see also JOHN R. VILE, *CONSTITUTIONAL CHANGE IN THE UNITED STATES* 40 (1994) (estimating that at least 100 Supreme Court opinions between 1810-1973 overturned a prior decision); see, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (ending the Court’s *Lochner* era on grounds that the Constitution does not protect the “freedom of contract”).

⁵⁰ Mary Ziegler, *If the Supreme Court Can Reverse Roe, It Can Reverse Anything*, THE ATLANTIC (June 24, 2022), https://www.theatlantic.com/ideas/archive/2022/06/roe-overturned-dobbs-abortion-supreme-court/661363/?taid=62b5d7668454cd0001d1e898&utm_campaign=the-atlantic&utm_content=true-anthem&utm_medium=social&utm_source=twitter [hereinafter Ziegler II].

⁵¹ H.B. 1510, 2018, Reg. Sess. (Miss. 2018).

⁵² Exceptions to Mississippi’s Act include medical emergencies and pregnancies involving “severe fetal abnormality.” *Id.*

⁵³ 505 U.S. 833, 846, 870 (1992).

⁵⁴ *Roe v. Wade*, 410 U.S. 113, 164-65 (1973); *Casey*, 505 U.S. at 846, 870. The *Roe* Court crafted the viability line to balance a pregnant individual’s Fourteenth Amendment privacy-

did not present an “undue burden” to patients seeking abortion care, but retained *Roe*’s viability line curtailing full abortion bans.⁵⁵ Current medical technology generally places viability at approximately twenty-four weeks of gestation,⁵⁶ about nine weeks later than permitted under Mississippi’s Act.⁵⁷

Jackson Women’s Health Organization, the only abortion clinic operating in Mississippi at the time, challenged the Act.⁵⁸ After a federal district court⁵⁹ and the United States Fifth Circuit Court of Appeals⁶⁰ both found Mississippi’s Act unconstitutional, the Supreme Court granted certiorari.⁶¹ It initially sought to answer “[w]hether all pre-viability prohibitions on elective abortions are unconstitutional.”⁶² Instead of cabining its opinion on the issue of viability,⁶³ the *Dobbs* majority

based liberty interest in choosing to terminate a pregnancy against the state’s interest in potential life. *Roe*, 410 U.S. at 153-54, 162-63.

⁵⁵ *Casey*, 505 U.S. at 878-79 (“To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State’s profound interest in potential life, we will employ the undue burden analysis Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”).

⁵⁶ Gabriela Weigel et al., *Understanding Pregnancy Loss in the Context of Abortion Restrictions and Fetal Harm Laws*, KAISER FAM. FOUND. (Dec. 4, 2019), <https://www.kff.org/report-section/understanding-pregnancy-loss-in-the-context-of-abortion-restrictions-and-fetal-harm-laws-glossary/> (recognizing that viability “is generally considered to be around 24 weeks gestation but can be later or earlier depending on the pregnancy[.]”).

⁵⁷ H.B. 1510, 2018, Reg. Sess. (Miss. 2018).

⁵⁸ Complaint at 4, Jackson Women’s Health Org. v. *Dobbs*, 349 F. Supp. 3d 536 (S.D. Miss. 2018) (No. 3:18-cv-171).

⁵⁹ Jackson Women’s Health Org. v. *Dobbs*, 349 F. Supp. 3d 536, 544-45 (S.D. Miss. 2018).

⁶⁰ Jackson Women’s Health Org. v. *Dobbs*, 945 F.3d 265, 277 (5th Cir. 2019).

⁶¹ *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619, 2619-20 (2021) (granting certiorari). Despite the fact that the Supreme Court received Mississippi’s petition in *Dobbs* before Justice Ruth Bader Ginsburg’s death, the Court agreed to take the case only after the confirmation of her replacement on the Court, Justice Amy Coney Barrett, an appointee of former President Donald Trump. See Seung Min Kim, *Senate Confirms Barrett to Supreme Court, Cementing its Conservative Majority*, WASH. POST (Oct. 26, 2020, 9:26 PM), https://www.washingtonpost.com/politics/courts_law/senate-court-barrett-trump/2020/10/26/df76c07e-1789-11eb-befb-8864259bd2d8_story.html.

⁶² *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2310 (2022). The Court could have addressed this specific question without fully rejecting the constitutional right to abortion, as Chief Justice John Roberts proposed. *Id.* at 2314 (Roberts, C.J., concurring) (“Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to abortion at all.”).

⁶³ *Dobbs*, 142 S. Ct. at 2242.

found there was no constitutional right to abortion, overturning *Roe* and *Casey*.⁶⁴

A. Scope and Justifications Underlying Dobbs

In a textualist assessment⁶⁵ led by Justice Samuel Alito, the Court emphasized how the Constitution's language does not expressly refer to "abortion" or spell out associated rights to privacy.⁶⁶ Absent express language, the majority sought to assess the constitutionality of abortion by asking whether it is (i) "deeply rooted in [our] history and tradition" and (ii) "essential to our Nation's 'scheme of ordered liberty.'"⁶⁷ Through this limited originalist lens, the Court determined neither prong of this two-part inquiry was satisfied.⁶⁸ It argued primarily that abortion was criminalized at common law, at least after "quicken- ing,"⁶⁹ and noted how state laws had moved towards abortion criminalization around the time the Fourteenth Amendment was ratified in

⁶⁴ *Id.* at 2284 ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."). The Court further stated equal protection provides no basis for a right to abortion despite neither party raising this specific argument. *Id.* at 2235 ("Others have suggested that support can be found in the Fourteenth Amendment's Equal Protection Clause, but that theory is squarely foreclosed by the Court's precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the heightened scrutiny that applies to such classifications.").

⁶⁵ See BARBER & FLEMING, *supra* note 41 at 67 ("The textualist says we can find what the Constitution means by consulting the plain words of the constitutional document.") (emphasis omitted); SAGER, *supra* note 9 at 57 (describing the limits of originalist approaches, noting "[i]f the Constitution's text and context do not point us to a single outcome (and we have seen that they almost always do not), the originalist protocol will fail for the most mundane of reasons: It cannot offer answers to the questions with which modern constitutional law is preoccupied.").

⁶⁶ *Dobbs*, 142 S. Ct. at 2245 ("*Roe* . . . was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned.").

⁶⁷ *Id.* at 2246 (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019)).

⁶⁸ *Id.* at 2248.

⁶⁹ "Quickening" refers to the first movement of the fetus in the womb, which generally occurs between sixteen and twenty weeks of gestation. Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. J. 735, 741 (2018) (acknowledging that quickening generally occurred "in the fourth month of pregnancy").

1868.⁷⁰ Despite specious support for these historical findings,⁷¹ the Court concluded that abortion does not constitute a fundamental constitutional right.⁷²

The *Dobbs* majority justified its abandonment of long-standing precedent set by *Roe* and *Casey* through five distinct factors that Justice Alito purported are traditionally used by the Court in considering whether to overrule prior decisions: (1) the nature of the prior Court's error; (2) the quality of former reasoning; (3) the workability of the Court's rules; (4) the "disruptive effect" of prior decisions on other areas of law; and (5) reliance interests.⁷³

First, the majority painted *Roe* as "egregiously wrong and deeply damaging" in terms of the nature of its error.⁷⁴ It accused the *Roe* Court of improperly removing the issue of abortion from the democratic process.⁷⁵ Second, the majority explained that the quality of *Roe*'s reasoning was suspect given the lack of direct constitutional text protecting the right to abortion and the majority's own altered view of history.⁷⁶ As to workability, the Court shifted its criticisms of *Roe* to *Casey*, finding *Casey*'s "undue burden" standard vague and malleable.⁷⁷ It then claimed that its abortion precedents had disruptive effects on other areas of law, including severability, third-party standing, and even First Amendment issues.⁷⁸ Finally, the Court rejected *Casey*'s conclusion that individuals

⁷⁰ *Dobbs*, 142 S. Ct. at 2252-53 ("By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the states, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening. . . . Neither respondents nor the Solicitor General disputes the fact that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy.").

⁷¹ As noted by Justice Stephen Breyer, *id.* at 2323-24 (Breyer, J., dissenting), the Court's findings contradicted historical assessments from *Roe v. Wade*, 410 U.S. 113, 129-52 (1973), and historical associations as amici. Brief for Respondents at 27-28, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2254 (2022) (No. 19-1392).

⁷² *Dobbs*, 142 S. Ct. at 2283.

⁷³ *Id.* at 2265.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 2266. The majority argued further that the *Roe* Court had engaged in legislative, rather than judicial, functions when deciding *Roe*, and *Casey*'s departure from *Roe*'s trimester framework was also used to justify the argument that *Roe* was a poorly-reasoned decision. *Id.*

⁷⁷ *Id.* at 2272-73.

⁷⁸ *Id.* at 2275-76 ("The Court's abortion cases have diluted the strict standard for facial constitutional challenges[,] . . . ignored the Court's third-party standing doctrine[,] . . . flouted the ordinary rules on the severability of unconstitutional provisions, . . . [and] distorted First Amendment doctrines."). The Court does not discuss these disruptive effects in detail, choosing instead to cite several decisions it considers were impacted, largely referencing dissenting opinions authored by Justices Alito, Thomas, and former Justice Kennedy. *See id.* With respect to the First Amendment, the Court cites to Justice Kennedy and Justice Scalia's dissents in *Hill v. Colorado*,

structure their lives and relationships in reliance on available abortion care.⁷⁹ Discounting a half-century of public reliance on *Roe*, the majority decided there were no “concrete reliance interests”⁸⁰ at stake since abortions are largely “unplanned,” allowing for personal shifts in response to policy changes.⁸¹ In short, surmised the *Dobbs* majority, American families can sufficiently plan to comply with extant state abortion policies, and “women on both sides of the abortion” debate possess the political power necessary to impact these policies.⁸²

By overturning *Roe* and *Casey*, the Court subjected abortion to state regulations meeting only rational basis review.⁸³ Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan strongly dissented, explaining that *Dobbs* undermines the Court’s legitimacy in abandoning precedent and finding no constitutional significance in a “woman’s control of her body and the path of her life.”⁸⁴ Emphasizing how understandings of individual rights evolve over time, they dismissed the Court’s weak attempts to distinguish abortion rights from other non-textual rights.⁸⁵ As Justice Breyer observed, “[r]escinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight.”⁸⁶

530 U.S. 703 (2000), a case which dealt with Colorado restrictions on approaching within eight feet of other persons near a health care facility for purposes of engaging with them or providing leaflets/other materials without their consent. The Court held that Colorado’s restriction was a constitutional time, place, and manner restriction. *Id.* at 725. Evidently, the dissenters in *Hill* disagreed. Justice Scalia alleged the Court had engaged in “ad hoc nullification” of the issue because it involved abortion. *Id.* at 741 (Scalia, J., dissenting) (citation omitted). Justice Kennedy generally argued that the Court performed an incorrect First Amendment analysis. *Id.* at 765 (Kennedy, J., dissenting).

⁷⁹ *Dobbs*, 142 S. Ct. at 2276.

⁸⁰ *Id.* The Court expressly stated that the “concrete reliance interests” it was looking for were those normally present in contract or property law cases. *Id.*

⁸¹ *Id.*

⁸² *Id.* at 2277.

⁸³ *Id.* at 2283. Only fundamental rights receive heightened substantive due process scrutiny, and the Court’s determination in *Dobbs* found abortion is no longer a fundamental right. *See id.*; CHEMERINSKY, *supra* note 38 at 565 (explaining that rational basis scrutiny requires only that governmental actions be rationally related to a legitimate governmental interest).

⁸⁴ *Dobbs*, 142 S. Ct. at 2323 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

⁸⁵ *Id.* at 2319 (“The majority . . . is eager to tell us today that nothing it does ‘cast[s] doubt on precedents that do not concern abortion.’ But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not ‘deeply rooted in history’ The same could be said, though, of most of the rights the majority claims it is not tampering with. . . . Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure.”) (citations omitted).

⁸⁶ *Id.* at 2347.

B. Post-Dobbs Legal Repercussions

The immediate effects of the Supreme Court's termination of long-standing abortion rights in *Dobbs* are considerable. Anti-abortion proponents in nearly half of the states pounced on the Court's decision, locking in existing abortion bans,⁸⁷ implementing new, severe restrictions on specific abortion practices,⁸⁸ and seeking to control an individual's choice to pursue abortion outside their jurisdiction.⁸⁹ Altogether, states' anti-abortion measures greatly impact access to reproductive health services for tens of millions of Americans.⁹⁰

⁸⁷ CTR. FOR REPRODUCTIVE RIGHTS, *After Roe Fell: Abortion Laws by State*, <https://reproductiverights.org/maps/abortion-laws-by-state/> (last visited Aug. 17, 2022) (listing 26 state approaches as either hostile to abortion or making it illegal post-*Dobbs*); see also Sarah Knight et al. *Here's Where Abortions Are Now Banned or Strictly Limited, and Where They May Be Soon*, NPR (Nov. 23, 2022, 2:23 PM), <https://www.npr.org/sections/healthshots/2022/06/24/1107126432/abortion-bans-supreme-court-roe-v-wade> (denoting abortion bans or restrictions in multiple states post-*Dobbs*). Some state courts initially issued decisions enjoining anti-abortion statutes on various themes, including violations of existing state constitutional language. On June 28, 2022, for example, a state court stopped enforcement of Texas' highly-restrictive abortion law on grounds that it violated due process guarantees provided via Texas's state constitution. *TRO Granted, Abortions Can Resume, For Now, at Some Texas Clinics*, NBC: DFW (June 28, 2022, 2:42 PM), <https://www.nbcdfw.com/news/local/texas-news/tro-granted-abortion-can-resume-for-now-at-some-texas-clinics/3002241/>. The lower court decision was reversed three days later by the Texas Supreme Court. *In re Paxton*, No. 22-0527, 2022 WL 2425619 (Tex. July 1, 2022).

⁸⁸ As of January 5, 2023, thirteen states had implemented near-total abortion bans (AL, AR, ID, KY, LA, MS, MO, OK, SD, TN, TX, WV, WI); 20- through 6-week bans had been implemented in another five states (AZ, FL, GA, NC, UT). *Tracking the States Where Abortion is Now Banned*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> (last visited Jan. 5, 2023). In eight states (AZ, IA, IN, OH, ND, MT, UT, WY), state law bans or severe restrictions were blocked by courts. *Id.* Overall, twenty-six states pursued severe bans or restrictions on abortion within weeks of the *Dobbs* decision. *Id.* These restrictions will likely increase over time. See Piatt et al., *supra* note 5.

⁸⁹ See, e.g., Sarah Fentem, *Missouri Lawmaker Wants to Make It a Crime to Help People Get Abortions Out of State*, ST. LOUIS PUB. RADIO (Mar. 11, 2022, 6:21 PM), <https://news.stlpublicradio.org/health-science-environment/2022-03-11/missouri-lawmaker-wants-to-make-it-a-crime-to-help-people-get-abortion-out-of-state>; Caroline Kitchener & Devlin Barrett, *Anti-abortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022, 8:30 AM), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/>.

⁹⁰ Kelsey Butler et al., *Supreme Court Ruling Jeopardizes Abortion Access for 33 Million Women*, BLOOMBERG (June 24, 2022, 11:30 AM), <https://www.bloomberg.com/graphics/2022-supreme-court-roe-v-wade-abortion-access/#xj4y7vzkg> (suggesting nearly 33 million child-bearing women may lose access to abortions in their current jurisdictions); see also Marielle Kirstein et al., *One Month Post-Roe: At Least 43 Abortion Clinics Across 11 States Have Stopped Offering Abortion Care*, GUTTMACHER INST. (July 28, 2022), <https://www.guttmacher.org/article/2022/07/one-month-post-roe-least-43-abortion-clinics-across-11-states-have-stopped-offering>.

Furthermore, neither states nor the Court may be done adjudicating abortion-related interests.⁹¹ Professor Mary Ziegler and other reproductive rights scholars predict that the Court may hear future arguments to constitutionalize “fetal personhood,”⁹² bestowing rights on the unborn and effectively outlawing abortion nationally. Justice Brett Kavanaugh, concurring in *Dobbs*, espoused the view that the Constitution is strictly “neutral” on abortion, neither favoring nor prohibiting it, and thus subject it to states’ regulatory discretion.⁹³ His reasoning may counter attempts to establish fetal personhood,⁹⁴ but the *Dobbs* majority did not preclude the Court’s capacity to consider constitutional recognition of fetal personhood under substantive due process.⁹⁵

The effects of *Dobbs*’ “rights reversal” and analyses of other non-textual rights are even more concerning.⁹⁶ Justice Alito attempted to assuage concerns about *Dobbs*’ larger impact, suggesting additional

⁹¹ See Mitch Smith & Julia Bosman, *With Roe Gone, Republicans Quarrel Over How Far to Push Abortion Bans*, N.Y. TIMES (July 27, 2022), https://www.nytimes.com/2022/07/27/us/indiana-abortion.html?campaign_id=2&emc_source=edit_th_20220727&instance_id=67796&nl=to-daysheadlines®i_id=72831090&segment_id=99757&user_id=3030eb2f30a2a78dd0d19041cb80308c (documenting efforts and travails of Republican-led efforts in Indiana and other states to reach accord on the full extent of abortion restrictions included in post-*Dobbs* legislation).

⁹² Fetal personhood arguments are already arising in some capacity in states post-*Dobbs*. In Arizona, a district court preliminarily blocked a statute requiring interpretation of the term “person” across all Arizona statutes to include unborn fetuses. *Isaacson v. Brnovich*, 563 F. Supp. 3d 1024, 1046-47 (D. Ariz. 2021). The district court found the interpretation provision of the law to be unconstitutionally vague in violation of substantive due process. *Id.* at 1032-38, 1047. On October 11, 2022, the U.S. Supreme Court declined to take up a Rhode Island case presenting fetal personhood arguments. *Doe v. McKee*, 143 S. Ct. 309 (2022) (denying certiorari). Additional arguments regarding constitutional fetal personhood are anticipated in the wake of *Roe*’s overturning. See, e.g., Ziegler I, *supra* note 7.

⁹³ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring) (“On the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives . . .”).

⁹⁴ See *id.* (“To be clear, then, the Court’s decision today *does not outlaw* abortion throughout the United States.”).

⁹⁵ The *Dobbs* Court fully overturned *Roe*, which included language in *dicta* cabining fetal personhood arguments. *Roe v. Wade*, 410 U.S. 113, 158 (1973) (“All this, together with our observation that throughout the major portion of the 19th century prevailing legal abortion practices were freer than they are today, persuades us that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”) (citation omitted).

⁹⁶ See, e.g., Ziegler II, *supra* note 50 (“If this decision signals anything bigger than its direct consequences, it is this: No one should get used to their rights. Predicting with certainty which ones, if any, will go, or when, is impossible. But [*Dobbs*] is a stark reminder that this can happen. Rights can vanish.”).

rights are not at risk.⁹⁷ According to the Court, abortion is different than other non-textual rights because it “destroys what [*Roe* and *Casey*] call ‘potential life[.]’”⁹⁸ Thus, concluded Justice Alito, the Court’s decision in *Dobbs* should not be “understood to cast doubt on precedents that do not concern abortion.”⁹⁹ Yet no specific constitutional grounding was advanced by the Court to support this blanket conclusion.¹⁰⁰ The only limiting justification offered by the majority seems to be that other decisions have not “involved the critical moral question posed by abortion.”¹⁰¹ Which critically moral issues are subject to the Court’s analysis ahead is indeterminate. *Dobbs* opens the door to additional non-textual rights being subjected to their own “*stare decisis* analysis.”¹⁰²

II. NON-TEXTUAL CONSTITUTIONAL RIGHTS AT RISK

Dobbs’ “rights reversal” sets new legal precedent for analyzing individual rights outside the four corners of constitutional text. For decades, the Court rejected the outright need to “identify the specific source of [particular] right[s]”¹⁰³ or “ascribe the source of [] right[s] . . . to particular constitutional provision[s.]”¹⁰⁴ although it typically sought to tie specific rights to constitutional provisions as jurisprudence evolved. Privacy rights, first envisioned as “penumbras”¹⁰⁵ loosely related to various

⁹⁷ *Dobbs*, 142 S. Ct. at 2258 (“None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.”).

⁹⁸ *Id.*

⁹⁹ *Id.* at 2277-78.

¹⁰⁰ Justice Thomas issued a separate concurrence in *Dobbs* expressly calling on the Court to fully reconsider all of the Court’s previous substantive due process precedents and the rights they established. *Id.* at 2301 (Thomas, J., concurring) (“Because the Due Process Clause does not secure any substantive rights, it does not secure a right to abortion. . . . [I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous,’ we have a duty to ‘correct the error’ established in those precedents.”) (citations omitted).

¹⁰¹ *Id.* at 2258 (majority opinion).

¹⁰² *Id.* at 2280-81.

¹⁰³ *Saenz v. Roe*, 526 U.S. 489, 498-99 (1999) (examining the constitutional foundations and support for varied rights to travel). Writing for the majority, Justice Stevens mentions that the right to travel was included in the Articles of Confederation and goes on to determine whether the Privileges and Immunities Clause protects the rights of citizens to resettle in other states. *Id.* at 501.

¹⁰⁴ *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).

¹⁰⁵ See, e.g., TRIBE, *supra* note 33, at 133 (characterizing the *Griswold* Court as speaking “in cloudy terms about the ‘penumbras’ of various amendments as the sources of its holding.”).

explicit Bills of Rights protections,¹⁰⁶ were later rooted in Fourteenth Amendment prohibitions against state deprivations of life and liberty.¹⁰⁷ The *Dobbs* Court's rejection of *Roe*'s holding that rights to privacy were "broad enough" to include decisions to terminate a pregnancy¹⁰⁸ leaves the scope of these protections uncertain and vulnerable.

Challengers to other rights evoking so-called morality arguments¹⁰⁹ may solicit renewed assessments of constitutional grounding or

¹⁰⁶ See *infra* notes 136-138 and accompanying text (discussing the *Griswold* Court's utilization of protections stated in the First, Fourth, Fifth, and Ninth Amendments to find an implied right to privacy).

¹⁰⁷ Justice John Marshall Harlan argued in his *Griswold* concurrence that the case was improperly decided via the "incorporation" approach and should have instead relied on the Due Process Clause of the Fourteenth Amendment because the Connecticut law prohibiting married couples from obtaining contraceptives violated "basic values 'implicit in the concept of ordered liberty.'" *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Harlan, J., dissenting)). Justice Harlan warned that

by limiting the content of the Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsewhere in the Constitution . . . judges will thus be confined to 'interpretation' of specific constitutional provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the 'vague contours of the Due Process Clause.'

Id. at 500-01 (citations omitted). In post-*Griswold* privacy cases (including *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Lawrence v. Texas*, 539 U.S. 558 (2003)), the Court relied in part on Justice Harlan's concurrence in *Griswold*.

¹⁰⁸ *Roe v. Wade*, 410 U.S. 113, 153 (1973). The *Roe* Court's respect for notions of personal autonomy and decision-making (and medical—including psychological—detriment) warrants its constitutional protection irrespective of its express reference in constitutional text: "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.*

¹⁰⁹ Restrictions on access to contraception (particularly levonorgestrel, an emergency contraception drug commonly known as "Plan B" or the "morning-after pill") could argue the drug "similarly 'destroys a potential life[.]'" See Elizabeth Fite, *Demand, Concern Over Contraception Spikes in Chattanooga After Roe Ruling*, CHATTANOOGA TIMES FREE PRESS (July 10, 2022, 4:54 PM), <https://www.timesfreepress.com/news/local/story/2022/jul/10/demand-concern-over-contraceptives-chattan/572498/#/questions>.

historical understandings “cherry-picked”¹¹⁰ by conservative Justices.¹¹¹ Consequently, certain non-textual privacy rights previously affirmed in Supreme Court decisions may be at risk of reconsideration like abortion was in *Dobbs*.¹¹² As the majority noted, these rights are not expressly specified in the Constitution but are instead shaped and built via precedent supported by constitutional theory.¹¹³ While privacy-based rights are clear targets for reconsideration, other rights may also be questioned under the Court’s logic.¹¹⁴

¹¹⁰ On June 23, 2022, the day before the *Dobbs* decision, the Supreme Court decided *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). *Bruen* expanded Second Amendment freedoms to include carrying a handgun for self-protection outside the home. *Id.* at 2122. Historian Saul Cornell called the Court’s new interpretive mode a “distortion of the historical record, misreading of evidence, and dismissal of facts that don’t fit the gun-rights narrative[.]” Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen’s Originalist Distortions*, SCOTUSBLOG (June 27, 2022, 5:05 PM), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/>.

¹¹¹ Gone is *Roe*’s inclusive view that the Constitution “‘is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.’” *Roe*, 410 U.S. at 117 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

¹¹² For example, in *Kelley v. Azar*, No. 4:20-CV-00283-O, 2021 WL 4025804, at *1 (N.D. Tex. Feb. 25, 2021) originally filed in 2020, plaintiffs challenged interpretations of the Patient Protection and Affordable Care Act (ACA) requiring insurers to cover preventive care and services (including birth control), objecting specifically to ACA coverage of pre-exposure prophylaxis (PrEP) drugs. Constitutional scholar Richard Albert warned that the PrEP lawsuit “suggest[s] that LGBTQ+ rights will come under more intense and more frequent attack now that the court has telegraphed its willingness to revisit hard-won constitutional protections against sexual orientation discrimination.” Trent Straube, *Lawyer Who Fought Abortion Rights Takes Aim at HIV Prevention PrEP*, POZ (July 15, 2022), <https://www.poz.com/article/lawyer-fought-abortion-rights-takes-aim-hiv-prevention-prep>. In September 2022, federal judge Reed O’Connor agreed with plaintiffs, finding that covering PrEP “‘substantially burdens’ the religious freedom of a Christian-owned company.” Erik Larson, *Texas Judge Says HIV Drug Mandate Violates Religious Freedom*, BLOOMBERG L. (Sept. 7, 2022), <https://www.bloomberg.com/news/articles/2022-09-07/judge-says-hiv-drug-coverage-violates-religious-freedom>.

¹¹³ The Fourteenth Amendment Due Process Clause “has been held to guarantee some rights that are not mentioned in the Constitution” but are “deeply rooted” in U.S. “history and tradition” and “implicit in the concept of ordered liberty.” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted)).

¹¹⁴ See *infra* Part III.A (discussing the scope and constitutional sources of the right to travel). Justice Kavanaugh’s concurrence espousing the establishment of the constitutional right to interstate travel is “ironic” considering this right is unwritten in the U.S. Constitution. Adam Lip-tak, *The Right to Travel in a Post-Roe World*, N.Y. TIMES (July 11, 2022), <https://www.ny-times.com/2022/07/11/us/politics/the-right-to-travel-in-a-post-roe-world.html>.

A. *Distinguishing Textual and Non-Textual Rights*

What exactly qualifies as a “non-textual right”¹¹⁵ and how are they distinct from textual rights?¹¹⁶ The U.S. Constitution guarantees individual liberties and protections primarily through enumerated, textual rights and inferred, non-textual rights.¹¹⁷ Textual rights are explicitly listed in the Bill of Rights or constitutional amendments.¹¹⁸ They include free speech,¹¹⁹ free exercise of religion,¹²⁰ and voting rights.¹²¹ Some textual rights are clearly stated, such as Third Amendment guarantees against the quartering of soldiers.¹²² Others are recognized from logical, reasonable interpretations of express constitutional text (e.g., the Sixth Amendment’s right to “effective” assistance of counsel¹²³ and the First

¹¹⁵ See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 45-58 (1991) (describing what the authors and others refer more generally as “unenumerated rights”).

¹¹⁶ Justice Neil Gorsuch purports that textually explicit rights may be treated distinctly from non-textual rights. See *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70-71 (2020) (Gorsuch, J., concurring) (per curiam) (“Even if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution’s penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise” under the First Amendment).

¹¹⁷ The Constitution does not preclude rights not explicitly listed in the text or subsequent amendments. The Ninth Amendment provides for “enumeration in the Constitution[] of certain rights” and “others retained by the people.” U.S. CONST. amend. IX.

¹¹⁸ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 488-91 (1965) (Goldberg, J., concurring) (distinguishing textual fundamental rights from penumbral fundamental rights, as evidenced by the Ninth Amendment).

¹¹⁹ The First Amendment states, in part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. Free speech is integral to the U.S. system of values. Political speech protections are almost absolute, *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969). Even hate speech is protected except in the case of imminent violence, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992).

¹²⁰ The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” U.S. CONST. amend. I. This freedom protects the individual right to freely practice a chosen religion and is closely associated with “separation of church and state” principles espoused by the Founders. See, e.g., Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), in 57 LIBRARY OF CONGRESS INFORMATION BULLETIN 6 (June 1998).

¹²¹ The Fifteenth Amendment provides that the right to vote shall not be denied “on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1. The Nineteenth Amendment extends the right to vote to women. U.S. CONST. amend. XIX. The Twenty-sixth Amendment assures voting rights for U.S. adults age eighteen and older. U.S. CONST. amend. XXVI, § 1.

¹²² The Third Amendment protects against the forced quartering of soldiers: “[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” U.S. CONST. amend. III.

¹²³ These terms do not appear in the Constitution but have been recognized by the Supreme Court based on natural readings of the text. The Sixth Amendment provides in part that criminal

Amendment's freedom of "association").¹²⁴ Recognition of other rights extends beyond express guarantees.¹²⁵

As per the Court's analysis in *Dobbs*, absent express constitutional language, the Supreme Court has crafted and protected non-textual rights strongly rooted in notions of individual liberty and historical

defendants have the right to "the Assistance of Counsel for [their] defense." U.S. CONST. amend. VI. In *Strickland v. Washington*, 466 U.S. 668, 685 (1984), the Court more clearly elucidated this right, holding that "a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." A "right to counsel is the right to *effective assistance* of counsel." *Id.* at 686 (emphasis added) (citation omitted). The Court recognized that the right to counsel "exists, and is needed, in order to protect the fundamental right to a fair trial" which logically extends to a threshold for effective counsel, creating an objective standard of reasonableness for counsel's performance. *Id.* at 684-85.

¹²⁴ The First Amendment states that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . ." U.S. CONST. amend. I. In *NAACP v. Alabama*, 357 U.S. 449 (1958), the Court held that Alabama could not constitutionally demand NAACP's membership list. *Id.* at 466. Alabama state legal requirements to produce this information violated inherent First Amendment rights of assembly, including rights to free association. *Id.* at 462. The Court held that "[i]mmunity from state scrutiny of petitioner's membership lists" is "so related" to NAACP members' rights to pursue "lawful private interests privately" and "associate freely with others" as to be within the scope of the Fourteenth Amendment, logically extending the express wording of the right. *Id.* at 466.

¹²⁵ The Second Amendment provides that a "well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The Supreme Court has expanded the right beyond the "well-regulated militia" specified in constitutional text to all U.S. adults for lawful purposes (e.g., self-defense within the home). *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). In 2022, the Court interpreted the Second Amendment to protect against state restrictions of guns outside the home, hindering state efforts to curb gun violence by issuing permits for concealed carry. *N.Y. State Rifle & Pistol Ass'n. v. Bruen*, 142 S. Ct. 2111, 2122 (2022).

tradition.¹²⁶ These rights, generally recognized as inherent despite lacking express enumeration,¹²⁷ include intimate, family decision-making interests and privacy expectations regarding bodily autonomy.¹²⁸

Many non-textual rights stem from the Supreme Court's substantive due process jurisprudence via the Fifth and Fourteenth Amendments' Due Process Clauses.¹²⁹ In addition to providing procedural protections against deprivations of life, liberty, or property, substantive due process protects a "zone" of fundamental interests against government

¹²⁶ Enlightenment values held by many of the Constitution's drafters included fundamental "natural rights" not dependent on any state or government. Thomas Jefferson is attributed with writing in the Declaration of Independence that England violated natural rights of the colonies, justifying rebellion to secure freedom. *See generally* Herbert W. Schneider, *The Enlightenment in Thomas Jefferson*, 53 ETHICS 246 (1943); Andrew J. Reck, *The Enlightenment in American Law I: The Declaration of Independence*, 44 REV. METAPHYSICS 549 (1991).

¹²⁷ Constitutional scholars have argued that the Founders' Enlightenment-era notions of liberties necessitated inherent rights not expounded upon. Proclamations of "Life, Liberty, and the pursuit of Happiness" in the Declaration of Independence suggest that while the Founders identified major natural rights, they did not exhaustively list them because "natural rights cannot be enumerated." IOANNA TOURKOCHORITI, FREEDOM OF EXPRESSION: THE REVOLUTIONARY ROOTS OF AMERICAN AND FRENCH LEGAL THOUGHT 227 (2022). *See* Peter Brandon Bayer, *Deontological Originalism: Moral Truth, Liberty, and Constitutional Due Process: Part II – Deontological Constitutionalism and the Ascendancy of Kantian Due Process*, 43 T. MARSHALL L. REV. 165, 324 n.559 (2017) (some Founders argued "that an enumeration of rights and liberties against the national government would supply a dangerous basis for recognizing unenumerated governmental powers . . . [and] delegates could not possibly enumerate all of the rights and liberties individuals held"). Constitutional scholars have similarly posited that where the Constitution is silent regarding federal sovereign powers, certain principles are inherent. *See generally* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (describing federal authorities over foreign relations including presidential authorities to criminalize foreign arms sales as inherent).

¹²⁸ *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (protecting the right to family decision-making regarding when and whether to bear children); Roe v. Wade, 410 U.S. 113, 153 (1973) (expressing the deeply personal aspects of deciding whether to bear a child); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (expressing the right of "the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear a child.").

¹²⁹ *See, e.g.,* Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that the Fourteenth Amendment protected a teacher's right to teach a child in a language other than English and a parent's right to engage the teacher to do so); Skinner v. Oklahoma, 316 U.S. 535 (1942) (striking down an Oklahoma sterilization statute for violating the Equal Protection Clause of the Fourteenth Amendment); Griswold v. Connecticut, 381 U.S. 479 (1965) (protecting marital privacy with respect to the use of contraceptives under several different Amendments); Haig v. Agee, 453 U.S. 280 (1981) (finding that due process under the Fifth Amendment was sufficiently met in a statute allowing the Secretary of State to revoke passports); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) (stating the Fourteenth Amendment's Due Process Clause prohibits states from awarding grossly excessive damages); Lawrence v. Texas, 539 U.S. 558 (2003) (ruling that a Texas statute outlawing "certain intimate sexual conduct" between two persons of the same sex infringed upon an individual's liberty protected by the Fourteenth Amendment).

intrusions that are arbitrary, vague, or capricious.¹³⁰ Stated alternatively, government must have sufficient justification to interfere with fundamental interests derived from principles of substantive due process, including the rights to marry, establish a home, and raise children.¹³¹ Fundamental rights may be limited or abrogated only if government can demonstrate a compelling state interest (e.g., national security concerns,¹³² termination of parental rights,¹³³ essential searches and seizures¹³⁴) through the least restrictive intervention possible pursuant to the Court's long-standing application of strict scrutiny.¹³⁵

¹³⁰ *Gore*, 517 U.S. at 568 (holding excessive punitive damages violate due process “[o]nly when an award can fairly be categorized as ‘grossly excessive’” in relation to the “[State’s] legitimate interests in punishing [the Defendant] and deterring it from future misconduct,” does the award “enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.”) (citations omitted). The *Griswold* Court cited Bill of Rights guarantees creating “zones of privacy,” informed by “penumbras, formed by emanations from those guarantees that help give them life and substance.” *Griswold*, 381 U.S. at 484.

¹³¹ *Meyer*, 262 U.S. 390 (holding that a 1919 Nebraska law restricting the teaching of foreign languages violated the Due Process Clause of the Fourteenth Amendment). Protected liberty undeniably

denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399.

¹³² *Haig*, 453 U.S. at 309-10 (upholding executive branch authorities to revoke U.S. citizen passports for national security reasons and U.S. foreign policy interests via the Passport Act of 1926); *Zemel v. Rusk*, 381 U.S. 1, 3 (1965) (upholding executive branch authorities to refuse to validate passports of U.S. citizens for travel to Cuba).

¹³³ *Santosky v. Kramer*, 455 U.S. 745, 768-70 (1982) (invalidating a New York state law allowing parental rights to be terminated upon a preponderance of the evidence, requiring a more compelling burden of proof).

¹³⁴ *McDonald v. United States*, 335 U.S. 451, 455-56 (1948) (“The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done . . . so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.”).

¹³⁵ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (invalidating an Oregon law requiring all children to attend public school under Fourteenth Amendment due process protections for personal civil liberties).

Non-textual rights expand constitutional protections to more people and types of conduct by making “express guarantees fully meaningful.”¹³⁶ Privacy interests “older than the Bill of Rights”¹³⁷ developed over decades through Supreme Court interpretations of the scope of bodily autonomy and protections from governmental interference.¹³⁸ Reproductive decision-making, first recognized in 1942 as a “basic civil right[] . . . fundamental to the very existence and survival [of humanity],” protected against forced state sterilizations.¹³⁹ Later, under privacy doctrine, the Court recognized inherent rights to marital privacy,¹⁴⁰ consensual sexual intimacy,¹⁴¹ marriage equality,¹⁴² and, until *Dobbs*, access to pre-viability abortion.¹⁴³

While the scope of non-textual constitutional rights is extensive, they all share specific commonalities that distinguish them from textual rights. To the extent non-textual rights lack express enunciation in the Constitution’s text, they (1) owe their existence to Supreme Court jurisprudence based on (2) broad constitutional language or principles of substantive due process designed to (3) secure basic freedoms, bodily autonomy, or inherent privacy interests.¹⁴⁴ Once identified, non-textual rights, along with textual rights, protect Americans against unwarranted

¹³⁶ *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). The Court utilizes First Amendment rights of association to prove jurisprudence fully protects individual rights: while “[a]ssociation . . . is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.” *Id.*

¹³⁷ *Id.* at 486 (“We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”).

¹³⁸ Justice Louis Brandeis’ co-authored article, “The Right to Privacy,” in 1890 elucidates early theories of legal privacy. The authors argue “[t]hat the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.” Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

¹³⁹ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that compulsory sterilization of criminals was unconstitutional via the Fourteenth Amendment). Writing for the majority, Justice William O. Douglas emphasized that it is “essential” that sterilization laws be held to strict scrutiny, given their “devastating effects . . . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.” *Id.*

¹⁴⁰ *Griswold*, 381 U.S. 479 (holding that the Constitution protects the liberty interests of married couples to purchase contraceptives, which was later extended to non-married couples in *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972)).

¹⁴¹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (determining that the Constitution protects the right of same-sex couples to engage in sexual intimacy).

¹⁴² *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (finding that the Constitution protects the right of same-sex couples to marry).

¹⁴³ *Roe v. Wade*, 410 U.S. 113, 164-65 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 870 (1992).

¹⁴⁴ *See supra* Part I.A.

or unjustified governmental intrusions, subject to differing levels of constitutional scrutiny.¹⁴⁵

B. *Non-textual Rights On the “Cutting Board”*

Despite decades of Supreme Court precedent developing non-textual rights, such rights are not immune from reconsideration. Of primary concern post-*Dobbs* is the mutability of other non-textual, predominantly privacy-based rights protecting (1) contraception, (2) sexual intimacy, and (3) marriage equality.¹⁴⁶ Dissenting Justices Breyer, Kagan, and Sotomayor explicated how these and other privacy-based rights “are all part of the same constitutional fabric, protecting autonomous decision-making over the most personal of life decisions.”¹⁴⁷ Despite contrary admonitions from the *Dobbs* majority,¹⁴⁸ many are concerned that these additional non-textual rights may be curtailed via forthcoming legislation, regulation, or litigation.¹⁴⁹

The right of married couples to purchase and use contraception without significant governmental interference was established in *Griswold v. Connecticut*.¹⁵⁰ In 1965, the Supreme Court invalidated a Connecticut law prohibiting contraceptives, holding that it unnecessarily regulated the “intimate relation[s] of husband and wife.”¹⁵¹ Justice William Douglas, writing for the majority, acknowledged a non-textual, penumbral¹⁵² right to privacy stemming from various express guarantees

¹⁴⁵ See CHEMERINSKY, *supra* note 38, at 699-701 (discussing levels of scrutiny applicable for considering alleged rights violations).

¹⁴⁶ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2319 (2022) (Breyer, Sotomayor, and Kagan, J.J., dissenting).

¹⁴⁷ *Id.*

¹⁴⁸ See *supra* Part I.A. The *Dobbs* majority asserted that these other non-textual rights are not at risk, distinguishing abortion because it involves “potential life.” *Dobbs*, 142 S. Ct. at 2277-78 (“Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”); see also *id.* at 2309 (Kavanaugh, J., concurring) (“Overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.”).

¹⁴⁹ Justice Thomas explicitly called for elimination of these and other rights grounded in substantive due process. See *supra* Part I.B and note 100 (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. . . . [W]e have a duty to ‘correct the error’ established in those precedents.”).

¹⁵⁰ 381 U.S. 479, 485 (1965).

¹⁵¹ *Id.* at 482, 485.

¹⁵² A penumbra is “[a] surrounding area or periphery of uncertain extent. . . . [T]he Supreme Court has ruled that specific guarantees in the Bill of Rights have penumbras containing implied rights, [especially] the right of privacy.” *Penumbra*, BLACK’S LAW DICTIONARY (11th ed. 2019).

found in the Bill of Rights, including the First,¹⁵³ Third,¹⁵⁴ Fourth,¹⁵⁵ Fifth,¹⁵⁶ and Ninth Amendments.¹⁵⁷ The Court found that married couples were especially entitled to privacy interests regarding intimate decisions inherent to their relationship, including contraceptive use.¹⁵⁸ Shortly thereafter, in 1972, the Court extended the right to contraception to unmarried individuals in *Eisenstadt v. Baird*.¹⁵⁹

¹⁵³ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

The right of ‘association,’ . . . includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. . . . [W]hile it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

Griswold, 381 U.S. at 483.

¹⁵⁴ “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” U.S. CONST. amend. III. “The Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy.” *Griswold*, 381 U.S. at 484.

¹⁵⁵ “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV. “We recently referred in *Mapp v. Ohio*, 367 U.S. 643, 656, to the Fourth Amendment as creating a ‘right to privacy, no less important than any other right carefully and particularly reserved to the people.’” *Griswold*, 381 U.S. at 484-85.

¹⁵⁶ “No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. V. “The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.” *Griswold*, 381 U.S. at 484.

¹⁵⁷ While the *Griswold* majority merely cited the Ninth Amendment, *Griswold*, 381 U.S. at 484, Justice Goldberg concurred to emphasize its importance in establishing a right to privacy: “[t]o hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.” *Id.* at 491 (Goldberg, J., concurring).

¹⁵⁸ The right to marital privacy stems largely from the First, Fourth, and Fifth Amendments. Citing the First Amendment right to association, the Court noted that marriage “is an association for as noble a purpose as any involved in our prior decisions.” *Id.* at 486. The Fourth and Fifth Amendments have been previously associated with a right to privacy, particularly against “governmental invasions ‘of the sanctity of a man’s home and the privacies of life.’” *Id.* at 484 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). The Court emphasized that enforcing the anti-contraceptive law at issue would empower unacceptable violations of a married couple’s home and life. *Griswold*, 381 U.S. at 485-86.

¹⁵⁹ 405 U.S. 438, 443 (1972) (“And we hold that the statute, viewed as a prohibition on contraception *per se*, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.”). Although *Eisenstadt* was decided under the Equal Protection Clause,

Over thirty years later, privacy interests under substantive due process served as the foundation for extending equal rights to same-sex couples in *Lawrence v. Texas*.¹⁶⁰ In assessing a Texas statute criminalizing same-sex intimacy,¹⁶¹ the Supreme Court found the law unconstitutional as applied to two individuals engaged in consensual sexual acts in their home.¹⁶² The *Lawrence* Court overturned a prior Court decision upholding a law criminalizing same-sex intimacy, *Bowers v. Hardwick*,¹⁶³ arguing that the *Bowers* Court had failed to consider “the extent of the liberty at stake.”¹⁶⁴ Justice Anthony Kennedy, penning the *Lawrence* majority opinion, affirmed that such rights are based on principles of governmental noninterference with intimate decisions that “touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home.”¹⁶⁵ The *Bowers* Court’s expansive historical assessment denying a right to sexual intimacy was rejected by the *Lawrence* Court in favor of a more refined look at laws and traditions from the prior half-century, furthering evolving notions of liberty.¹⁶⁶ As Justice Kennedy observed, “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”¹⁶⁷

In *Obergefell v. Hodges*,¹⁶⁸ Justice Kennedy, again leading the majority, affirmed same-sex marriage equality under substantive due process and equal protection principles in 2015.¹⁶⁹ Multiple states’ laws defining marriage solely as “a union between one man and one woman”

the Court noted that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Id.* at 453.

¹⁶⁰ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct [same-sex intimacy] without intervention of the government.”).

¹⁶¹ *Id.* at 563.

¹⁶² See JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 184-90* (2005) (arguing that the Court’s decision in *Lawrence* constituted an original take on the limits of government to regulate private conduct principally in the interests of advancing societal morality).

¹⁶³ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁶⁴ *Lawrence*, 539 U.S. at 567.

¹⁶⁵ *Id.* at 567.

¹⁶⁶ *Id.* at 571-72.

¹⁶⁷ *Id.* at 572 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

¹⁶⁸ 576 U.S. 644 (2015).

¹⁶⁹ *Id.* at 675 (“These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty.”).

were invalidated by the Court.¹⁷⁰ Recognition of the right to marriage among persons of the same sex resolved conflicting state laws.¹⁷¹ The Court attested to the constitutional nature of marriage¹⁷² through four “traditional” principles—all of which also apply to same-sex couples¹⁷³—namely that marriage: (1) “is [a decision] inherent in the concept of individual autonomy[;]”¹⁷⁴ (2) fosters an association “unlike any other[;]”¹⁷⁵ (3) “safeguards children and families[;]”¹⁷⁶ and (4) serves as a societal “foundation.”¹⁷⁷ Recognizing evolutions of equality and liberty over time,¹⁷⁸ just as it did in *Lawrence*, the *Obergefell* Court prohibited outright exclusions of same-sex couples from exercising the fundamental right to marry.¹⁷⁹ As Justice Kennedy counseled, the Constitution must retain sufficient flexibility to allow “future generations . . . [to] protect[] . . . the right of all persons to enjoy liberty as we learn its meaning.”¹⁸⁰

Existing precedents set by *Griswold*, *Lawrence*, and *Obergefell* have not deterred challenges largely from state governments, officials, and political candidates seeking to stymie their recognition or implementation. Even before *Dobbs*, rights to contraception¹⁸¹ and LGBTQ+ interests¹⁸² were subjected to governmental infringements. Limits on

¹⁷⁰ *Id.* at 653-54, 675-76.

¹⁷¹ *Id.* at 681.

¹⁷² *Id.* at 664 (“[T]he Court has long held the right to marry is protected by the Constitution.”). See generally *Loving v. Virginia*, 388 U.S. 1 (1967) (prohibiting bans on interracial marriages); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (invalidating financial limitations on obtaining a marriage license); *Turner v. Safley*, 482 U.S. 78 (1987) (invalidating marriage regulations on prison inmates).

¹⁷³ *Obergefell*, 576 U.S. at 665 (“The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”).

¹⁷⁴ *Id.* at 665-66.

¹⁷⁵ *Id.* at 666-67.

¹⁷⁶ *Id.* at 667-69.

¹⁷⁷ *Id.* at 669-70.

¹⁷⁸ *Id.* at 671-73.

¹⁷⁹ See *id.* at 680. Counsel in *Obergefell* has since defended the strong legal basis for marriage equality, stating that *Obergefell* is partially based in the Equal Protection Clause, unlike *Dobbs*. Maia Spoto, *Same-Sex Marriage Victors Ready to Refight Battle Already Won*, BLOOMBERG L. (Aug. 16, 2022, 4:45 AM), <https://news.bloomberglaw.com/us-law-week/same-sex-marriage-lawyers-say-battle-has-already-begun>.

¹⁸⁰ *Obergefell*, 576 U.S. at 664. See also TRIBE & DORF, *supra* note 115, at 6 (“[T]he Constitution . . . is only a framework; it is not a blueprint.”).

¹⁸¹ *Don’t Be Fooled: Birth Control Is Already at Risk*, NAT’L WOMEN’S L. CTR. (2022), https://nwlc.org/wp-content/uploads/2022/06/FactSheet_Attacks-on-birth-control-6.17.22.pdf.

¹⁸² *Legislation Affecting LGBTQ Rights Across the Country*, ACLU, <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country> (last updated Oct. 7, 2022).

contraception access have been linked to anti-abortion measures and decisions.¹⁸³ In *Burwell v. Hobby Lobby Store*, Justice Alito led the Supreme Court majority in 2014 in determining that privately-held corporations may claim religious exemptions from Affordable Care Act contraceptive coverage requirements for specific forms of contraception that company owners consider abortifacients.¹⁸⁴

Pro-life state lawmakers have since continued promoting the argument made by *Hobby Lobby* plaintiffs, erroneously classifying certain types of contraceptives as abortifacients,¹⁸⁵ and spurring legislative efforts to restrict access to birth control.¹⁸⁶ According to the Guttmacher Institute, nine states restrict access to emergency contraceptives¹⁸⁷ and a dozen states permit certain providers to refuse to provide contraceptive-related services.¹⁸⁸ The mere potential for further erosion of rights to contraception post-*Dobbs*¹⁸⁹ led to immediate spikes in demand for

¹⁸³ *Don't Be Fooled: Birth Control Is Already at Risk*, *supra* note 181.

¹⁸⁴ 573 U.S. 682, 691-92, 701-02, 719 (2014) (involving business owners asserting that two forms of emergency contraception and two types of intrauterine devices constituted abortifacients).

¹⁸⁵ Pam Belluck, *Questioning Birth Control, Inaccurately*, N.Y. TIMES, Sept. 8, 2018, at A14; Joerg Dreweke, *Contraception Is Not Abortion: The Strategic Campaign of Antiabortion Groups to Persuade the Public Otherwise*, 17 GUTTMACHER POL'Y R. 14, 14-15 (2014) (citing Brief of *Amici Curiae* American College of Obstetricians and Gynecologists, Physicians for Reproductive Health, American Academy of Pediatrics, American Nurses Association, *et al.* in Support of the Government, *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014) (No. 13-354)), https://www.guttmacher.org/sites/default/files/article_files/gpr170414.pdf.

¹⁸⁶ Michael Ollove, *Some States Already Are Targeting Birth Control*, *Stateline*, THE PEW CHARITABLE TRS. (May 19, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/19/some-states-already-are-targeting-birth-control>; *see also* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2332, n.9 (2022) (Breyer, J., dissenting) (describing state legislative measures underway to restrict contraceptives even as the Court was considering its decision in *Dobbs*).

¹⁸⁷ *Emergency Contraception, State Laws and Policies*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/emergency-contraception> (Sept. 1, 2022) (identifying states excluding emergency contraceptives from insurance coverage mandates, family planning programs, or allowing pharmacies/pharmacists to refuse dispensation).

¹⁸⁸ *Refusing to Provide Health Services, State Laws and Policies*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services> (Sept. 1, 2022).

¹⁸⁹ Melissa Murray, *Opinion, Birth Control Could Be Next*, N.Y. TIMES, May 29, 2022, at SR6.

contraceptive-related services,¹⁹⁰ which were exasperated by retailer rationing¹⁹¹ and select refusals to provide consumers access to certain products.¹⁹²

LGBTQ+ persons' privacy interests and rights secured in cases like *Lawrence* and *Obergefell* have largely been the focus of restrictions sought by conservative state and local policymakers for years.¹⁹³ The non-partisan Equality Federation counted over 400 anti-LGBTQ+ state bills in 2021 alone.¹⁹⁴ The Human Rights Campaign documented over 300 additional, similar bills introduced through mid-July 2022.¹⁹⁵ These varied legislative efforts include measures that directly discriminate against LGBTQ+ people, reshape education curricula to eliminate gay,

¹⁹⁰ Virginia Langmaid, *Contraception Demand Up After Roe Reversal, Doctors Say*, CNN (July 6, 2022, 7:42 AM), <https://www.cnn.com/2022/07/06/health/contraceptives-demand-after-roe/index.html>.

¹⁹¹ Virginia Langmaid & Naomi Thomas, *Amazon and Rite Aid Limiting Purchases of Emergency Contraception*, CNN (June 28, 2022, 5:23 PM), <https://www.cnn.com/2022/06/28/health/emergency-contraception-purchase-limit-plan-b/index.html> (illustrating how some accessibility issues were due to substantial increases in demand among consumers).

¹⁹² Sara Edwards, *'Because of My Faith': Walgreens Employees Allegedly Denying Birth Control, Condom Sales*, USA TODAY (July 22, 2022, 2:31 PM), <https://www.usatoday.com/story/money/retail/2022/07/21/walgreens-pharmacy-birth-control-condoms/10110827002/> (documenting how some pharmacists refused to refill birth control prescriptions due to a "moral objection.").

¹⁹³ See Charles M. Blow, *Trying to Build a Gay Ghetto*, N.Y. TIMES, June 23, 2022, at A23 (noting comments made immediately after the Court's decision in *Obergefell* attributed to former Arkansas Governor and Republican Presidential candidate, Mike Huckabee: "[t]he only outcome worse than this flawed, failed decision would be for the president and Congress, two coequal branches of government, to surrender in the face of this out-of-control act of unconstitutional, judicial tyranny.").

¹⁹⁴ Sharita Gruberg & Caroline Medina, *The 2022 Legislative Landscape for LGBTQI+ Rights*, CTR. FOR AM. PROGRESS (Feb. 1, 2022) (citing Equality Federation, *2021 Legislative Report*), <https://www.americanprogress.org/article/the-2022-legislative-landscape-for-lgbtqi-rights/>.

¹⁹⁵ *Anti-LGBTQ+ Bills in 2022*, HUM. RTS. CAMPAIGN: UNITED AGAINST HATE, <https://www.hrc.org/campaigns/the-state-legislative-attack-on-lgbtq-people#state-legislative-tracker-map> (Mar. 8, 2022).

bisexual, or transgender material,¹⁹⁶ limit access to specific health services among transgender people,¹⁹⁷ and ban transgender youth from participating in some school athletics.¹⁹⁸ Since *Obergefell* was decided, multiple states have proposed or passed religious exemption laws (notoriously known as “license-to-discriminate” laws) enabling wedding and other vendors to refuse services to same-sex couples on religious grounds, despite state antidiscrimination laws.¹⁹⁹ In the 2022-23 term, the Supreme Court will adjudicate *303 Creative, LLC v. Elenis*, in which a web designer challenges Colorado’s Anti-Discrimination Act on First Amendment religious freedom grounds because she wishes to preemptively refuse to provide wedding-related services for same-sex couples.²⁰⁰

The Court’s decision in *Dobbs* has emboldened lawmakers to ramp up their attacks on LGBTQ+ rights. Some state officials support bringing direct challenges to *Lawrence* and *Obergefell* to the Supreme

¹⁹⁶ Jo Yurcaba, *Florida Families and Advocacy Groups File Lawsuit Over ‘Don’t Say Gay’ Law*, NBC NEWS (July 26, 2022, 4:13 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/florida-families-advocacy-groups-file-lawsuit-dont-say-gay-law-rcna40053>.

¹⁹⁷ Lindsey Dawson et al., *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KAISER FAM. FOUND. (June 1, 2022), <https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/> (“Four states [AL, AZ, AR, and TX] recently enacted laws or policies restricting youth access to gender affirming care and, in some cases, imposing penalties on adults facilitating access.”).

¹⁹⁸ Jo Yurcaba, *Oklahoma Schools Now Require ‘Biological Sex Affidavit’ for Student Athletes*, NBC NEWS (July 29, 2022, 4:40 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/oklahoma-schools-now-require-biological-sex-affidavit-student-athletes-rcna40705> (Oklahoma is now one of 18 states “requiring students from kindergarten to college to complete ‘biological sex affidavits’ if they want to compete in school sports . . . [and] bans transgender students . . . from competing on the sports teams of their gender identity as opposed to their sex assigned at birth.”). For an overview of LGBTQ+ legislation, see *State Legislation Tracker*, EQUAL. FED’N, <https://www.equalityfederation.org/state-legislation> (last visited July 26, 2022). Some of these proposed measures are an affront to guiding principles underlying existing Supreme Court jurisprudence. See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (affirming that employment discrimination based on “sex” under Title VII of the Civil Rights Act of 1964 includes discrimination against individuals based on their sexual orientation or gender identity).

¹⁹⁹ HUMAN RIGHTS WATCH, “ALL WE WANT IS EQUALITY”: RELIGIOUS EXEMPTIONS AND DISCRIMINATION AGAINST LGBT PEOPLE IN THE UNITED STATES 11-15 (2018), https://www.hrw.org/sites/default/files/report_pdf/lgbt0218_web_1.pdf.

²⁰⁰ *303 Creative L.L.C. v. Elenis*, 142 S. Ct. 1106 (2022). In 2018, the Court decided that a Colorado administrative law judge and commission failed to exercise sufficient neutrality under the First Amendment free exercise clause in assessing the expressed, religious interests underlying a baker’s refusal to provide services for a gay couple seeking a wedding cake. *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

Court.²⁰¹ On July 22, 2022, the New York Times reported that Texas Attorney General Ken Paxton indicated “he would be ‘willing and able’ to defend at the Supreme Court any law criminalizing sodomy enacted by the Legislature[.]”²⁰² notwithstanding the Court’s contrary ruling in *Lawrence*. Similar to anti-abortion-related state laws pre-*Dobbs*, sixteen states retain anti-sodomy laws rendered moot by *Lawrence*.²⁰³ When asked during a July 2022 debate, Republican gubernatorial candidates in Michigan refused to support same-sex marriages.²⁰⁴ Currently, thirty-five states have constitutional provisions or statutes banning same-sex marriage that could potentially take effect if *Obergefell* is reversed.²⁰⁵ On June 24, 2022, Utah’s Senate President Stuart Adams endorsed reinstating Utah’s anti-gay marriage law if *Obergefell* is overruled by the Supreme Court.²⁰⁶ Additionally, future attempts to constitutionalize “fetal personhood” post-*Dobbs*²⁰⁷ could significantly affect LGBTQ+ couples seeking to start a family through reproductive technologies (e.g., in vitro fertilization).²⁰⁸

Against the backdrop of increasing state-led affronts to contraception access and LGBTQ+ rights, the premise that the U.S. Congress

²⁰¹ Trip Gabriel, *Roe’s Reversal Stokes Attacks on Gay Rights*, N.Y. TIMES, July 23, 2022, at A1; see also Scott Wong, *Sen. Ted Cruz Says Supreme Court ‘Clearly Wrong’ in Decision Legalizing Same-Sex Marriage*, NBC NEWS (July 17, 2022, 10:35 PM), <https://www.nbcnews.com/politics/congress/sen-ted-cruz-says-supreme-court-clearly-wrong-decision-legalizing-sex-rcna38588>.

²⁰² Gabriel, *supra* note 201.

²⁰³ *Sodomy Laws by State 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/sodomy-laws-by-state> (last visited July 26, 2022). This data is accurate as of 2021.

²⁰⁴ John Russell, *Most GOP Candidates in Michigan Governor’s Race Want to End Same-Sex Marriage Right*, LGBTQ NATION (July 6, 2022), <https://www.lgbtqnation.com/2022/07/gop-candidates-michigan-governors-race-want-end-sex-marriage-right/>.

²⁰⁵ Elaine S. Povich, *Without Obergefell, Most States Would Have Same-Sex Marriage Bans*, STATELINE (July 7, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/state-line/2022/07/07/without-obergefell-most-states-would-have-same-sex-marriage-bans>. Efforts to repeal these existing laws have repeatedly been rejected in multiple states, despite generally high public acceptance rates of marriage equality. See Sasha Issenberg, *Opinion, How Democrats Can Win on a Culture-War Issue*, POLITICO (June 29, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/06/29/democrats-run-on-lgbtq-00042965>; Justin McCarthy, *Same-Sex Marriage Support Inches Up to New High of 71%*, GALLUP (June 1, 2022), <https://news.gallup.com/poll/393197/same-sex-marriage-support-inches-new-high.aspx> (finding that 71% of Americans support same-sex marriage in 2022, an increase of approximately 10% since 2015).

²⁰⁶ Bryan Schott, *GOP Lawmaker Says She Trusts Utah Women to Control Their ‘Intake of Semen’ as Abortion Trigger Law Goes into Effect*, SALT LAKE TRIB. (June 27, 2022, 3:38 PM), <https://www.sltrib.com/news/politics/2022/06/24/utah-republicans-take/>.

²⁰⁷ See Ziegler I, *supra* note 7.

²⁰⁸ Julie Moreau, *Roe Reversal May Threaten Already Fragile LGBTQ Family-planning Landscape*, NBC NEWS (Aug. 1, 2022, 4:16 PM), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/roe-reversal-may-threaten-already-fragile-lgbtq-family-planning-landsc-rcna40955>.

will intervene to stabilize the legal landscape is spurious.²⁰⁹ In July 2022, the House of Representatives passed bills to protect rights to contraception²¹⁰ and same-sex marriage,²¹¹ the latter of which was ultimately signed into law despite initial expectations that the bill would not pass the Senate.²¹² Even if Congress comes to the rescue of other at-risk non-textual rights any legislation it passes is susceptible to immediate veto by future Presidents or repeal by Congress in subsequent years.²¹³ Legislating privacy rights at the federal level in hotly-contested political arenas—like abortion, contraceptives, and LGBTQ+ interests—is, at best, tenuous and temporary.²¹⁴

III. COHESIVE APPROACH TO RIGHTS REVERSALS

A resounding theme of constitutional jurisprudence in *Griswold*, *Lawrence*, and *Obergefell* is the Court's adherence to evolving concepts

²⁰⁹ See *supra* note 14 and accompanying text.

²¹⁰ Right to Contraception Act, H.R. 8373, 117th Cong. (2022) (statutorily protects a person's right to access contraception and a provider's right to provide contraception-related services); see also Annie Karni, *House Passes Bill to Ensure Contraception Rights After Dobbs*, N.Y. TIMES July 22, 2022, at A10 ("The House . . . passed legislation to ensure access to contraception nationwide, moving over almost unanimous Republican opposition to protect a right that is regarded as newly under threat after the Supreme Court's overturning of *Roe v. Wade*.").

²¹¹ Respect for Marriage Act, H.R. 8404, 117th Cong. (2022) (statutorily protects the right to marriage for same-sex couples and interracial couples).

²¹² The Senate has already blocked the Right to Contraception Act. Rose Wagner, *Senate Republicans Block Bill That Would Federally Enshrine Right to Contraception*, COURTHOUSE NEWS SERV. (July 27, 2022), <https://www.courthousenews.com/senate-republicans-block-bill-that-would-federally-enshrine-right-to-contraception/>. The fate of the Respect for Marriage Act was initially delayed until September 2022. Rose Horowitz, *U.S. Senate Likely to Delay Bill on Gay Marriage Until September*, REUTERS (Aug. 1, 2022, 4:58 PM), <https://www.reuters.com/world/us/us-senate-likely-delay-bill-gay-marriage-until-september-2022-08-01/>. *Contra* The Daily, *How Roe's Demise Could Safeguard Gay Marriage*, N.Y. TIMES (July 26, 2022), <https://www.nytimes.com/2022/07/26/podcasts/the-daily/abortion-roe-dobbs-gay-marriage.html> ("The bill was expected to go nowhere, but it has won more and more Republican support and now seems to have a narrow path to enactment."). On November 29, 2022, the Senate passed the Respect for Marriage Act with bipartisan support. Amy B. Wang & Mariana Alfaro, *Senate Passes Bill to Protect Same-Sex, Interracial Marriages*, WASH. POST (Nov. 29, 2022, 11:06 PM), <https://www.washingtonpost.com/politics/2022/11/29/respect-for-marriage-act-senate-vote/> ("The bill passed in a 61-36 vote, with 12 Republicans joining Democrats to vote for it."). Notably, the Act does not codify *Obergefell's* holding that same-sex marriage is constitutionally-protected. Rather, it reverts the legality of same-sex marriage to state law (if *Obergefell* is overturned) and requires governments to recognize same-sex marriages that were legally entered into in other states. Kaitlyn Radde, *What Does the Respect for Marriage Act Do? The Answer Will Vary by State.*, NPR (Dec. 8, 2022, 12:27 PM), <https://www.npr.org/2022/12/08/1140808263/what-does-the-respect-for-marriage-act-do-the-answer-will-vary-by-state>.

²¹³ See *supra* note 212; U.S. CONST. art. I, § 7, cl. 2.

²¹⁴ See *supra* note 212.

of constitutional liberties in support of non-textual rights grounded in inherently-personal interests.²¹⁵ This approach, however, was summarily skewed by the *Dobbs* Court through its application of strict originalism,²¹⁶ suggesting non-textual rights will only be upheld if they are “deeply rooted in this Nation’s history and tradition.”²¹⁷ The extent to which rights to contraceptives, same-sex intimacy, and marriage equality may survive the Court’s current approach in anticipated future litigation is a paramount concern nationally given pervasive legal and policy challenges across multiple states.²¹⁸

It is hard to fathom just how the *Dobbs* majority concludes the Constitution does not protect abortion rights despite the Court holding inapposite for nearly fifty years. Although the Justices’ views and approaches in *Dobbs* diverge vastly, they also share a common thread: they all seem to focus almost exclusively on individual rights and protections in attempting to answer whether the Constitution expressly “confers a right to obtain an abortion.”²¹⁹ Consequently, their linear approach fails to fully account for other constitutional principles at play.²²⁰

Each branch of government (executive, legislative, and judicial) at every level (federal, state, tribal, and local) exercises its own constitutional role related to abortion laws and policies.²²¹ Yet the Justices in *Dobbs* do not meaningfully account for structural principles like separation of powers or federalism in their assessments.²²² Justice Alito leads

²¹⁵ See *supra* Part II.B.

²¹⁶ Concerning the potential pitfalls of originalism, Justice Stephen Breyer has described the “constitutional harm” related to the tendency of literalism to “undermine the Constitution’s efforts to create a framework for democratic governance—a government that, while protecting basic individuals’ liberties, permits citizens to govern themselves . . . effectively.” BREYER, *supra* note 41, at 131-132.

²¹⁷ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg* 521 U.S. 702, 721 (1997)).

²¹⁸ See *supra* Part II.B.

²¹⁹ *Id.* (majority opinion) (emphasis added).

²²⁰ See *TRIBE & DORF*, *supra* note 115, at 53 (“[J]udges, legislators, and other officials sworn to uphold the Constitution would be derelict in their duty if they were simply to ignore those parts of the document whose meaning is not crystal-clear to them.”); *BARBER & FLEMING*, *supra* note 41, at 120 (“[F]ew will deny that American judges should exercise their power in ways that maintain constitutional structures.”).

²²¹ See *Hodge, Jr. et al.*, *supra* note 39 at 179. See also *TRIBE & DORF*, *supra* note 115 (implying that constitutional interpretation and judicial decisions emphasize the abilities of different branches of government to have a role in impacting laws and policies, including those related to abortion).

²²² See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2264-65 (2022) (noting that from the five factors used to overturn past precedent, structural principles are non-existent). The only express mention of structural principles occurs via a quick parenthetical reference to federalism in the appendix to the dissenting opinion. *Id.* at 2354 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985)).

the *Dobbs* majority in repeatedly chastising the *Roe* Court for impermissibly undertaking legislative activities or proffering legislative judgments, presumably in violation of separation of powers,²²³ but he sees no similar structural limits to his own majority opinion. Separation of powers and federalism principles arguably arise in the Court's zest to "return" abortion matters to state legislatures and voters, but no serious attempts were made to determine whether or how these structural concepts affect the Court's outcome.²²⁴

Other Justices' opinions reflect a similar, rights-centric focus. Justice Clarence Thomas questions whether certain constitutional language protects specific rights, irrespective of structural limits.²²⁵ Justice Kavanaugh verges mildly into structural limitations, but only from an originalist, rights-based perspective. He argues the Court "does not possess the *authority* either to declare a constitutional right to abortion or to declare a constitutional prohibition of abortion."²²⁶ Chief Justice John Roberts, on the other hand, intimates the Court lacked judicial restraint in deciding a broader question than necessary.²²⁷ His observation relates more to common practices of jurisprudence than to specific structural

²²³ The *Dobbs* Court accuses the *Roe* Court of acting legislatively several times but does not expressly use the term "separation of powers" to characterize a constitutional violation. *Id.* at 2240 (majority opinion) ("After cataloguing a wealth of other information having no bearing on the meaning of the Constitution, the [*Roe*] opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by the legislature."); *id.* at 2266-67 ("Not only did this scheme resemble the work of a legislature, but the Court made little effort to explain how these rules could be deduced from any of the sources on which constitutional decisions are usually based."); *id.* at 2267 ("After surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee."); *id.* at 2268 ("The scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body.").

²²⁴ See Hodge, Jr. et al., *supra* note 39 at 179 ("Protecting the public's health is a primary (even if unstated) function of government at all levels (federal, state, local) and branches (legislative, executive, judicial). As governments seek to respond to this essential function, structural conflicts between different levels and divisions invariably arise.").

²²⁵ *Dobbs*, 142 S. Ct. at 2302 (Thomas, J., concurring) (explaining that the Court in the future may need to consider "whether the [14th Amendment's] Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those rights.").

²²⁶ *Id.* at 2306 (Kavanaugh, J., concurring) (emphasis added). Justice Kavanaugh also opines that the Constitution does not allow the Court "to rewrite the Constitution to create new rights and liberties based on our own moral or policy views." *Id.* If the Court in *Dobbs* upheld *Roe* and *Casey*, it would not have been engaging in creating a *new* right, however, but rather affirming an existing one. While Justice Kavanaugh suggests the Court lacks the power to create a new right, it apparently is empowered to reverse one previously guaranteed. See *id.* at 2242 (holding that abortion is not a right guaranteed by the Constitution).

²²⁷ See *id.* at 2310-11, 2313 (Roberts, C.J., concurring) ("We granted certiorari to decide one question: 'Whether all pre-viability prohibitions on elective abortions are unconstitutional.'").

limitations in the Constitution.²²⁸ Even in dissent, Justices Breyer, Sotomayor and Kagan concentrate nearly exclusively on rights. They argue that the majority opinion runs contrary to “our Nation’s understanding of constitutional rights[,]”²²⁹ but do not elucidate the scope of the Constitution’s structural principles.

The significance of the Court’s rights-centric approaches is two-fold. First, principles of *constitutional cohesion*, discussed below, demonstrate that rights-based and structural principles align to protect against governmental intrusions on personal freedoms.²³⁰ Determinations or reversals of individual rights do not exist in a constitutional vacuum. Instead, the United States’ unique constitutional design requires judicial interpretations of core textual and non-textual rights to comport with underlying structural principles.²³¹ Second, the *Dobbs* Court’s failure to account for these cohesive principles runs counter to its prior opinions in which structural norms are viewed as express limitations of the Court’s own authorities.²³² In essence, the *Dobbs* Court turns a blind eye to a series of structural principles in reversing rights which its predecessors previously granted.²³³

A. Principles of Constitutional Cohesion

That the Supreme Court would focus its analyses on rights when explicitly asked by plaintiffs to do so in cases like *Griswold*, *Lawrence*, *Obergefell*, and *Dobbs* is seemingly understandable.²³⁴ Why should the Court explore structural constitutional factors like separation of powers or federalism at all when assessing the existence or scope of specific

²²⁸ See *id.* at 2311 (“If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more. . . . Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*.”).

²²⁹ *Id.* at 2347 (Breyer, Sotomayor, & Kagan, JJ., dissenting). See also *id.* at 2320 (explaining that “in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. . . . [W]e uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.”).

²³⁰ See *infra* Part III.A.

²³¹ See *infra* Part III.A.

²³² See *infra* Part III.B.

²³³ See *infra* Part III.B.

²³⁴ See Hodge, Jr. et al., *supra* note 39, at 180-81 (arguing that while it is intuitive to separate structural and rights-based arguments in issues of public health, a constitutional cohesion approach can support considering these two factors together).

rights? Frankly, because the Constitution requires it to via its cohesive design.²³⁵ As Professor Robert Nagel espoused:

To see the purposes of judicial review almost entirely in terms of securing individual rights is to invert the priorities of the framers and ultimately to trivialize the Constitution. . . . This [constitutional] structure itself was to be the great protection of the individual, not the ‘parchment barriers’ that were later . . . added to the document.²³⁶

Conventional understanding typically distinguishes two predominant functions of the U.S. Constitution: (1) to confer rights, whether textually or by inference, protecting persons from unwarranted governmental infringements or interferences;²³⁷ and (2) to craft structural interventions setting out and allocating governmental powers.²³⁸ These unquestionable constitutional objectives are often misunderstood as distinct or unrelated.²³⁹ In reality, constitutional rights and structural principles are “mirror image[s]”²⁴⁰ of each other in the cohesive constitutional scheme as repeatedly recognized by the Supreme Court.²⁴¹

²³⁵ *Id.* at 181-82 (explaining that the cohesive interaction of the branches of government as designed by the Constitution is necessary to considering the existence and scope of rights).

²³⁶ NAGEL, *supra* note 35, at 64-65.

²³⁷ See Hodge Jr. et al., *supra* note 39, at 180 (“[S]cholars, judges, policymakers, practitioners, and students of the law are apt to separate structural and rights-based constitutional arguments when considering or challenging varied public health laws.”).

²³⁸ See *id.* at 179 (“Determining that government has an affirmative legal duty to protect and promote the public’s health is invariably tied to the U.S. Constitution based on (1) its structure and (2) the rights it protects. First, constitutional structural arguments grounded in principles of federalism, separation of powers, and preemption surface in light of interjurisdictional disputes and policies.”).

²³⁹ *Id.* at 179-82 (explaining how structural foundations and rights-based protections ultimately serve the same ends through governmental acts and omissions).

²⁴⁰ Ozan O. Varol, *Structural Rights*, 105 GEO. L.J. 1001, 1004 (2017). See also *id.* at 1005 (arguing that “pigeonholing” structures and rights into distinct categories negates the opportunity to examine how to fit them “into a coherent, harmonious whole.”). According to Professor Varol, “constitutional structure affects individual liberty, [but] its mirror image has been left understudied[.]” as “[s]cholars have largely assumed that individual rights have little resemblance to constitutional structure.” *Id.* at 1004. See also J. Harvie Wilkinson, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1689, 1707 (2004) (arguing that the structure of the Constitution is largely disregarded in favor of a rights-based view).

²⁴¹ In *San Antonio Independent School District v. Rodriguez*, the Supreme Court linked federalism with principles of equal protection in assessing right to education claims stating, every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining

“Constitutional cohesion” refers to how “structural facets and rights-based principles are interwoven within the fabric of federal or state constitutions” to “protect individuals and groups from governmental vices.”²⁴² By design, structural and rights-based components may be dually implicated in constitutional arguments because they are inextricably bound toward unified goals of protecting persons against unwarranted governmental interferences or abuses of power.²⁴³ Among the most profound implications of constitutional cohesion is the possibility that new rights may arise despite their lack of expression²⁴⁴ in the Bill of Rights.²⁴⁵ Taken a step further, rights may be derived not only from

whether a State’s laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.

411 U.S. 1, 44 (1973). In *Printz v. United States*, when invalidating federal firearm purchase background checks, the Court noted how constitutional structural components (e.g., separation of powers and federalism) are designed to protect individual liberty. 521 U.S. 898, 918-21 (1997). In *National Labor Relations Board v. Canning*, the Court equated structural concepts as “no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights.” 573 U.S. 513, 570-71 (2014) (Scalia, J., concurring).

²⁴² Hodge, Jr. et al., *supra* note 39, at 173; *see also id.*, at 179-88 (explicating how structural foundations and rights-based protections ultimately serve the same ends—to limit governmental vices—oppression, overreaching, tyranny, and malfeasance—through governmental acts and omissions).

²⁴³ *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties.’” (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))). *See also* LANE V. SUNDERLAND, POPULAR GOVERNMENT AND THE SUPREME COURT: SECURING THE PUBLIC GOOD AND PRIVATE RIGHTS 52 (1996) (“Separation of powers is the leading institutional mechanism of the Constitution through which representative majorities govern. These mechanisms were designed to provide for a strong government and to protect individual rights.”).

²⁴⁴ Professor Akhil Reed Amar posits that the judiciary is poised via the Ninth Amendment to consider unexpressed individual rights “that nevertheless might deserve constitutional status.” AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 328 (2005). Judges should “look for rights that the people themselves have truly embraced—in the great mass of state constitutions, perhaps, or in widely celebrated lived traditions, or in broadly inclusive political reform movements.” *Id.* at 329. *See also* Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1, 3 (2006) (classifying multiple models for interpreting the purposes of the Ninth Amendment and concluding that one, the individual natural rights model, “preserve[s] unenumerated individual rights.”); Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 346-47, 362 (2004) (suggesting Barnett’s individual natural rights interpretation could protect a “collective right of the people to state or local self-government” under principles of federalism).

²⁴⁵ *See, e.g.*, 1 Annals of Cong. 439 (1789) (Joseph Gales ed., 1834). Concerning the proposition of the Bill of Rights, Framers James Madison stated:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently

textual and non-textual sources,²⁴⁶ but also from purely structural components of the Constitution.²⁴⁷

These implications of constitutional cohesion are not theoretical. Rather, they are recognized and accepted in Supreme Court jurisprudence.²⁴⁸ Consider the Court's assessment of the right to travel.²⁴⁹ For decades, it acknowledged specific aspects of this right without expressly attributing them to explicit constitutional language.²⁵⁰ In *Saenz v. Roe*²⁵¹ the Court re-examined primary components of the right to travel,²⁵² including citizens' ingress and egress across state borders.²⁵³ Failing to ascertain any explicit constitutional support for this specific aspect, the Court concluded this component of the right to travel "may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'"²⁵⁴ In essence, the right to come and go freely across borders exists not because of explicit textual language written in the Constitution, but rather due to structural constitutional support.²⁵⁵

insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against.

Id.

²⁴⁶ See *supra* Part II.A.

²⁴⁷ Professor Randy Barnett posits that unstated rights may flow from new interpretations of express language as well as the structure of the Constitution. See Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 628 (1991). James Wilson has proclaimed that "[i]n all societies, there are many powers and rights, which cannot be particularly enumerated." *Id.* Professor Sunstein argues that not every right has to be specified constitutionally to warrant protection. Sunstein, *supra* note 11, at 11.

²⁴⁸ See cases cited *supra* note 241.

²⁴⁹ See Hodge, Jr. et al., *supra* note 39 at 208-09 (assessing the Supreme Court's use of constitutional cohesion when evaluating the right to travel).

²⁵⁰ As Justice Brennan observed in 1986: "the 'elusive' right to travel seems to be inferred from 'the federal structure of government adopted by our Constitution.'" *Id.* at 209. See also *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (finding that "the important role that [the right to travel] has played in transforming many States into a single Nation" precluded any need to textually base it); see also *Paul v. Virginia*, 75 U.S. 168, 180 (1869) (recognizing that without an inherent right to interstate travel "the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists").

²⁵¹ 526 U.S. 489 (1999).

²⁵² The Court concluded that two applications of the right have definitive, textual sources. *Id.* at 500-03 (holding that U.S. citizens have a right "to be treated as a welcome visitor . . . when temporarily present" in another state under Article IV's Privileges and Immunities Clause and to be treated like other citizens who are permanent state residents pursuant to the Fourteenth Amendment's Privileges or Immunities Clause).

²⁵³ *Id.* at 498, 501.

²⁵⁴ *Id.* at 501 (citing *U.S. v. Guest*, 383 U.S. 745, 758 (1966)).

²⁵⁵ See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

Constitutional cohesion also lends to more practical applications extending from the interrelated nature of rights and structure. Co-existence of rights-based and structural principles premised on the protection of individuals from governmental infringements suggests neither may be ignored to the exclusion of the other.²⁵⁶ Consequently, determinations of textual or non-textual constitutional rights over time are not exclusively limited to focused examinations of explicit language or its inferences.²⁵⁷ Rather, it is a shared endeavor grounded in structural- and rights-based facets at the core of the Constitution's foundations.²⁵⁸ Simply stated, what does or does not constitute a right is determined by the Constitution's overall structure and explicit or inferred language.

B. Structural Limits on Judicial Interpretations

Supreme Court jurisprudence has consistently reflected how structural components, including separation of powers, federalism, and preemption, have empowered and limited the Court's own authorities and decisions over time. Separation of powers principles, for example, have been interpreted by the Court to limit its power in manifold

[Walking, strolling, and wandering] are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity.

Id.

²⁵⁶ For example, in 2017 President Trump issued Executive Order 13768, proposing to federally defund "sanctuary cities" providing cover for persons subject to federal deportation. Exec. Order No. 13768 82 Fed. Reg. 8799 (Jan. 30, 2017). Attorney General Jeff Sessions imposed similar conditions on funding for state and local law enforcement. Press Release, U.S. Dep't of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial/>. These measures were immediately challenged in courts based on violations of due process rights, *see, e.g.*, *City of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 534, 535-36 (N.D. Cal. 2017) (granting Santa Clara and San Francisco an injunction on a finding that the Order was "unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause"); and separation of powers principles, *see, e.g.*, *City of Chicago v. Sessions*, 888 F.3d 272, 291, 293 (7th Cir. 2018) ("The plaintiffs have demonstrated a likelihood of success on the claim that the Attorney General lacked any Constitutional authority to impose the conditions upon the grant recipients, and therefore that the actions violated the separation of powers principles."), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018).

²⁵⁷ *See* discussion *supra* Part III.B; *see also* NAGEL, *supra* at note 35 and accompanying text.

²⁵⁸ *See* discussion *supra* Part III.B; *see also* NAGEL, *supra* at note 35 and accompanying text.

cases.²⁵⁹ In *Egbert v. Boule*, the same Court that reversed abortion rights in *Dobbs* in 2022, rejected Fourth Amendment claims of unlawful search and seizure against a U.S. border patrol agent.²⁶⁰

How the *Egbert* Court justified its decision is key. Justice Thomas, writing for the majority, invoked separation of powers principles in support of federal legislative directives.²⁶¹ As he explained, Congress is better positioned to create remedies in the border-security context.²⁶² Crafting causes of action is a legislative endeavor,²⁶³ not a function of the Court. As the majority stated, “[c]ourts engaged in that unenviable task must evaluate a ‘[broad] range of policy considerations [that] . . . a legislature would consider’ . . . Unsurprisingly, Congress is ‘far more competent than the Judiciary’ to weigh such policy considerations[.]”²⁶⁴ Multiple cases similarly affirm separation of powers limitations on the Court’s authority to interpret or apply specific rights.²⁶⁵

²⁵⁹ See *Egbert v. Boule*, 142 S. Ct. 1793, 1799-1800 (2022) (considering whether a Border Patrol agent committed an unreasonable search and seizure of an individual’s home with no warrant).

²⁶⁰ *Id.* at 1805, 1807. Justice Sotomayor criticized the holding, noting that in rejecting a private cause of action, the Court narrowed its prior ruling in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971), where it determined that constitutional violations by federal officers may give rise to private Fourth Amendment causes of action for damages. *Egbert*, 142 S. Ct. at 1823-24 (Sotomayor, J., dissenting).

²⁶¹ *Egbert*, 142 S. Ct. at 1823-24.

²⁶² *Id.* at 1804 (majority opinion) (rejecting a *Bivens* action in the border-security context because “‘regulating the conduct of agents at the border unquestionably has national security implications,’ and the ‘risk of undermining border security provides reason to hesitate. . . .’” (quoting *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020))). The Court explicitly acknowledged that “‘matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention[.]’” *Id.* at 1804-05 (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)).

²⁶³ *Id.* at 1802 (“[C]reating a cause of action is a legislative endeavor.”).

²⁶⁴ *Id.* at 1802-03 (first quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971); then quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)). Policy considerations include “‘economic and governmental concerns,’ ‘administrative costs,’ and the ‘impact on governmental operations systemwide.’” *Id.* at 1802 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017)).

²⁶⁵ See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding that individual liberties under substantive due process are not infringed via vaccine mandates implemented within the state’s police power). In *Jacobson*, Justice John Marshall Harlan for the majority analyzes the limitation that separation of powers imposes on the Court: “the [C]ourt would usurp the functions of another branch of government if it adjudged, as a matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary and not justified by the necessities of this case.” *Id.* at 28. “[N]o court . . . is justified in disregarding the action of the legislature simply because in its . . . opinion [a] particular method was – perhaps, or possibly – not the best . . .” *Id.* at 35. See also *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (holding that temporary limitations on religious assemblies during the COVID-19 pandemic outweighed religious entities’ First Amendment free exercise protections, explaining that “[o]ur Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and

Federalism principles directly impact judicial interpretations and authorities as well. In *Gregory v. Ashcroft*,²⁶⁶ Justice Sandra Day O'Connor, writing for the majority in 1991, relied heavily on federalism in determining that Missouri's constitutional retirement requirements for state judges did not violate the federal Age Discrimination in Employment Act (ADEA)²⁶⁷ or the Equal Protection Clause.²⁶⁸ The Court's analyses centered on federal-state interactions, determining initially how judgeship age retirement requirements are relevant to state official qualifications, which fall squarely within powers reserved to states via the Tenth Amendment.²⁶⁹ As a result, Justice O'Connor concluded the ADEA should be interpreted to avoid infringing on core principles of federalism.²⁷⁰ "The 'constitutionally mandated balance of power' between the States and the Federal Government," she explained, "was adopted by the Framers to ensure the protection of 'our fundamental liberties.'"²⁷¹

The Court in *Gregory* went further still.²⁷² It dismissed state judges' equal protection claims, finding no violation in Missouri's mandatory retirement provision (despite the fact that Missouri proffered differing retirement standards for other, similarly-situated state officials).²⁷³ "The people of Missouri have a legitimate, indeed compelling,

protect.'" (quoting *Jacobson*, 197 U.S. at 38)). Chief Justice Roberts further explained in *South Bay* that, provided "broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to access public health and is not accountable to the people." *Id.* at 1614 (quoting *Garcia v. San Antonio Metro. Transit Author.*, 469 U.S. 528, 545 (1985)). See also *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (holding a state's hair grooming regulation for policemen did not violate the Fourteenth Amendment because the "promotion of safety of persons and property is unquestionably at the core of the State's police power . . . [and thus] entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power.").

²⁶⁶ *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

²⁶⁷ See generally *id.*; see Age Discrimination in Employment Act of 1967, 29 U.S.C.A. § 621 (1967).

²⁶⁸ *Gregory*, 501 U.S. at 456.

²⁶⁹ *Id.* at 463.

²⁷⁰ *Id.* at 476-68.

²⁷¹ *Id.* at 458 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

²⁷² *Id.* at 473.

²⁷³ *Id.*

This is also a rational explanation for the fact that state judges are subject to a mandatory retirement provision, while other state officials—whose performance is subject to greater public scrutiny, and who are subject to more standard elections—are not. Judges' general lack of accountability explains also the distinction between judges and other state employees, in whom a deterioration in performance is more readily discernible and who are more easily removed.

Id.

interest in maintaining a judiciary fully capable of performing the demanding tasks that judges perform,²⁷⁴ observed Justice O'Connor. This federalism interest, adjudged the Court, outweighed equal protection concerns.²⁷⁵ Equal protection "scrutiny will not be so demanding" when examining "matters resting firmly within a State's constitutional prerogatives."²⁷⁶

In *Gregory*, federalism was positioned not only as a counter-balance to the power of federal preemption pursuant to the ADEA, but also to rights determinations under equal protection principles.²⁷⁷ Federalism, however, is a dual-edged concept. In *United States v. Lopez*,²⁷⁸ the Supreme Court limited Congress' commerce powers to prohibit possession of guns at or near schools pursuant to the federal Gun-Free School Zones Act of 1990.²⁷⁹ Under principles of federalism, Chief Justice William Rehnquist noted for the majority that Congress' extensive commerce powers do not equate with broad "police power[s]" held by states.²⁸⁰ The Court explicated the essential split between federal commerce powers and state's sovereign authorities.²⁸¹ Federalism was "adopted by the Framers to ensure protection of our fundamental liberties,"²⁸² observed Chief Justice Rehnquist, on the premise that "a healthy

²⁷⁴ *Id.* at 472.

²⁷⁵ *Id.* at 462.

²⁷⁶ *Id.* (quoting *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973)). Missouri's mandatory retirement age classification for judges "does not violate the Equal Protection Clause," concluded the Court. *Id.* at 473.

²⁷⁷ *Id.* at 463-64, 468.

²⁷⁸ 514 U.S. 549 (1995).

²⁷⁹ *Id.* at 567 ("The possession of a gun in a local school zone is in no sense an economic activity . . . substantial[ly] affect[ed] by] . . . interstate commerce."); see Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(2) (1990) (making it a crime to possess a firearm in a school zone).

²⁸⁰ *Lopez*, 514 U.S. at 567-68,

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States . . . To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local.

(citations omitted)).

²⁸¹ *Id.* at 565-67.

²⁸² *Id.* at 552 (quoting *Gregory*, 501 U.S. at 458).

balance of power...will reduce the risk of tyranny and abuse” by government.²⁸³ Federalism, in essence, acts like a shield against governmental threats to liberty, and not as a guise for denying rights the Constitution otherwise supports.²⁸⁴

Supreme Court analyses may also be influenced via the structural confines of preemption, supported directly by the Supremacy Clause²⁸⁵ and principles of federalism. In *Graham v. Richardson*, Arizona and Pennsylvania welfare laws limited legal resident aliens’ rights to receive state assistance by conditioning their benefits on citizenship or durational residency requirements.²⁸⁶ Both state laws were challenged in 1971 as violating Fourteenth Amendment equal protection principles.²⁸⁷ The Court agreed.²⁸⁸

In the majority opinion by Justice Harry Blackmun (also the lead author of *Roe*), the *Graham* Court emphasized that immigration policies are constitutionally reserved to the federal government via Congress’ complete scheme of regulation (known as field preemption), therefore preempting conflicting state laws.²⁸⁹ Federalism also supported the Court’s recognition of Congress’ role in setting immigration policies to the exclusion of states’ contrary policies.²⁹⁰ As Justice Blackmun explained,

[a]n additional reason why the state statutes at issue in these cases do not withstand constitutional scrutiny emerges from the area of federal-state relations. . . . State

²⁸³ *Id.* (quoting *Gregory*, 501 U.S. at 458). *See also* *Gonzales v. Oregon*, 546 U.S. 243, 269-70 (2006) (holding that the federal Controlled Substances Act does not prohibit physicians from prescribing drugs for physician-assisted suicide under state law). The *Gonzales* Court refers to “the structure and limitations of federalism, which allows the States ‘great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.’” *Id.* at 270 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)).

²⁸⁴ *Lopez*, 514 U.S. at 567.

²⁸⁵ *See supra* notes 27-28 and accompanying text.

²⁸⁶ 403 U.S. 365 (1971).

²⁸⁷ *Id.* at 366.

It has long been settled, and it is not disputed here, that the term ‘person’ in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside . . . [W]e hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause.

Id. at 371, 376.

²⁸⁸ *Id.* at 376.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with . . . overriding national policies in an area constitutionally entrusted to the Federal Government.²⁹¹

Over three decades later, in 2008, the Court similarly found in *Chamber of Commerce of U.S. v. Brown*²⁹² that a California statute inhibiting employer speech regarding workers joining unions²⁹³ was preempted by multiple federal laws, including the Labor Management Relations Act of 1947.²⁹⁴ Undergirded by First Amendment free speech principles,²⁹⁵ the Act “manifested a ‘congressional intent to encourage free debate on issues dividing labor and management.’”²⁹⁶ To this end, the Court found California’s statutory limitations unconstitutional.²⁹⁷ To the extent “Congress’ express protection of free debate forcefully buttresses the pre-emption analysis in this case,” the Court essentially voided California state law on preemption grounds in addition to First Amendment violations.²⁹⁸

In cases like *Graham* and *Brown*, the Court consistently recognizes the dual facets underlying constitutional cohesion, namely how (1) explicit constitutional rights like equal protection (in *Graham*) and free speech (in *Brown*) support the preemptive nature of Congressional acts; and (2) structural concepts like preemption or federalism principles can protect against limits on personal freedoms or liberties.²⁹⁹ Conversely,

²⁹¹ *Id.* (noting how “[t]he National Government has ‘broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.’” (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948))).

²⁹² 554 U.S. 60, 65 (2008).

²⁹³ *Id.* at 63.

AB 1889 prohibits certain employers that receive state funds—whether by reimbursement, grant, contract, use of state property, or pursuant to a state program—from using such funds to ‘assist, promote, or deter union organizing.’ See Cal. Govt. Code Ann. §§ 16645.1-16645.7. This prohibition encompasses ‘any attempt by an employer to influence the decision of its employees’ regarding ‘[w]hether to support or oppose a labor organization’ and ‘[w]hether to become a member of any labor organization.’ § 16645(a).

Id. at 71 (“AB 1889 imposes a targeted negative restriction on employer speech about unionization.”).

²⁹⁴ Labor Management Relations Act of 1947 § 7, 29 U.S.C. § 141 (1947).

²⁹⁵ *Brown*, 554 U.S. at 67.

²⁹⁶ *Id.* (quoting *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966)).

²⁹⁷ *Id.* at 76.

²⁹⁸ *Id.* at 68.

²⁹⁹ See *Graham v. Richardson*, 403 U.S. 365 (1971); *Brown*, 554 U.S. 60 (2004).

the Court's decisions in *Egbert* and *Gregory* reveal its capacity to carefully weigh constitutional rights (specifically related to lawful searches and equal protection), against structural facets (notably separation of powers and federalism).³⁰⁰

IV. CONSTITUTIONAL ENDGAME REGARDING "RIGHTS REVERSALS"

Several critical takeaways arise from the progeny of theories, positions, and cases reflecting principles of constitutional cohesion. Foremost is the direct correlation of structural and rights-based components within the U.S. Constitution.³⁰¹ Structural principles and rights serve the same basic purposes of protecting individuals and groups from unwarranted intrusions.³⁰² These protections are most essential when inherent, intensely personal rights are implicated.³⁰³ Americans' interests in bodily and decisional privacy extending to their homes, marriages, children, families, locations, and movements do not flow solely from textual constitutional language.³⁰⁴ Rather, these non-textual rights may be derived from or framed by multiple constitutional sources, including explicit constitutional concepts (e.g., substantive due process), amorphous constitutional principles (e.g., rights to travel), and structural protections (e.g., federalism).³⁰⁵

How varying sources of protections of freedoms and liberties enjoyed by Americans over time arise within the spirit of the Constitution lend to another key finding. Principally, constitutional rights do not

³⁰⁰ See *Egbert v. Boule*, 142 S. Ct. 1793 (2022); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

³⁰¹ NAGEL, *supra* note 35, at 64-65.

³⁰² *Id.*

³⁰³ NAGEL, *supra* note 35, at 62-63 (discussing how judicial inattention to structural principles is particularly pronounced in relation to rights determinations). As Professor Nagel observes, "Even when structural principles are treated as fully constitutional matters, their main influence is on the definition of individual rights." *Id.* at 62.

³⁰⁴ See SAGER, *supra* note 9 at 35-36; *infra* notes 306-313 and accompanying text.

³⁰⁵ See *supra* Parts II-III.

spring solely from limited examinations of extant text,³⁰⁶ historical traditions,³⁰⁷ Framers' conceptions,³⁰⁸ public perceptions,³⁰⁹ or political views.³¹⁰ Within the U.S. federalist system of government, constitutionally-grounded, non-textual rights emerge through concerted efforts among jurists to ascertain specific interests that warrant protection from unjustified governmental intrusions.³¹¹ Stated alternatively, core privacy interests—including abortion, contraceptive use, sexual intimacy, and marriage equality—rise to the level of rights not only based on explicit constitutional language and non-textual concepts, but also structural foundations.

To the extent that the Supreme Court adopts a linear, rights-centric approach in *Dobbs* without closely considering structural constitutional factors at play, it fails to undertake a cohesive constitutional assessment.³¹² Looking past structural foundations in assessing the existence, scope, and dimensions of non-textual privacy rights opens the Court to manifold additional legal challenges entrenched in resulting

³⁰⁶ See, e.g., SAGER, *supra* note 9, at 39 (“The text of the Constitution is not an adequate guide to questions of constitutional meaning at the level of concrete detail.”).

³⁰⁷ See CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 198-99 (2004) (questioning constitutional explorations of privacy rights grounded in tradition, noting “[t]radition may be a guide, but its teachings are nuanced and require interpretation.”).

³⁰⁸ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2324 (2022) (Breyer, J., dissenting) (significantly challenging the premise advanced by the majority that “we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. . . . If those people did not understand reproductive rights as part of the guarantee of liberty . . . , then those rights do not exist.”).

³⁰⁹ *Id.* at 2278 (majority opinion) (“The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution”) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 963 (1992) (Rehnquist, J. concurring in judgment in part and dissenting in part)).

³¹⁰ See JOHN ARTHUR, THE UNFINISHED CONSTITUTION 24 (1989) (“Constitutional interpretation involves more than disagreement about the meaning of words or even the best means to achieve political objectives; it often reflects deep moral and political tensions.”); see SAGER, *supra* note 9, at 17 (“For the originalist, constitutional interpretation is a backward-looking enterprise of decoding the text and circumstances of the Constitution’s authorship to reveal the meaning lodged there. The Constitution on this view picks up and leaves off just as and because the framers took up and left off, whatever the cause: arbitrary choice, oversight, political pressure, or simply fatigue.”).

³¹¹ *Obergefell v. Hodges*, 576 U.S. 644, 671-72 (2015) (“[R]ights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”). See also NAGEL, *supra* note 35, at 65 (“In adopting a viewpoint and vocabulary that focuses on individuals, modern judges and scholars have tended to shut themselves off from full participation in the great debates about governmental theory begun by the framers.”).

³¹² See NAGEL, *supra* note 35, at 71-72 (discussing the downsides of judicial concentration of rights as leading to narrow, instrumentalist views that fail to reflect the full nature of constitutional structure and design).

structural conundrums.³¹³ These challenges have the potential to limit the Court's own authority, and, subsequently, re-characterize or reinstate dispossessed rights.

A. Existing Structural Legal Challenges

Postulating that the Supreme Court may have improperly attended to structural norms in its reversal of non-textual privacy rights in *Dobbs*,³¹⁴ and potentially other cases ahead, may seem unavailing at first glance. It suggests that the *Dobbs* Court was misguided in taking a laser-focused approach to dispense with the right to abortion to the exclusion of structural limits.³¹⁵ If this observation is actually true, structural objections to the reversal of abortion or other privacy rights would assuredly surface. In reality, they already have.³¹⁶

Absent meaningful presidential or congressional responses to the Court's power to adjudicate rights,³¹⁷ structural constitutional arguments designed to limit or guard against existing and future rights reversals are circulating. Consistent with principles of federalism, multiple states seeking to protect non-textual rights from further diminutions are acting within the scope of their sovereign powers to limit their cooperation with states adopting anti-abortion laws and policies.³¹⁸ On the same day *Dobbs* was issued, June 24, 2022, the governors of California, Oregon, and Washington signed a multi-state agreement refusing non-fugitive extradition of individuals and cooperation with out-of-state legal actions targeting lawful reproductive health services in their states.³¹⁹ Governors in at least a dozen states signed executive orders including similar extradition limitations.³²⁰ Comparable prohibitions

³¹³ See NAGEL, *supra* note 35, at 71-72.

³¹⁴ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

³¹⁵ See TRIBE & DORF, *supra* note 115, at 53 (“[I]t is no more legitimate to subtract something from the Constitution because it is out of phase with your vision of the overall plan than it is to add something that you wish it contained.”).

³¹⁶ See *infra* notes 317-23 and accompanying text.

³¹⁷ See *supra* notes 14-20 and accompanying text; Janelle Bouie, *The Supreme Court Is the Final Word on Nothing*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/opinion/dobbs-roe-supreme-court.html> (suggesting Congress has the constitutional power to strip the Court of jurisdiction over certain cases, or that Congress could “in theory, use the guarantee clause to defend the basic rights of citizens against overbearing and tyrannical state governments.”).

³¹⁸ See *supra* Part I.B.

³¹⁹ GAVIN NEWSOM, KATE BROWN & JAY INSLEE, MULTI-STATE COMMITMENT TO REPROD. FREEDOM (2022).

³²⁰ At the time of publication, gubernatorial executive orders had issued in California, Colorado, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, North Carolina,

have been passed by several state legislatures, including Connecticut,³²¹ Delaware,³²² New Jersey,³²³ and New York.³²⁴ Some localities within abortion-hostile states are attempting to inhibit the reach of state law.³²⁵

Supreme Court oversight and interference with these state-based actions emanating from their sovereign powers may be limited to the extent they do not concern federal questions or run afoul of federal constitutional principles.³²⁶ Beyond the limits of the Court's own jurisdiction in such prospective cases is its internal recognition of the role of

Pennsylvania, Rhode Island, and Washington. Office of Governor Gavin Newsom, Executive Order N-12-22 (June 27, 2022) <https://www.gov.ca.gov/wp-content/uploads/2022/06/6.27.22-EO-N-12-22-Reproductive-Freedom.pdf> (California); Office of Governor Jared Polis, Executive Order D 2022 032 (July 6, 2022) <https://drive.google.com/file/d/10zvLU35d47Y9DYmG0vFZzI7tJA1ACXYg/view> (Colorado); Office of Governor Janet T. Mills Executive Order 4 (July 5, 2022) https://www.maine.gov/governor/mills/official_documents/executive-orders/2022-07-executive-order-4-order-protecting-access-reproductive (Maine); Exec. Order No. 600, Mass. Reg. 1473 (2022); Office of Governor Gretchen Whitmer Executive Order 2022-4 (July 13, 2022), <https://www.michigan.gov/whitmer/news/state-orders-and-directives/2022/07/13/executive-order-2022-4-unavailability-of-interstate-extradition>; Office of Governor Tim Walz, Executive Order 22-16 (June 25, 2022) https://mn.gov/governor/assets/EO_22-16_tcm1055-532111.pdf (Minnesota); Office of Governor Steve Sisolak, Executive Order 2022-8 (June 28, 2022), https://gov.nv.gov/News/Executive_Orders/2022/Executive_Order_2022-08_Protecting_Access_to_Reproductive_Health_Services_in_Nevada/ (Nevada); Office of Governor Michelle Lujan Grisham, Executive Order 2022-107 (June 27, 2022), <https://www.governor.state.nm.us/wp-content/uploads/2022/06/Executive-Order-2022-107.pdf> (New Mexico); Office of Governor Roy Cooper, Executive Order 263 (July 6, 2022), <https://governor.nc.gov/media/3298/open> (North Carolina); Office of Governor Tom Wolf, Executive Order 2022-01 (July 12, 2022), <https://www.governor.pa.gov/wp-content/uploads/2022/07/20220712-EO-2022-01.pdf> (Pennsylvania); Office of Governor Daniel J. McKee, Executive Order 22-28 (July 5, 2022), <https://governor.ri.gov/executive-orders/executive-order-22-28> (Rhode Island); Office of Governor Jay Inslee, Executive Order 22-12 (June 30, 2022), [https://www.governor.wa.gov/sites/default/files/directive/22-12%20-%20Prohibiting%20Assistance%20with%20interstate%20abortion%20investigations%20\(tmp\).pdf?utm_medium=email&utm_source=govdelivery](https://www.governor.wa.gov/sites/default/files/directive/22-12%20-%20Prohibiting%20Assistance%20with%20interstate%20abortion%20investigations%20(tmp).pdf?utm_medium=email&utm_source=govdelivery) (Washington).

³²¹ H.B. 5414, 2022 Leg. Sess. (Conn. 2022).

³²² H.B. 455, 151st Gen. Assemb., Reg. Sess. (Del. 2022).

³²³ A. B. 3975, 220th Leg. Sess. (N.J. 2022).

³²⁴ S.B. 9077A, 2022 Leg. Sess. (N.Y. 2022).

³²⁵ In Texas, for example, the Dallas City Council passed an ordinance (referred to as the "Grace Act") on August 10, 2022, to deprioritize police department investigations into abortions. Paul Wedding, *Dallas City Council Passes Resolution Limiting Abortion Investigations in City*, WFAA NEWS (Aug. 10, 2022, 10:26 PM), <https://www.wfaa.com/article/news/local/dallas-city-council-passes-resolution-limiting-abortion-investigations/287-fd9c654f-ef46-4cc0-a5f3-5f356a7f0ce5>.

³²⁶ 3 MOORE'S MANUAL: FEDERAL PRACTICE & PROCEDURE § 29.01[1] & [2][a] (2022) ("Additionally, the Eleventh Amendment prohibition against certain suits against an individual state, and the underlying principles, sovereign immunity and justiciability, limit the scope of the Court's original and appellate jurisdiction. . . . [H]owever, by statute, Congress [vests in] the Supreme Court *exclusive* original jurisdiction over controversies between two or more states.").

federalism as a limit to its authority. Current Supreme Court determinations under *Dobbs* may have eliminated constitutional rights protections for abortion but left intact state-based authorities under federalism to regulate abortions as they see fit, meeting only the minimal “rational basis” test ascribed under substantive due process.³²⁷ Consequently, states can not only proscribe abortion practices, as many have done,³²⁸ but also affirmatively support them as aggressively as their sovereign authorities allow.³²⁹

In this way, the *Dobbs* Court acknowledges state’s inherent authorities to bestow similar “rights” designations under principles of federalism.³³⁰ The downside, of course, is the immediate loss of what was nationally-recognized as a federal constitutional right between the issuance of *Roe* and *Dobbs*, paving the way for extensive adverse state-based laws inhibiting abortion access.³³¹ The upside, however, is the stream of federalism-based arguments flowing from state-based clashes over the new “abortion battleground”³³² that the Supreme Court is bound by numerous precedents to recognize.

Structural principles inhibit state attempts to broadly limit rights.³³³ States considered and introduced legislation seeking to penalize abortion extraterritorially even before *Dobbs*.³³⁴ They may predictably do the same with respect to other non-textual privacy rights at risk

³²⁷ The *Dobbs* Court stated the Constitution “does not prohibit the citizens of each State from regulating or prohibiting abortion,” and that, in overturning *Roe* and *Casey*, the Court was “return[ing] that authority to the people and their elected representatives.” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022).

³²⁸ See *supra* Part I.B.

³²⁹ For example, in the first attempt to de-constitutionalize rights to abortion via ballot measure post-*Dobbs*, Kansas citizens “resoundingly” rejected the ballot initiative by a “decisive margin” with 59% opposed to the restrictive measure to 41% in favor. Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protections in Its Constitution*, N.Y. TIMES, (Aug. 2, 2022), https://www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html?campaign_id=2&emc=edit_th_20220802&instance_id=68309&nl=todaysheadlines®i_id=72831090&segment_id=100312&user_id=3030eb2f30a2a78dd0d19041cb80308c.

³³⁰ See generally *Dobbs*, 142 S. Ct. 2228.

³³¹ See David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. ___ (forthcoming 2023).

³³² See generally *id.*

³³³ See *id.*; *infra* notes 334-341 and accompanying text.

³³⁴ See, e.g., Alice Miranda Ollstein & Megan Messerly, *Missouri Wants to Stop Out-of-State Abortions. Other States Could Follow*, POLITICO (Mar. 19, 2022, 7:00 AM), <https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539>; Zach Despart & James Barragán, *Texas Republicans Say if Roe Falls, They’ll Focus on Adoptions and Preventing Women From Seeking Abortions Elsewhere*, TEX. TRIBUNE (May 9, 2022, 5:00 AM), <https://www.texastribune.org/2022/05/09/texas-republicans-roe-wade-abortion-adoptions/> (indicating that “some of the more conservative members of the [Texas] House said they also want to . . . prevent

of reversal, particularly those impacting LGBTQ+ individuals.³³⁵ Concerning reproductive rights, Professors Cohen, Donley, and Rebouché suggest these threats directly implicate constitutional structural protections.³³⁶ The Dormant Commerce Clause, for example, prohibits states from unjustifiably burdening interstate commerce,³³⁷ including the movements or actions of people engaged in commerce.³³⁸ Existing anti-contraception or anti-abortion state laws attempting to reach individuals acting beyond their borders to criminalize lawful, commercial conduct (e.g., obtaining contraception or abortion-related health care in states legalizing the same) may consequently be struck down.³³⁹ As the Court acknowledges in cases like *Lopez*,³⁴⁰ constitutional structural principles assign regulation of interstate commerce exclusively to Congress. Consequently, principles of separation of powers and federalism militate

pregnant Texans from seeking legal abortions in other states”); Tessa Weinberg, *Missouri House Blocks Effort to Limit Access to Out-of-State Abortions*, MO. INDEP. (Mar. 29, 2022, 8:58 PM), <https://missouriindependent.com/2022/03/29/missouri-house-blocks-effort-to-limit-access-to-out-of-state-abortions/>; Kitchener & Barrett, *supra* note 89.

³³⁵ LGBTQ+ community advocates are concerned that a rollback of federal recognition for marriage equality—and return of control of these interests to states, as Justice Thomas suggests—would inhibit fundamental freedoms. Sarah Kate Ellis, president and CEO of GLAAD, a non-governmental media monitoring organization protesting defamatory coverage of LGBTQ+ persons, worries that the LGBTQ+ community would “go back to the dark days of being shut out of hospital rooms, left off of death certificates, refused spousal benefits, or any of the other humiliations that took place in the years before *Obergefell*.” Silvia Foster-Frau, *LGBTQ Community Braces for Rollback of Rights After Abortion Ruling*, WASH. POST, (June 24, 2022, 4:50 PM), <https://www.washingtonpost.com/nation/2022/06/24/abortion-fears-lgbtq-gay-rights/?itid=hp-banner-main>; see also Shane Stahl, *This Legal Case is ADF’s Latest Desperate Attempt to Roll Back LGBTQ Protections*, FREEDOM FOR ALL AMS. (Apr. 23, 2018, 6:19 PM), <https://freedomforallamericans.org/adf-latest-attempt-to-roll-back-lgbtq-protections-non-discrimination/>. Some entities and groups have asked the Supreme Court to re-allow states to criminalize sodomy. Nico Lang, *The Architect of Texas’ Abortion Ban Wants to Make Gay Sex Illegal Again*, THEM (Sep. 20, 2021), <https://www.them.us/story/architect-texas-abortion-ban-wants-to-make-gay-sex-illegal-again>.

³³⁶ Cohen et al., *supra* note 331, at 27-32 (acknowledging a series of structural arguments limiting extraterritorial application of state laws, including pursuant to the dormant commerce clause and Privileges and Immunities Clause, while positing that the main limitation likely springs from the Due Process Clause given prospective limitations to the applicability of the commerce clause via forthcoming Supreme Court cases).

³³⁷ CHEMERINSKY, *supra* note 38, at 444 (“[E]ven if Congress has not acted—even if its commerce power lies dormant—state and local laws can still be challenged as unduly impeding interstate commerce.”).

³³⁸ See *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964) (upholding Congress’ use of interstate commerce power to ban racial discrimination in places of public accommodation, including hotels, based in part on the premise that people moving within and across state lines are commerce).

³³⁹ See *supra* note 338 and accompanying text.

³⁴⁰ *U.S. v. Lopez*, 514 U.S. 549, 552-53 (1995) (“The Constitution delegates to Congress the power ‘[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.’ Art. I, § 8, cl. 3.”).

against enforcement of state extra-jurisdictional laws attempting to prohibit individuals from exercising their privacy interests lawfully outside their borders.³⁴¹

Constitutional provisions like the Privileges and Immunities (P&I) Clause³⁴² prevent discriminatory treatment of citizens of other states,³⁴³ which seemingly support individuals seeking to vindicate their access to reproductive services in states where abortions are legal. However, the reach of the P&I Clause is limited. The Court has held that it only protects “fundamental rights,”³⁴⁴ which no longer include abortion post-*Dobbs*, but may implicate rights to interstate travel.³⁴⁵ Yet, the Court has clarified further that state laws may only violate the P&I Clause if “enacted for the protectionist purpose of burdening out-of-state citizens.”³⁴⁶ The Court has declined to re-visit precedent considering the scope of this doctrine.³⁴⁷ Consequently, application of the P&I

³⁴¹ *Id.* at 553.

³⁴² U.S. CONST. art. IV, § 2, cl. 1.

³⁴³ CHEMERINSKY, *supra* note 38, at 490 (“The Supreme Court has interpreted this provision as limiting the ability of a state to discriminate against out-of-staters with regard to fundamental rights or important economic activities.”).

³⁴⁴ *McBurney v. Young*, 569 U.S. 221, 226 (2013) (holding that Virginia’s citizens-only Freedom of Information Act (FOIA) provision was constitutionally valid under the P&I Clause because the statute does not abridge plaintiff’s fundamental right to earn a living by obtaining public records on behalf of his clients); *see also* ARTHUR, *supra* note 310, at 31 (“The [P&I] clause did not protect individual citizens against state and local government encroachments of the fundamental rights enumerated in the Bill of Rights.”).

³⁴⁵ *Zobel v. Williams*, 457 U.S. 55, 66 (1982) (holding that “the right [to travel] predates the Constitution, and was carried forward in the [P&I] Clause of Art. IV”). However, the *Slaughter-House Cases* seemingly limit the scope of the Clause to rights more strongly rooted in constitutional text, which could exclude non-textual rights. Justice Thomas, in his *Dobbs* concurrence, acknowledged that it was undecided whether the P or I Clause extends to non-textual rights:

[t]o answer that question, we would need to decide important antecedent questions, including whether [it] protects any rights that are not enumerated in the Constitution and, if so, how to identify those rights. . . . That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach.

Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2302 (2022).

³⁴⁶ *McBurney*, 569 U.S. at 227 (quoting *Toomer v. Witsell*, 334 U.S. 385, 395, 397 (1948) (holding no P&I violation where South Carolina law designated certain coastal waters for its own citizens)). In *McBurney*, the Court held that Virginia’s FOIA law had a nonprotectionist aim, providing state citizens with access to records allowing state officials to be held accountable, for which non-citizens had no need. *Id.* at 228.

³⁴⁷ In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court declined to reconsider whether the Second Amendment right to bear arms, as interpreted in the *Slaughter-House Cases*, was a fundamental right for P&I purposes, 561 U.S. at 758. (referencing the *Slaughter-House Cases*, 83 U.S. 36 (1873) (holding the P&I Clause only protects rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws.”)). The

Clause to state issues surrounding receipt of extra-jurisdictional abortion care is largely unchartered.³⁴⁸

Preemption-based arguments also warrant judicial reconsiderations of current and future rights reversals. *Dobbs*' rights-centric approach of "returning" abortion regulations to states does not account for broader federal authorities that guarantee access to abortion and contraceptive medications.³⁴⁹ Congressionally-assigned statutory powers of the Food and Drug Administration (FDA) to approve safe and effective medications for use in interstate commerce may thwart states' attempts to restrict abortion medication or contraception.³⁵⁰ In *GenBioPro, Inc. v. Dobbs*,³⁵¹ a Mississippi federal court was considering whether FDA's authority to vet and approve abortion medications preempts state laws restrictions, although the company dismissed the case without prejudice to seek a distinct forum.³⁵² Should a similar case arise, the Supreme

McDonald Court expressly declined to "disturb" the *Slaughter-House* precedent. *Id.* The *Dobbs* majority cites Justice Thomas' *McDonald* concurrence in justifying a limited reading of the P&I Clause. *Dobbs*, 142 S. Ct. at 2247.

³⁴⁸ A 2022 Missouri bill criminalizing efforts to help residents get an abortion outside the state at any point in pregnancy, may arguably inhibit persons' rights to travel in pursuit of lawful activities in other states. H.B. 1677, 101st Gen. Assemb., Reg. Sess. (Mo. 2022), <https://house.mo.gov/billtracking/bills221/amendpdf/4311H02.14H.pdf>. The City of St. Louis Board Bill 61 would provide "logistical support" for abortions and assist those seeking the procedure. ST. LOUIS, MO., ORDINANCE 71554 (2022). In a motion for preliminary injunction, the Missouri attorney general claimed that the City's Bill violated the P&I clause of the Missouri constitution, which extends to fetal tissue because "life...begins at conception." Plaintiff's Motion for Preliminary Injunction at 1, 8, Missouri ex rel. Eric S. Schmitt v. St. Louis, No. 2222-CC08920 (St. Louis Cir. Ct. July 21, 2022), https://ago.mo.gov/docs/default-source/press-releases/2022-07-21—motion-for-preliminary-injunction—final.pdf?sfvrsn=68a7e5e3_2.

³⁴⁹ *Contraceptive Use in the United States by Method*, GUTTMACHER INST. (May 2021), <https://www.guttmacher.org/fact-sheet/contraceptive-method-use-united-states#> (following female sterilization (28%), pills were the second most commonly used birth control method in 2018 (21%)); Rachel K. Jones et al., *Medication Abortion Now Accounts for More than Half of All US Abortions*, GUTTMACHER INST. (Mar. 2, 2022), <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions> (illustrating that "in 2020, medication abortion accounted for 54% of all U.S. abortions").

³⁵⁰ *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 476 (2013) ("Under the Federal Food, Drug, and Cosmetic Act (FDCA), ch. 675, 52 Stat. 1040, as amended, 21 U.S.C. § 301 et seq., drug manufacturers must gain approval from [FDA] before marketing any drug in interstate commerce. § 355(a).").

³⁵¹ Complaint at 1, *GenBioPro Inc. v. Dobbs*, No. 3:20-cv-00652 (S.D. Miss. Oct. 9, 2020); Celine Castronuovo, *Abortion Pill Lawsuit Offers Guide to Challenging State Limits*, BLOOMBERG L. (May 25, 2022, 5:35 AM), <https://news.bloomberglaw.com/health-law-and-business/abortion-pill-lawsuit-offers-guide-to-challenging-state-limits>.

³⁵² The plaintiff filed a motion to amend its complaint on July 21, 2022, following the release of *Dobbs* and subsequent implementation of Mississippi's trigger law. GenBioPro, Inc.'s Memorandum in Support of Its Motion for Leave to File Amended Complaint, *GenBioPro Inc. v. Dobbs*, No. 3:20-CV-00652 (S.D. Miss. July 7, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.mssd.109735/gov.uscourts.mssd.109735.42.0.pdf>. Counsel for GenBioPro

Court may have to wrangle with how principles of federal preemption limit states' abilities to fully restrict access to approved abortion and contraception drugs for which national access is assured under other constitutional exercises of legislative and executive powers.³⁵³

How the Court may rule on these issues is indeterminate in light of its own inconsistent jurisprudence on FDA's preemptive authority³⁵⁴ and emerging views on the limits of agency regulatory authorities overall.³⁵⁵ As the defense in *GenBioPro* emphasized in prior filings, the

also submitted a letter to the presiding judge shortly after *Dobbs* was released, arguing the case should not be dismissed despite Mississippi's trigger law banning nearly all abortions in the state by any means. Letter from U. Gwyn Williams, Latham & Watkins LLP & J. Carter Thompson, Jr., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, to Hon. Henry T. Wingate, U.S. District Court, S.D. Miss. (June 30, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.mssd.109735/gov.uscourts.mssd.109735.31.0.pdf> ("GenBioPro's claims arise under two provisions in the United States Constitution: the Supremacy Clause and the Commerce Clause, not the Fourteenth Amendment. To be clear, GenBioPro's claims in no way implicate the substantive due process interests at issue in *Dobbs* and *Roe v. Wade*." (emphasis omitted)). GenBioPro later voluntarily dismissed the case, noting its intention to re-file in a different forum. Ian Lopez & Celine Castronuovo, *GenBioPro Gives Up Abortion Pill Suit Against Mississippi*, BLOOMBERG L. (Aug. 19, 2022), <https://news.bloomberglaw.com/health-law-and-business/genbiopro-gives-up-abortion-pill-suit-against-mississippi>; Ian Lopez, *Abortion Pill Maker Eyes Changed Judiciary as It Mulls New Suit*, BLOOMBERG L. (Sept. 14, 2022), <https://news.bloomberglaw.com/health-law-and-business/abortion-pill-maker-eyes-changed-judiciary-as-it-mulls-new-suit>.

³⁵³ Access to contraceptives is legislatively assured under the ACA. Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41318, 41318 (July 14, 2015) ("These preventive services include . . . [w]ith respect to women, preventive care and screenings . . . including all . . . (FDA)-approved contraceptives, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider (collectively, contraceptive services)."). On July 28, 2022, HHS, the Departments of Labor and Treasury issued guidance to reiterate that contraceptive coverage—including emergency contraception—is required by the ACA in *all* states. Press Release, HHS Press Off., HHS, DOL, and Treasury Issue Guidance Regarding Birth Control Coverage (July 28, 2022), <https://www.hhs.gov/about/news/2022/07/28/hhs-dol-treasury-issue-guidance-regarding-birth-control-coverage.html>; U.S. DEP'T OF HEALTH & HUM. SERVS., U.S. DEP'T OF LABOR, & U.S. TREAS., FAQs ABOUT AFFORDABLE CARE ACT IMPLEMENTATION PART 54 (2022), <https://www.cms.gov/files/document/faqs-part-54.pdf>. Potential future challenges to this guidance may raise questions about the preemptive authority of the ACA regarding contraceptives.

³⁵⁴ Supreme Court jurisprudence on FDA's preemptive authority is inconsistent. *See Wyeth v. Levine*, 555 U.S. 555, 567 (2009) (holding that FDA approval did not preempt state failure-to-warn claims); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 613 (2011) (holding that FDA regulations preempt state-law claims); and *Bartlett*, 570 U.S. at 476 (holding that FDA regulations preempt state-law design-defect claims). In *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019), Justice Breyer for the majority explained that FDA "pre-emption takes place 'only when and if [the agency] is acting within the scope of its congressionally delegated authority, . . . for an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.'" (citation omitted).

³⁵⁵ This presupposes that the Supreme Court does not undertake separate analyses of FDA's regulatory authority to review and approve abortion-related drugs and contraceptives. In *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022), the Court relied on the so-called "major questions

Court may have to newly assess the FDA's capacity to review and approve abortion-related drugs and contraceptives against the backdrop of state restrictions largely approved in *Dobbs*.³⁵⁶ Aligning the FDA's regulatory authorities is no easy task but may be necessitated by structural protections encapsulated in federal preemption and in line with separation of powers principles.

Additional preemption issues post-*Dobbs* arise pursuant to the Emergency Medical Treatment and Active Labor Act of 1986 (EMTALA).³⁵⁷ EMTALA helps assure that Americans have access to emergency medical treatment regardless of their ability to pay.³⁵⁸ It requires most hospitals that operate emergency rooms to provide initial screening and stabilization efforts to patients presenting with emergency conditions, including persons in active labor.³⁵⁹ On July 11, 2022, the Department of Health and Human Services (HHS) issued guidance that emergency department physicians are required under EMTALA to provide abortion services to pregnant individuals as needed to treat an

doctrine" to limit EPA's powers to regulate carbon dioxide emissions utilizing a generation shifting approach. It held that this methodology was outside the scope of what the Clean Air Act authorized EPA to regulate. *Id.* As this case marked the Court's first mention of the "major questions doctrine" in a majority opinion, the scope of the doctrine is not well defined. Still, its applications in later cases may impact the scope of FDA's regulatory authority assessed by courts ahead.

³⁵⁶ Defendant's Response to the Court's Inquiry Regarding the Effect the U.S. Supreme Court Decision in *Dobbs v. Jackson Women's Health Organization* and Mississippi's Trigger Law Have on the Merits of This Case at 6, *GenBioPro Inc. v. Dobbs*, No. 3:20-CV-00652 (S.D. Miss. June 30, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.mssd.109735/gov.uscourts.mssd.109735.32.0.pdf> ("This case is not about the safety of an FDA-approved drug, or considerations under the REMS for mifepristone. This case is about the State's primary authority over abortion, regardless of the means by which the abortion is induced.").

³⁵⁷ Emergency Medical Treatment & Active Labor Act, 42 U.S.C. § 1395dd.

³⁵⁸ *Emergency Medical Treatment & Labor Act (EMTALA)*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Regulations-and-Guidance/Legislation/EMTALA> (Aug. 25, 2022, 3:30 PM).

³⁵⁹ *Id.*

emergency medical condition, irrespective of state laws restricting abortions.³⁶⁰ Congress explicitly stated that EMTALA requirements preempt conflicting state laws.³⁶¹

On July 14, 2022, Texas Attorney General Ken Paxton sued HHS,³⁶² arguing it “attempt[ed] to use federal law to transform every emergency room in the country into a walk-in abortion clinic.”³⁶³ Paxton grossly overstated the scope of HHS’ EMTALA interpretation, as it only applies to patients presenting with emergency conditions (and not those patients merely seeking to terminate an otherwise safe pregnancy). However, a Texas federal district court nevertheless agreed with his interpretation when it preliminarily blocked the guidance’s applicability.³⁶⁴ In contrast, in a suit the U.S. Department of Justice initiated in Idaho, a federal district court found the state’s near complete abortion ban preempted by EMTALA under the Constitution’s Supremacy Clause.³⁶⁵ Ultimately, if appellate or other courts follow precedent related to structural assessments of federal preemption, access to abortions may be assured nationally at least in emergency situations.³⁶⁶

³⁶⁰ Memorandum from Directors, Quality, Safety & Oversight Group (QSOG) and Survey & Operations Group (SOG) on U.S. Reinforcement of EMTALA Obligations specific to patients who are Pregnant or are Experiencing Pregnancy Loss to the State Survey Agency Directors 14 (July 11, 2022), <https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and-memos-states-and/reinforcement-emtala-obligations-specific-patients-who-are-pregnant-or-are-experiencing-pregnancy-0> (“If a physician believes that a pregnant patient presenting at an emergency department is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician must provide that treatment. When a state law prohibits abortion and does not include an exception for the life and health of the pregnant person — or draws the exception more narrowly than EMTALA’s emergency medical condition definition — that state law is preempted.”) (emphasis omitted).

³⁶¹ 42 U.S.C. § 1395dd(f) (“The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.”).

³⁶² Press Release, Texas Office of the Attorney General, Choose Life & Protect Life/Unborn, Paxton Sues Biden Admin Over Its Efforts to Force Abortions in Texas (July 14, 2022), <https://www.texasattorneygeneral.gov/news/releases/paxton-sues-biden-admin-over-its-efforts-force-abortions-texas>.

³⁶³ State of Texas’ Original Complaint at 1, *Texas v. Becerra*, No. 5:22-CV-185 (N.D. Tex. July 14, 2022).

³⁶⁴ 42 U.S.C. § 1395dd(e); *see also* *Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525 (N.D. Tex. Aug. 23, 2022).

³⁶⁵ *United States v. Idaho*, No. 1:22-cv-00329, 2022 WL 3692618 (D. Idaho Aug. 24, 2022); *see also* Hannah Rabinowitz & Veronica Stracqualursi, *Biden Justice Department Sues Idaho Over State’s Abortion Restrictions in First Post-Dobbs Lawsuit*, CNN (Aug. 2, 2022, 4:45 PM), <https://www.cnn.com/2022/08/02/politics/justice-department-abortion-idaho/index.html> (noting support for the lawsuit by U.S. Attorney General Merrick Garland, who exclaimed “[w]e will use every tool at our disposal to ensure that pregnant women get the medical care that they are entitled to.”).

³⁶⁶ Memorandum from Directors, *supra* note 360.

B. Impending Cohesive Legal Strategies

The proposition that structural arguments or objections may completely set aside or fully deter blanket “rights reversals” handed down by the Supreme Court and restore or secure highly-valued privacy interests may be far-fetched. Nothing short of a direct reversal of *Dobbs* in a future Court decision may lead to this result concerning abortions so long as the Court retains its Article III role as supreme arbiter of constitutional rights.³⁶⁷ Definitive limits on the Court’s ability to determine rights devoid of structural principles may not derail the Court’s long-standing role in having the last say on what constitutes a right as a core facet of U.S. democratic foundations.³⁶⁸

Yet failing to attend to constitutional structural limits can also be the source of the Court’s own undoing in areas where its legitimacy is on the line.³⁶⁹ *Roe* and *Casey* were not the only precedents directly challenged in *Dobbs*.³⁷⁰ The Court’s skirting of structural legal issues at

³⁶⁷ *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803) (“It is emphatically the . . . duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. . . . If . . . courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.”); *contra* VILE, *supra* note 49, at 6 (“Scholars increasingly recognize that the judiciary is not the sole expositor of the written Constitution, and the courts certainly have no monopoly over influencing and interpreting [it].”); Joshua Zeitz, *How the Founders Intended to Check the Supreme Court’s Power*, POLITICO (July 3, 2022, 9:02 AM), <https://www.politico.com/news/magazine/2022/07/03/dont-expand-the-supreme-court-shrink-it-00043863> (highlighting Justice Sotomayor’s comments during *Dobbs* oral argument that the Constitution does not expressly authorize the Court’s judicial review authorities as per *Marbury v. Madison*: “what the Court did was reason from the structure of the Constitution that that’s what was intended.”).

³⁶⁸ *See* Blow, *supra* note 193 (“There is no finality in the battle for civil rights. Wins don’t stay won. They must be defended and can sometimes be reversed.”).

³⁶⁹ *See* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2350 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting) (describing how the majority opinion “breaches a core rule-of-law principle, designed to promote constancy in the law . . . , [and] places in jeopardy other rights, from contraception to same-sex intimacy and marriage [,] [a]nd finally, it undermines the Court’s legitimacy.”); Transcript of Oral Argument at 10, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (“To overrule under fire in the absence of the most compelling reason, to reexamine a watershed decision, would subvert the Court’s legitimacy beyond any serious question.”); *Id.* at 10-11 (“Overruling unnecessarily and under pressure would lead to condemnation, the Court’s loss of confidence in the judiciary, the ability of the Court to exercise the judicial power and to function as the Supreme Court of a nation dedicated to the rule of law.”) (quotations omitted). *See also* MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* 140 (2001) (observing how the Supreme Court’s assessment of its own legitimacy in *Casey*, “depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”).

³⁷⁰ *See Dobbs*, 143 S. Ct. at 2350.

the forefront of privacy rights and protections demarcated a blatant departure from manifold cases in which structural constitutional principles were decisive to the Court's determinations.³⁷¹ The *Dobbs* Court's failure to assess structural principles opens the door to substantial judicial challenges targeting structural deficiencies, gaps, or conundrums emanating from actual or prospective rights reversals.³⁷²

In the wake of current or future reversals of non-textual rights, innovative structural legal strategies offer strong potential for at least two substantial outcomes: (1) the re-characterization of rights or interests properly framed within structural contexts; and (2) the partial reinstatement of rights or interests based on resolutions of unavoidable structural impediments.³⁷³ Concerning the former, dispossessed rights to abortion or other rights facing reversals³⁷⁴ may be repurposed or alternatively characterized through affirmative recognition of underlying structural norms.

Consistent with preemption and federalism arguments percolating nationally,³⁷⁵ for example, the Supreme Court may ultimately acknowledge that abortion medications approved by FDA, like all FDA-approved medications, remain lawful and thus accessible nationwide. Similarly, emergency abortive procedures assured via Congress through EMTALA continue to be generally available even after *Dobbs*.³⁷⁶ Contrary state laws attempting to outlaw these medications or reproductive services may consequently fall aside in recognition of structural constitutional protections assuring access to specific reproductive services, even if explicit rights to contraception or abortion are no longer recognized by the Court.³⁷⁷

Re-characterizations of rights or interests advanced through structural arguments closely interplay with their reinstatement. Presume that the Supreme Court will not muster the votes anytime soon to directly reverse *Dobbs*. It is an easy supposition—no court, especially at

³⁷¹ See *supra* Part III.B.

³⁷² See *supra* Part IV.A.

³⁷³ See *supra* Part IV.A.

³⁷⁴ See *supra* Part II.B.

³⁷⁵ The vitality of these structural arguments depends in part on judicial balancing of these constitutional facets as well. The Supreme Court has previously expressed disdain for preemptive arguments that interfere with federalism interests. See, e.g., Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, in PREEMPTION CHOICE 13, 22 (William W. Buzbee, ed., 2009) (“In determining whether Congress has preempted state law, modern courts have generally applied a presumption against preemption, especially in regulatory areas commonly left to the states.”).

³⁷⁶ Memorandum from Directors, *supra* note 360; but see *Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525 (N.D. Tex. Aug. 23, 2022).

³⁷⁷ See *supra* Part IV.A.

the highest level, wants to admit its own wrongdoing close in time to its decision.³⁷⁸ Against this backdrop, many have concluded that rights to abortion are completely renounced.³⁷⁹ Cohesive structural principles and resulting challenges suggest otherwise.

Principles of federalism effectively shift authorities to recognize rights to abortions from the federal to state levels. As noted, multiple states' legislative, executive, and judicial branches constitutionally recognize these rights in their jurisdictions and back them up with affirmative legislation or regulations to effectuate their continued access.³⁸⁰ Given how the *Dobbs* Court projected this outcome, it may struggle under existing federalism precedents to completely strip states of these interests under "fetal personhood" or other prospective arguments.³⁸¹ Principles of federalism reserve to the states extensive authority over the health, safety, and welfare of their residents.³⁸² The Court's continued adherence to this structural foundation militates against future decisions wholly stripping states of their capacities to authorize (or admittedly to prohibit) access to abortions.³⁸³

³⁷⁸ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2264 (2022) ("No Justice of this Court has ever argued that the Court should *never* overrule a constitutional decision, but overruling a precedent is a serious matter. It is not a step that should be taken lightly."); *Id.* at 2316 (Roberts, C.J., concurring) ("The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case.").

³⁷⁹ Even prior to *Dobbs*, the right to access abortions was already restricted. Pursuant to *Casey*, for example, states could impose restrictions on abortions so long as they did not constitute "undue burdens" to access. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 879 (1992). The majority in *Dobbs* also observed in describing *Roe* how the "Court did not claim that this broadly framed right is absolute, and no such claim would be plausible." *Dobbs*, 142 S. Ct. at 2257.

³⁸⁰ See *supra* Part I.B.

³⁸¹ See *supra* Part I.B.

³⁸² See, e.g., *Gibbons v. Ogden*, 22 U.S. 1, 72 (1824) (acknowledging the fundamental role of states and localities in protecting public health); *Breard v. Alexandria*, 341 U.S. 622, 640 (1951) (noting in dicta that "[t]he police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." (citation omitted)); *Gonzales v. Oregon*, 546 U.S. 243, 279 (2006) (recognizing states' "police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" (citation omitted)).

³⁸³ Professor Charles Fried describes the Supreme Court's essential role in determining the scope and boundaries of federalism in noting ". . . the Constitution does embody a conception of the relation between state and national power; that conception can find expression in constitutional doctrine." FRIED, *supra* note 307, at 46. Furthermore, "when cases come before [the Court] implicating [federalism] it is 'the province and the duty of the Court to say what the law is.'" *Id.* at 47 (citing *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803)).

Federalism has its limits as well within the constitutional design, specifically when states attempt to impose their policies in contravention of other states, interfering with Congress' interstate commerce powers.³⁸⁴ Anti-abortion states' efforts to restrict the lawful activities of their own residents to seek abortions in other states³⁸⁵ are inimical not only to separation of powers and federalism principles underlying dormant commerce clause jurisprudence, but also right to travel protections firmly secured in prior Supreme Court cases.³⁸⁶ Under principles of constitutional cohesion, such restrictive state laws cannot stand in a nation freely supporting the cross-border movement of individuals as agents of commerce seeking lawful services.³⁸⁷ Structural- and rights-based arguments align against highly-restrictive extraterritorial state laws and policies attempting to curb abortion access or other non-textual rights withdrawn by the Court.³⁸⁸ To the degree these state measures fall aside, Americans retain some assured level of access to abortion or other services. The partial reinstatement of "rights" to abortion may have shifted from the national to state levels following *Dobbs*, but assuring access or recognition of interests is still secured at some level.

V. CONCLUSION

"Rights reversals" represent an extant threat to Americans' health and safety as well as an affront to principles of equity. In the absence of effective legislative or executive action, curbing existing or future diminutions of non-textual privacy rights (e.g., abortions, contraceptives, sexual intimacy, marriage equality) relies in part on the very branch and level of government—the nation's Supreme Court—most responsible for their loss through originalist thinking and linear, rights-centric approaches. The Constitution's cohesive structure is designed to assure access to and protection of these interests, despite the Court's current or prospective withdrawal of universal recognition of these rights. Admittedly, re-characterizations or partial reinstatements of these interests are no substitute for their constitutional enshrinement. The Court's ability to reconsider the existence of non-textual rights cannot wholly be supplanted through existing or novel objections grounded in cohesive structural and rights-based principles. However, its powers can be curbed through foundational constitutional concepts that the

³⁸⁴ U.S. CONST. art. I, § 8, cl.3.

³⁸⁵ See *supra* Part IV.A.

³⁸⁶ See *supra* Part III.A.

³⁸⁷ See *supra* Part III.B.

³⁸⁸ See *supra* Part III.A.

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Court, and other branches and levels of government, recognize and adhere to under America's federalist system of government.