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Rebuilding the Constitutional Right to Abortion After *Dobbs*

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ABSTRACT

Efforts to restore abortion as a federal constitutional right should aspire to more than resurrecting the status quo that existed before Dobbs v. Jackson Women's Health Organization*. In this Article, I explain how the loss of* Roe v. Wade *offers an opportunity not only to rebuild the right to abortion on a stronger doctrinal footing but also to do so in a way that embraces the critical role of nonjudicial institutions in constructing and legitimating constitutional rights claims. In rebuilding the constitutional right to abortion, the grassroots activism, movement mobilization, and political advocacy for reproductive rights that* Dobbs *energized will ultimately be as important as litigation strategies and new Supreme Court Justices. I argue that the primary long-term goal of a campaign of constitutional transformation on reproductive rights should be the passage of federal legislation protecting access to abortion under Congress's authority to enforce the Fourteenth Amendment. In the face of such an achievement, a future Supreme Court would have the opportunity to do something it has never done before: revise its interpretation of the Fourteenth Amendment in the process of upholding a federal law passed under its enforcement authority. Such a process of constitutional transformation would not only return abortion as a constitutional right but also display an alternative and better pathway to constitutional change. A durable and effective constitutional right to abortion requires foundations outside the courts.*

INTRODUCTION

Since the Supreme Court's repudiation of a constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*,[1] supporters of abortion rights have been searching for a path forward. This search involves finding ways to address the most immediate needs of women who no longer have access to legal abortion. It involves persuading the American people of the importance of reproductive rights to their lives. It involves political mobilization aimed toward electing local, state, and national officials who support reproductive rights policies and toward referenda campaigns aimed toward entrenching abortion rights in state constitutions. And it involves more long-term strategizing on how access to abortion might one day be resurrected as a constitutional right. This Article focuses on this third

[1] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

category. I draw on our historical experience with constitutional change to present an account of how, in the decades to come, we might once again live in a nation where abortion is recognized as a fundamental right that is protected under the United States Constitution.

In charting a path toward rebuilding the constitutional right to abortion, I advance two basic arguments. The first is that a reconstituted constitutional right to abortion should, as a matter of principle and pragmatism, be the product of more than simply getting five votes on the Supreme Court. The Court has always been least effective, and constitutional rights most vulnerable, when the Justices advance rights claims that lack or fail to secure stable bases of support outside the Court. This was one of the lessons that those committed to reproductive rights should have learned from the embattled forty-nine-year life of *Roe v. Wade*.[2] A new constitutional right to abortion requires a firm foundation of civil society efforts to make abortion access in the United States a lived reality. It requires social movement activism that gains adherents to the cause of reproductive justice. And it requires local, state, and national legislative victories advancing reproductive rights generally. A future Supreme Court ruling returning abortion rights to a constitutionally protected status is more likely to happen, and more likely to embed itself in the firmament of constitutional principle and practice, if the Court's actions build upon a movement that has changed the politics and norms of abortion. In the years since *Dobbs*, there are promising signs that such a movement is underway.

My second argument is that a successful effort to rebuild the constitutional right to abortion provides an opportunity to rebuild constitutional law. This argument is both doctrinal and institutional. I argue that the best pathway to rebuilding a constitutional right to abortion would involve Congress taking a leading role in the development of this right by exercising its authority under Section 5 of the Fourteenth Amendment[3] to prohibit certain constraints on access to abortion. In the best-case scenario, a future Supreme Court would recognize a constitutional right to abortion in a case that did not involve striking down a state or federal abortion regulation but instead saw the Court upholding a congressional effort to protect abortion rights under its authority to enforce the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Past Supreme Court Justices have

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

3 U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

considered the possibility of revising their interpretation of Section 1 of the Fourteenth Amendment in response to congressional exercise of its Section 5 authority,[4] but the Court has never actually taken this step. To do so would be a transformative achievement—for abortion rights and for the vitality of American constitutionalism. It would show the nation, in dramatic and unmistakable terms, that while the Supreme Court plays a key role in protecting the rights of vulnerable Americans, it is a role that is embedded within and ultimately dependent upon legislative and popular engagement with the Constitution.

Although the constitutional world I describe is far removed from what we see around us today, I locate the pieces of this world squarely in the realm of what is—in our shared past experiences and in existing constitutional doctrine. Aspirational visions of new and better constitutional possibilities have always been integral to American constitutional development. When southern slave interests appeared to have firm control of the entire federal government, abolitionists insisted that the Constitution was an antislavery document. Women's rights advocates pressed constitutional equality arguments for over a century before winning acceptance at the Supreme Court. During the darkest days of Jim Crow, racial justice activists offered a redemptive vision of America grounded in the egalitarian purpose of the Reconstruction Amendments. More recently, claims of a constitutional right to same-sex marriage have traveled in remarkably short order from fringe to mainstream. Transforming constitutional norms has often required imagining futures that seem improbable, even impossible.

I
DOBBS AND THE DYNAMICS OF CONSTITUTIONAL CHANGE

The central premise of this Essay is that constitutional claims in the courts are more persuasive and durable when they are built on changes in social norms and political achievements. Successful social movements change social norms. Effective political advocacy changes policy. Shaping the meaning of the Constitution, whether in the form of constitutional practices and expectations outside the courts or judicially recognized constitutional rights, builds on both social norms and policy achievements. This is a lesson of the anti-abortion

[4] *See* Christopher W. Schmidt, *Section 5's Forgotten Years: Congressional Power to Enforce the Fourteenth Amendment Before* Katzenbach v. Morgan, 113 NW. U. L. REV. 47 (2018).

movement in the aftermath of *Roe*. *Dobbs* was the achievement of a half-century of activism and political engagement in which abortion opponents pressed their case through public protests, passed abortion restrictions in state and national legislatures, and pressured political candidates to openly embrace pro-life positions.[5] Court-focused efforts to overturn *Roe*, both through litigation and judicial appointments, were always one component of a much larger effort. The success this movement had in the courts would not have been possible without the success it had outside the courts. In the post-*Dobbs* era, defenders of reproductive rights would do well to follow the same game plan.

The widespread disillusionment many felt toward the Supreme Court in the aftermath of *Dobbs* has produced a clearer understanding of the limits of the judiciary in protecting individual rights. Since at least the time of the Warren Court, liberals and progressives have held an outsized faith in the courts. The *Roe* decision offered yet more evidence for this faith. But the harsh experience of losing a right that the Court had recognized for almost half a century has caused many liberals to reconsider their attitude toward the Court and to reassess the feasibility and desirability of relying on the Court to protect individual rights.[6] Although critics of *Dobbs* have often pointed to opinion polls showing declining confidence in the Court as yet more evidence of the damage that the ruling has wrought,[7] one might also see these polls as reflecting a more accurate public understanding of the Court. Post-*Dobbs* polls show a sharp uptick in the percentage of Americans who believe the Court has too much power[8] and who believe that the

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5 *See generally* MARY ZIEGLER, *ROE*: THE HISTORY OF A NATIONAL OBSESSION (2023) (detailing the mobilization of abortion opponents following *Roe v. Wade*).

6 *See, e.g.*, *The Supreme Court Isn't Listening, and It's No Secret Why*, N.Y. TIMES (Oct. 1, 2022), https://www.nytimes.com/2022/10/01/opinion/supreme-court-legitimacy.html [https://perma.cc/C6EA-SW2E] ("[T]he meaning of the Constitution is far more than what the [C]ourt decrees; it is the result of an ongoing conversation between the [C]ourt and the American people. Those who protested the loss of their rights after the Dobbs decision, and those who showed their determination to protect those rights . . . are speaking directly to the [C]ourt.").

7 *See, e.g.*, Linda Greenhouse, *Requiem for the Supreme Court*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/opinion/roe-v-wade-dobbs-decision.html [https://perma.cc/4E64-RBMH].

8 *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/ [https://perma.cc/8E3D-LHQJ] (finding 45% of Americans believe the Court has too much power, up 20% from two years earlier).

Court is overly engaged with politics.[9] The high confidence numbers the Supreme Court historically received may be attributed, in part, to misconceptions and a lack of knowledge about the Court. Viewed from this perspective, *Dobbs* provided a clarifying moment in terms of public attitudes toward the Court; it made clear that courts are inconsistent allies in struggles for expanded opportunity and equality. *Dobbs* thus offers an opportunity to rethink the role of the courts, particularly the Supreme Court, in protecting constitutional rights.

History shows that the Supreme Court has rarely been in the vanguard of advancing rights. At best, the Court recognizes new constitutional rights when the Justices believe majority sentiment has coalesced or is in the process of coalescing around a shared norm.[10] It was on this assumption that the Court struck down state-mandated segregation in schools in 1954;[11] overturned state bans on interracial marriage in 1967;[12] declared the death penalty effectively unconstitutional in 1972;[13] struck down laws criminalizing homosexual relations[14] and then bans on same-sex marriage;[15] and declared the Second Amendment to protect an individual right to bear arms.[16] This was also the operating assumption of the Court in *Roe v. Wade* in 1973: the Justices assumed their decision aligned with a trend of growing support for abortion access.[17] In most of these cases, the Court's reading of public sentiment was correct, and future generations of jurists, lawmakers, and citizens came to understand the judicial recognition of the constitutional right as one step in a larger, more

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9 *Over Half of Americans Disapprove of Supreme Court as Trust Plummets*, ANNENBERG PUB. POL'Y CTR. (Oct. 10, 2022), https://www.annenbergpublicpolicycenter.org/over-half-of-americans-disapprove-of-supreme-court-as-trust-plummets/ [https://perma.cc/MX7T-RPTQ] (finding 69% of Americans feel the Supreme Court is "too mixed up in politics"); *see also id.* (finding an increase in the percentage of Americans who believe the Court is conservative and a decrease in the percentage who believe Justices "set aside their personal and political [views and] make rulings based on the Constitution, the law, and the facts [of the case]").

10 *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996).

11 *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

12 *See generally* Loving v. Virginia, 388 U.S. 1 (1967).

13 *See generally* Furman v. Georgia, 408 U.S. 238 (1972).

14 *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

15 *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).

16 *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008).

17 *See generally* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* (1994) (detailing the history of the Court's deliberation in *Roe v. Wade*).

durable transformation of the politics and norms surrounding the issue. On this count, *Roe* proved an exception.

Contestation over constitutional principles outside the courts performs a function in our constitutional system that is every bit as significant and consequential as the more self-consciously legalistic constitutionalism that lawyers and judges practice in the courts. Extrajudicial engagement with the Constitution provides information to the courts. Even if Supreme Court Justices proclaim themselves independent from the demands of public opinion,[18] this has never been the reality.[19] Robust social movements, particularly those that produce victories in the political sphere, get the attention of the courts and influence the development of constitutional doctrine. United States constitutional history is replete with examples of this dynamic in action. The Court's economic libertarian leanings in the early decades of the twentieth century became increasingly untenable in the face of widespread support for economic regulation and labor rights in the New Deal era.[20] The Massive Resistance campaigns of the mid- and late 1950s constrained the Court's implementation of *Brown*,[21] while the achievements of the civil rights movement in the 1960s fueled the Warren Court's willingness to expand constitutional protections against racial discrimination.[22] The gun rights movement helped turn far-fetched claims into Second Amendment doctrine, and the gay rights movement did the same for novel Fourteenth Amendment claims.[23] Social movements, political breakthroughs, and norm shifts play an integral role in shaping constitutional law.

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18 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 291 (2022) ("[W]e cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 958 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (asserting "the Court's duty is to ignore public opinion and criticism on issues that come before it"); *id.* at 964 (asserting "the Court's legitimacy is enhanced by faithful interpretation of the Constitution irrespective of public opposition").

19 *See, e.g.*, *Dobbs*, 597 U.S. at 230 (noting that twenty-six states had called on the Court to overturn *Roe*).

20 *See generally* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2002) (describing the transformation of constitutional law in the 1930s).

21 *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 290–343 (2004).

22 *See generally*, *e.g.*, CHRISTOPHER W. SCHMIDT, THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA (2018) (describing the impact of the Black freedom struggle on constitutional law in the 1960s).

23 *See generally* DAVID COLE, ENGINES OF LIBERTY (2016); BARRY FRIEDMAN, THE WILL OF THE PEOPLE (2009).

Extrajudicial activism not only increases pressure on the courts to respond to demands for constitutional change; it also helps shape the values and principles expressed in constitutional doctrine.[24] The appeal to public sensibility is a critical element of successful social movements, and political mobilization can serve as a proving ground for constitutional claims. The campaign for gun rights promoted an image of individual citizens defending themselves and their homes, an image the Court in *Heller* transformed into a Second Amendment right.[25] The campaign for same-sex marriage revolved around two central principles: a critique of discrimination based on sexual orientation; and an affirmative argument for the importance of marriage and free choice. Each resonated in the social movement and political efforts to expand support for marriage equality, each featured prominently in the constitutional claims pursued in the courts, and each was drawn on by Justice Kennedy in *Obergefell*.[26] His hybrid-rights approach was an awkward fit as a matter of established constitutional doctrine, but it captured a common sense of the issue that had coalesced through campaigns to advance the cause of marriage equality outside the courts.

Those who seek to reconstruct a constitutional right to abortion after *Dobbs* would do well to learn from the rich history of the intersection of extrajudicial political and social mobilization and constitutional change. The strengthening of reproductive rights as a political issue and a social norm constitutes an essential building block to a possible future moment when the Supreme Court again recognizes access to abortion as a fundamental right under the Fourteenth Amendment.

II
ABORTION RIGHTS ACTIVISM SINCE *DOBBS*

Dobbs has changed the politics of abortion and given reproductive rights advocates the upper hand. After decades of relatively unchanged polling on abortion, support for access to abortion has increased.[27] The

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[24] On this point, the work of Reva Siegel is particularly valuable. *See*, *e.g.*, Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PENN. L. REV. 297 (2001); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004).

[25] *See, e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008).

[26] Obergefell v. Hodges, 576 U.S. 644, 672–75 (2015).

[27] *Broad Public Support for Legal Abortion Persists 2 Years After Dobbs*, PEW RSCH. CTR. (May 13, 2024), https://www.pewresearch.org/politics/2024/05/13/broad-public

campaign to protect access to abortion has taken place on a variety of levels: grassroots consciousness-raising efforts; political mobilization for abortion rights at the local, state, and national levels; and litigation efforts in state and federal courts.[28] State-level abortion-rights mobilization is well underway. The new politics of abortion rights was on display within months of *Dobbs*, when voters in Kansas, typically a bastion of conservative politics, easily rejected a state constitutional amendment that would have removed state constitutional protection for abortion.[29] The Kansas referendum proved a bellwether, and subsequent referenda to protect abortion rights—some in states with strong Republican majorities—have mostly succeeded. Voters in Arizona, California, Colorado, Maryland, Michigan, Missouri, Montana, New York, Nevada, Ohio, and Vermont approved constitutional amendments protecting abortion rights.[30]

Although state constitutional litigation has provided important victories for abortion rights, overall, state courts have produced mixed results for reproductive rights advocates. In early 2023, the South Carolina Supreme Court ruled that its state constitution protects access to abortion, basing its holding on a provision protecting against "unreasonable invasion[s] of privacy."[31] Six weeks later, the

-support-for-legal-abortion-persists-2-years-after-dobbs/ [https://perma.cc/3PW6-9SK6]; Christine Fernando & Amelia Thomson-Deveaux, *Support for Legal Abortion Has Risen Since Supreme Court Eliminated Protections, AP-NORC Poll Finds*, AP NEWS (July 9, 2024, 7:21 AM), https://apnews.com/article/abortion-trump-biden-election-2024-dobbs-498d14f6e2bbfe1f313f006ad089de4e [https://perma.cc/R6W4-ZFJ6].

28 *See, e.g.*, Kate Zernike, *The Long Path to Reclaim Abortion Rights*, N.Y. TIMES (July 2, 2022), https://www.nytimes.com/2022/07/02/us/abortion-rights-roe-v-wade.html [https://perma.cc/4HG3-GUUB].

29 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 [https://perma.cc/45PG-UFAJ].

30 Mitch Smith & Ava Sasani, *Michigan, California and Vermont Affirm Abortion Rights in Ballot Proposals*, N.Y. TIMES (Nov. 10, 2022), https://www.nytimes.com/2022/11/09/us/abortion-rights-ballot-proposals.html [https://perma.cc/TQG6-6ESE]; Julie Carr Smyth, *Ohio Voters Enshrine Abortion Access in Constitution in Latest Statewide Win for Reproductive Rights*, AP NEWS (Nov. 7, 2023, 8:31 PM), https://apnews.com/article/ohio-abortion-amendment-election-2023-fe3e06747b616507d8ca21ea26485270 [https://perma.cc/8ADA-8DML]; *Results For Abortion-Related Ballot Measures, 2024*, BALLOTPEDIA, https://ballotpedia.org/Results_for_abortion-related_ballot_measures,_2024 [https://perma.cc/8RKV-P24J]. *See also* Jane S. Schacter, *Direct Democracy After* Dobbs*: Paradox, Irony and the Coming Recalibration*, 2024 U. ILL. L. REV. 1497 (describing post-*Dobbs* referenda in support of abortion rights).

31 Planned Parenthood of S. Atl. v. South Carolina, No. 2022-001062 (S.C. Jan. 5, 2023).

same court reversed course, upholding a six-week abortion ban.[32] The supreme courts of Idaho and Iowa have held that their state constitutions do not recognize abortion as a fundamental right.[33] Courts in North Dakota and Indiana have held that their state constitutions protect access to abortion in cases where the life or health of the mother is at risk; courts in Oklahoma and Texas have held that their state constitutions protect access to abortion when needed to preserve the life of the patient.[34] The Supreme Court of Kansas struck down abortion regulations as violating a state constitutional provision protecting personal autonomy, which the Court had recognized as protecting access to abortion.[35] The Supreme Court of Utah indicated that it was considering whether its state constitution protected abortion rights, and emphasized that it was not obligated to follow the line of reasoning of the U.S. Supreme Court in *Dobbs*.[36]

Reproductive rights advocates have also sought federal legislation protecting access to abortion. In September 2021, anticipating a possible decision overturning *Roe*, Democrats in the House of Representatives passed the Women's Health Protection Act.[37] The bill opened with a list of findings, the first of which reads:

> Abortion services are essential to health care and access to those services is central to people's ability to participate equally in the economic and social life of the United States. Abortion access allows

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32 Planned Parenthood of S. Atl. v. South Carolina, No. 2023-000896 (S.C. Aug. 23, 2023).

33 Planned Parenthood Great Nw v. Idaho, No. 49615-2022 (Idaho Jan. 5, 2023); Planned Parenthood of the Heartland v. Reynolds *ex rel.* Iowa, 975 N.W.2d 710 (Iowa 2022); Planned Parenthood of the Heartland v. Reynolds *ex rel.* Iowa, No. 23-1145 (Iowa June 28, 2024).

34 A summary of state-level litigation efforts can be found at *State and Federal Reproductive Rights and Abortion Litigation Tracker*, KFF, (June 6, 2025), https://www.kff.org/womens-health-policy/report/state-and-federal-reproductive-rights-and-abortion-litigation-tracker/ [https://perma.cc/4C2S-BRGT].

35 Hodes & Nauser v. Kobach, 551 P.3d 37 (Kan. 2024); Hodes & Nauser v. Stanek, 551 P.3d 62 (Kan. 2024); Hodes & Nauser v. Schmidt, 440 P.3d 461, 466 (Kan. 2019) (holding that section 1 of the Kansas Constitution Bill of Rights protects an inalienable natural right to personal autonomy, which includes the right to abortion).

36 Planned Parenthood of Utah v. Utah, 554 P.3d 998 (Utah 2024). *See generally* Mary Ziegler, *An Eventful Summer for State Constitutional Abortion Rights Litigation*, STATE CT. REP. (Aug. 21, 2024), https://statecourtreport.org/our-work/analysis-opinion/eventful-summer-state-constitutional-abortion-rights-litigation [https://perma.cc/652N-DGLR] (describing state-level abortions rights litigation); Laura E. Jenkins, Roe *is Dead, Long Live the Courts: The Role of Courts in a Post-*Roe *America*, 45 NEW POL. SCI. 264 (2023) (describing state-level abortions rights litigation).

37 Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021),

> people who are pregnant to make their own decisions about their pregnancies, their families, and their lives.[38]

The bill never made it to a vote in the Senate. The House passed the bill again in July 2022, directly following *Dobbs*, but again it failed to receive a vote in the Senate. At the next session of Congress, the bill was introduced once again.[39]

Abortion rights groups have also seen a massive increase in fundraising in the wake of *Dobbs*.[40] Contributions to support abortion-protective referenda have vastly outpaced opposition contributions. For the 2024 referenda, abortion rights contributions in Arizona were $35 million, compared with $1.3 million in opposition contributions; in Missouri, they were over $30 million versus under $2 million; in Florida, they were $118 million versus $12 million.[41] An abortion rights organizer noted that they had "been out-raised, out-organized and out-funded for 50 years," but post-*Dobbs* this is no longer the case.[42] "In moments of tragedy, I am hopeful that there comes solidarity and increased clarity."[43]

The campaign to make a world in which the Supreme Court recognizes a constitutional right to abortion cannot be limited to constitutional litigation in federal courts.[44] "Constitutionality needs to become part of the currency of abortion politics," the legal scholar Jeremy Waldron urged.[45] Movement mobilization, legislative advocacy, and state-level constitutional litigation are all critical battlegrounds for this campaign. Each offers forums for actors outside the federal judiciary to debate the principles on which federal constitutional rights are constructed.

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38 *Id.*

39 Women's Health Protection Act of 2023, S. 701, 118th Cong. (2023); Women's Health Protection Act of 2023, H.R. 12, 118th Cong. (2023).

40 Rose Horowitch, Dobbs*'s Confounding Effect on Abortion Rates*, ATLANTIC (Oct. 26, 2023), https://www.theatlantic.com/politics/archive/2023/10/post-roe-national-abortion-rates/675778/ [https://perma.cc/22WN-P6SX] ("In the five months after *Roe* fell, the National Network of Abortion Funds received four times the money from donations than it got in all of 2020.").

41 *Results for Abortion-Related Ballot Measures, 2024*, BALLOTPEDIA, https://ballotpedia.org/Results_for_abortion-related_ballot_measures,_2024 [https://perma.cc/8RKV-P24J].

42 Zernike, *supra* note 28.

43 *Id.*

44 *See* David S. Cohen, Greer Donley & Rachel Rebouché, *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1, 11–13 (2022).

45 Jeremy Waldron, *Denouncing* Dobbs *and Opposing Judicial Review* 31 (N.Y. Univ. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 22-39, 2022), https://ssrn.com/abstract=4144889 (on file with the Oregon Law Review).

III
REFRAMING THE CONSTITUTIONAL RIGHT TO ABORTION: DOCTRINE

The project to reconstruct a constitutional right to abortion in the wake of *Dobbs* provides an opportunity to advance a new and more powerful frame for constitutional rights analysis. Rebuilding the right to abortion as a matter of constitutional doctrine should draw strength and direction from the social movement and political efforts to protect abortion rights across the nation. Most importantly, it is an opportunity to center the constitutional right around a principle of women's equality alongside the autonomy and personal freedom principles that have long been the centerpiece of reproductive rights doctrine.

A. The Limits of Liberty and the Promise of Equality

From *Roe* to *Casey* to *Dobbs*, the prevailing understanding of the constitutional right to abortion centered on the Due Process Clause and its protection of privacy and personal autonomy. Although advocates for abortion rights advanced sex equality arguments in the litigation preceding *Roe*,[46] Justice Harry Blackmun's *Roe* opinion centered not on women's equal role in society but on the "right of the physician to administer medical treatment" and the "right of personal privacy."[47] The dominance of privacy-based rationales for the right to abortion was largely a product of the particular circumstances in which *Roe* took shape in the 1970s. These circumstances included Blackmun's drafting of the *Roe* decision itself and abortion-rights litigation that immediately followed;[48] the Court's recognition of sex as a suspect classification without discussion of abortion regulations;[49] the Court's holding in *Geduldig v. Aiello*[50] that discrimination based on pregnancy did not constitute sex discrimination under the Constitution;[51] and the campaign for the Equal Rights Amendment, whose advocates downplayed connections between the proposed amendment and abortion rights.[52]

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46 Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 823–24 (2007).

47 Roe v. Wade, 410 U.S. 113, 165, 154 (1973).

48 Siegel, *supra* note 46, at 826.

49 *Id.*

50 417 U.S. 484 (1974).

51 Siegel, *supra* note 46, at 826.

52 Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. 1323, 1389–415 (2006); Siegel, *supra* note 46, at 827–28.

Those who frame the right to abortion as a matter of privacy, as Justice Blackmun did in *Roe*, or personal liberty, as the Kennedy-O'Connor-Souter plurality did in *Casey*, have been criticized for failing to fully capture the constitutional stakes of the issue.[53] Ruth Bader Ginsburg famously argued that the right to reproductive choice is better understood as advancing a principle of sex equality. In 1985 she wrote, "the Court's *Roe* position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."[54] In 1992 Ginsburg suggested that *Roe* would have been less controversial if it had "homed in more precisely on the women's equality dimension of the issue."[55] The primary thrust of these arguments is that the right to abortion would be better grounded not in the liberty protections of the Due Process Clause but in the Equal Protection Clause.

Members of the Supreme Court have repeatedly referenced equality principles as implicated in the right to abortion. Although Justice Blackmun's *Roe* decision framed the right largely in terms of privacy

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53 Scholarship advancing an equality grounding for the right to abortion include Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016–28 (1984); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160 (2013); Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. 167 (2020); Brief of Equal Protection Constitutional Law Scholars Serena Mayeri et al. as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392), 2021 WL 4340072 [hereinafter Equal Protection Amici Curiae Brief]; Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67 (2023).

54 Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 386 (1985).

55 Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200 (1992); *see also* Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."); *Nomination of Ruth Bader Ginsberg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 103d Cong., 207 (1993) (statement of Ruth Bader Ginsburg, J., D.C. Cir.) [hereinafter *Ginsburg Confirmation*] ("[Y]ou asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated [in the abortion question]. The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices."); Jonathan Bullington, *Justice Ginsburg:* Roe v. Wade *Not 'Woman-Centered,'* CHI. TRIB. (May 16, 2019, at 18:17 CDT), https://www.chicagotribune.com/2013/05/11/justice-ginsburg-roe-v-wade-not-woman-centered-2/ [https://perma.cc/MYE4-ALN9].

and deference to physician judgment, in subsequent abortion opinions, he recognized women's equality as a core principle of the right.[56] Advocates in the *Dobbs* litigation urged the Court to consider an equal protection basis for the right to abortion.[57] The *Dobbs* majority opinion summarily dismissed the equal protection claim,[58] declaring it foreclosed by the 1974 precedent of *Geduldig v. Aiello*.[59]

B. The Possibility of Blended Rights Claims

A reconstituted right to abortion need not choose between equality and liberty. Although the right to abortion can be built upon existing rights doctrine, either under an unenumerated fundamental rights analysis under the Due Process Clause or an equal protection analysis, an approach that threads together fundamental rights and equality principles provides another constitutional foundation for reproductive rights. Such blended rights claims are often wrongly portrayed as novel departures for American constitutionalism. In fact, constitutional claims that blend principles of liberty and equality have a robust historical pedigree in American constitutional history.

The dissent in *Dobbs* suggests what a reformulated constitutional right to abortion might look like. The joint dissenters argue that access to abortion protects both "liberty and equality"—a pairing they repeat numerous times.[60] "Respecting a woman as an autonomous being, and

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56 *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) ("A woman's right to make [the abortion] choice freely is fundamental. Any other result . . . would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.") (citations omitted); Webster v. Reproductive Health Servs., 492 U.S. 490, 538 (1989) (Blackmun, J., concurring in part and dissenting in part) ("I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 958 (1992) (opinion of Blackmun, J.) (The state's "assumption—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause."). On the evolution of Blackmun's views on abortion, see LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY (2005).

57 Equal Protection Amici Curiae Brief, *supra* note 53.

58 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236–37 (2022).

59 Geduldig v. Aiello, 417 U.S. 484 (1974); An equal protection argument is "squarely foreclosed by our 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." *Dobbs*, 597 U.S. at 236. Alito's *Dobbs* opinion also references *Bray v. Alexandria Women's Health Clinic* for the position that abortion regulations should not be treated as motivated by animus or invidious discrimination against women. *Id.* at 236–37 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 273–74 (1993)).

60 *Dobbs*, 597 U.S. at 359, 362, 376, 380, 411.

granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions," they write, adding that the majority ruling would result in "the curtailment of women's rights, and of their status as free and equal citizens."[61] "Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays."[62]

The joint dissent does not identify a historical foundation for the idea of a constitutional right based on the interwoven values of equality and liberty. On the interlinkages between liberty and equality, the dissent cites to Justice Kennedy's decision in *Obergefell v. Hodges*.[63] Justice Kennedy's *Obergefell* opinion, in turn, made little effort to ground in constitutional history its blending of equal protection and due process principles.[64] Justice Kennedy and the *Dobbs* dissenters treat the idea of a blended liberty and equality claim as one of abstract principle and common sense, not one with a foundation in the framing of the Fourteenth Amendment or in longstanding constitutional practice. Scholars have also tended to treat the blending of equal protection and due process in recent cases, particularly ones involving gay rights, as a novel turn in constitutional doctrine.[65]

This idea is not new, however. It can be traced back to the creation of the Fourteenth Amendment.[66] And it has operated in the background

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61 *Id.* at 359, 362; *see also id.* at 365 (describing *Roe* and *Casey* as based on "the equal rights of citizens to decide on the shape of their lives").

62 *Id.* at 380.

63 *Id.* (citing 576 U.S. 644, 672–75 (2015)).

64 In describing the "synergy" between the Equal Protection and Due Process Clauses, Justice Kennedy cites two cases: *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), and *Bearden v. Georgia*, 461 U.S. 660 (1983). Curiously, he included a citation to his concurrence in *M.L.B.*, 519 U.S. at 128–29, in which he concluded that a combination of the due process and equal protection principles were not necessary because he believed the due process claim sufficient to decide the case. *Obergefell*, 576 U.S. at 672–74.

65 Appreciation of the historical foundations of constitutional claims that blend principles of equality and liberty has not been helped by the proliferation of modern and technical-sounding terms—"stereoscopic," "legal double helix," "synergy"—to describe the concept. *See* Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) ("[D]ue process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix."); *Obergefell*, 576 U.S. at 672.

66 *See* Christopher W. Schmidt, *Thirteenth Amendment Echoes in Fourteenth Amendment Doctrine*, 73 HASTINGS L.J. 723, 730–35 (2022); *see also* Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355 (2020) (arguing that hybrid rights

of constitutional law ever since.[67] The doctrinal silos of due process and equal protection—of liberty and equality—were, in fact, a new development in the years following the drafting and ratification of the Fourteenth Amendment.

Those who were primarily responsible for adding the Fourteenth Amendment to the Constitution assumed that the principles of freedom from constraint and protection against group-based discrimination were inextricably linked.[68] In debates over the drafting and ratification of the Fourteenth Amendment, few people paid much attention to the division of work between its rights-protective provisions—the Privileges or Immunities Clause, Due Process Clause, and Equal Protection Clause.[69] The first legal challenges made under the Fourteenth Amendment tended toward a catchall approach in which litigants based their claims on each of the provisions of Section 1, as well as the Thirteenth Amendment, and early court decisions tended to echo this aggregative approach, describing the "freedom of the slave race" as the "one pervading purpose" of the Thirteenth and Fourteenth Amendments.[70]

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are best understood as traditional single-provision rights claims in which courts consider other parts of the Constitution to help determine constitutional meaning).

I operate from different premises from Coenen's thoughtful examination of hybrid rights. He assumes that a fully hybrid right would require that each separate provision contains a constitutional value, and that when a court wants to combine these constitutional values they operate in the world of hybrid rights. Rather than assuming that each provision can be correlated with a particular constitutional value, I argue that certain constitutional values exist that do not fit clearly into a single constitutional provision. This approach, I argue, aligns with the original meaning of the Fourteenth Amendment. The value exists, and the constitutional text was understood to protect that value, but the work of lining up particular constitutional words with the values was not a part of how the framers and ratifiers of the Fourteenth Amendment understood their work. The right I am interested in protecting emerged out of constitutional practice, not doctrine. I am urging an approach to constitutional law in which the doctrine adapts to better recognize the right, which is grounded in social expectations and political practice—rather than allowing the internal logics of doctrinal development limit law's ability to recognize constitutional rights.

67 Schmidt, *supra* note 66, at 748–71.

68 *Id.* at 730–37.

69 *See generally* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J 1385 (1992) (detailing history of the drafting of the Fourteenth Amendment); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 49–63 (1988) (same); ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 79 (2019) (noting that in 1866, "most congressmen referred to [the individual provisions of Section 1] as a set of principles that should be viewed as a whole and reinforce one another").

70 The Slaughter-House Cases, 83 U.S. 36, 71 (1872); *see also Ex Parte* Virginia, 100 U.S. 339, 344–45 (1879); Strauder v. West Virginia, 100 U.S. 303, 306 (1879).

If forced to locate this broad purpose in a particular provision of the Fourteenth Amendment, the framers and early interpreters of the Amendment would have looked to the Privileges or Immunities Clause. In the *Slaughter-House Cases*, the Supreme Court narrowed the provision's meaning to a narrow collection of rights relating to an individual's connection with the federal government.[71] Only in the late nineteenth century did it become clear that Fourteenth Amendment doctrine was moving down two increasingly distinct tracks: fundamental constitutional rights (protected under substantive due process doctrine against unreasonable infringement, without any special attention to race) and nondiscrimination (protected under equal protection doctrine). Over the course of the twentieth century, several landmark cases did not fit easily into a single category,[72] and members of the Supreme Court and academic commentators regularly questioned the wisdom and administrability of a doctrine premised on a sharp dichotomy between liberty and equality claims.[73] But the Fourteenth Amendment doctrine that solidified in the second half of the twentieth century assumed the dichotomy as its analytical baseline.[74]

The doctrinal silos in Fourteenth Amendment doctrine have often functioned to constrain rights claims. Consider, for example, the 1883 decision in the *Civil Rights Cases*, which struck down the 1875 Civil Rights Act.[75] The majority examined each potential constitutional basis for the federal law in turn and concluded that no provision of the Thirteenth or Fourteenth Amendment provided its authority. Justice Harlan's dissent, by contrast, slid from one Fourteenth Amendment provision to another, invoked the "substance and spirit" of the Fourteenth Amendment, and concluded that the foundational principle of that Amendment gave Congress authority to pass a national civil rights regulation.[76] Although Harlan's reasoning may come up short by the standards of modern doctrinal analysis, with its emphasis on textually derived doctrinal categorization, his looser, purpose-focused

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71 *Slaughter-House*, 83 U.S. at 78–80.

72 *See* Schmidt, *supra* note 66, at 748–54 (discussing Buchanan v. Warley, 245 U.S 60 (1917), and Brown v. Bd. of Educ., 347 U.S. 483 (1954), as examples of cases in which fundamental rights and equality principles intersected).

73 *Id.* at 762–71.

74 *Id.* at 761–62.

75 109 U.S. 3, 26 (1883).

76 *Id.* at 26–62.

approach mirrored prevailing assumptions about the Fourteenth Amendment when it was drafted and ratified.

More recently, various Supreme Court Justices have explored the possibilities of blended equality-liberty claims. They featured, for example, in a line of cases, dating to the 1950s, involving legal representation for the indigent.[77] Decades later, Justice Ginsburg tried to elevate this approach, emphasizing the power of the twinned principles.[78] Justice Kennedy's opinion for the Court in *Lawrence v. Texas* insisted that due process and equal protection operated in conjunction,[79] an approach he embraced even more explicitly in *Obergefell*.[80] Conservative justices have tended to push back against blended rights claims. Justice Thomas has a line of opinions critiquing the blending of due process and equal protection values in access-to-

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77 *See generally* Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S 353 (1963). Ross v. Moffitt, 417 U.S. 600, 608–09 (1974) ("The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause . . . and some from the Due Process Clause . . . . Neither Clause by itself provides an entirely satisfactory basis for the result reached . . . ." (footnote omitted)); Bearden v. Georgia, 461 U.S. 660, 665–66 (1983) (noting that "[d]ue process and equal protection principles [often] converge in the Court's analysis" and warning against the resolution of Fourteenth Amendment cases "by resort to easy slogans or pigeonhole analysis").

78 *See* M.L.B. v. S.L.J., 519 U.S. 102, 120–21 (1996). In praise of Ginsburg's approach, Kenneth Karst wrote, "the point of the judicial enterprise is not to achieve conceptual symmetry, but to provide citizens with equal justice under law." Kenneth L. Karst, *Those Appealing Indigents: Justice Ginsburg and the Claims of Equal Citizenship*, 70 OHIO ST. L.J. 927, 939 (2009); *see also* Karlan, *supra* note 65, at 480–83 (discussing M.L.B. as an example of a "stereoscopic" approach to the Fourteenth Amendment).

79 Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."); *see also id.* at 579 (O'Connor, J., concurring) (arguing that a law making only same-sex sodomy illegal violated the Equal Protection Clause); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 142 (2007) ("*Lawrence* stands at the pinnacle of a huge doctrinal edifice, built over the course of a century, in which concerns about group subordination have contributed to a notable development in the law of substantive due process.").

80 Obergefell v. Hodges, 576 U.S. 644, 672 (2015) ("The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become." (citations omitted)); *id.* at 673 ("Each concept—liberty and equal protection—leads to a stronger understanding of the other.").

justice cases.[81] In oral argument in *Lawrence*, Justice Scalia chastised a lawyer for not clearly separating their due process and equal protection claims.[82] Chief Justice Roberts lashed out against Kennedy's due process-equal protection "synergy" in his *Obergefell* dissent.[83] Critics accuse those who embrace blended claims of manipulating the doctrine to achieve their desired results.[84]

Returning to the doctrinal heritage of blended rights claims provides the framework for a new right to abortion. Of the various arguments for the value of hybrid rights, the one that is most relevant for my argument builds on Justice Ginsburg's reasoning for why she felt equal protection values would have been a stronger basis for the right to abortion. Writing in 1985, she predicted "that organized and determined opposing efforts to inform and persuade the public on the abortion issue will continue through the 1980s. In that process there will be opportunities for elaborating in public forums the equal-regard conception of women's claims to reproductive choice uncoerced and unsteered by government."[85] Note Ginsburg's emphasis on "efforts to inform and persuade the public on the abortion issue" and the elaboration of constitutional claims in "public forums." She recognized that even if constitutional doctrine's path dependencies meant that *Roe*'s privacy framework, for all its flaws, had considerable staying

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[81] Lewis v. Casey, 518 U.S. 343, 367 (1996) (Thomas, J., concurring); Halbert v. Michigan, 545 U.S. 605, 626–27 (2005) (Thomas, J., dissenting); *M.L.B.*, 519 U.S., at 130–44 (Thomas, J., dissenting).

[82] Oral Argument at 3:24–3:35, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), https://www.oyez.org/cases/2002/02-102 [https://perma.cc/R3R6-BQWN]. ("Well, you're getting to your equal protection argument now. Let's . . . let's separate the two. The first is, your . . . your . . . your fundamental right argument, which has nothing to do with equal protection?").

[83] *Obergefell*, 576 U.S. at 706–07 (Roberts, C.J., dissenting) ("[P]etitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a 'synergy between' the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases." (citation omitted)).

[84] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 244 (1982) (Burger, C.J., dissenting).

[85] Ginsburg, *supra* note 54, at 386; *see also Ginsburg Confirmation*, *supra* note 55, at 205 (Ginsburg noting, with regard to the equal protection and privacy bases for a constitutional right to abortion, "it has never in my mind been an either/or choice, never one rather than the other; it has been both"); Siegel, Mayeri, & Murray, *supra* note 53, at 97 ("After *Dobbs*, equality arguments continue to multiply in form and significance, expanding to new venues and vernaculars, and translating into legal and political discourse the constitutional values that animate struggles for reproductive justice.").

power, equality arguments resonated with people operating outside the courts. Ginsburg, in short, believed that extrajudicial constitutionalism would be the place where the stronger constitutional argument emerged. Assumedly, this would produce a feedback mechanism for the courts, in which judges eventually might incorporate the equality argument into constitutional doctrine protecting access to abortion.[86]

But the same reason Ginsburg argued that equality principles deserve greater prominence in the abortion debate tells us that liberty-based claims are also essential for fully capturing reproductive rights. Liberty-based arguments have a long pedigree in American history[87] and considerable cultural resonance today. The theme of freedom has remained central to abortion rights activism. Post-*Dobbs*, this seems to be the framing of the issue that abortion rights supporters feel will most resonate with broad constituencies. In 2024, Kamala Harris emphasized freedom as an overriding theme of her presidential campaign, with reproductive freedom as an integral component of this push.[88] In places such as Missouri, which approved an abortion-rights ballot initiative in 2024, supporters centered their campaign on a rhetoric of personal freedom. The constitutional amendment voters approved was titled "The Right to Reproductive Freedom Initiative," and it stated that the government "shall not deny or infringe upon a person's fundamental right to reproductive freedom," defined as "the right to make and carry out decisions about all matters related to reproductive health care . . . ."[89] The coalition that spearheaded the amendment campaign described its victory as "a monumental step toward restoring personal freedoms and ensuring politicians no longer interfere in deeply personal health care decisions."[90]

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86 *See also* Law, *supra* note 53, at 986 (lamenting that in debates over abortion "women's lives and sex-based equality have become distinctly secondary issues[,]" and attributing this development to the debate's focus on *Roe* and the Court, which has encouraged "a basis of opposition to abortion distinct from the merits of reproductive freedom itself.").

87 *See generally*, *e.g.*, ERIC FONER, THE STORY OF AMERICAN FREEDOM (1999).

88 *See, e.g.*, Elaine Kamarck & William A. Galston, *Freedom—Harris's Message to America*, BROOKINGS (Aug. 23, 2024), https://www.brookings.edu/articles/freedom-harriss-message-to-america/ [https://perma.cc/VK57-K8T2]; Savannah Kuchar, *Democrats Hope to Win Over Moderates Using Conservative Values*, USA TODAY (Aug. 26, 2024, at 09:54 ET), https://www.usatoday.com/story/news/politics/elections/2024/08/25/democrats-congress-abortion-republican-voters-values/74616721007/ [https://perma.cc/9RBY-5BYR].

89 MO. CONST. art. I, § 36, https://moconstitutionalfreedom.org/wp-content/uploads/2024/01/Missourians-for-Constitutional-Freedom-Amendment.pdf [https://perma.cc/9R78-6DDX].

90 *Missourians Vote YES on Amendment 3, Enshrining a Fundamental Right to Reproductive Freedom*, MISSOURIANS FOR CONST. FREEDOM (Nov. 5, 2024),

Post-*Dobbs* efforts to protect access to abortion showed a widespread belief that reproductive rights should be grounded in the nation's commitments to principles of both liberty and equality. The doctrine would do well to reflect this. The opportunity to rethink and rebuild the constitutional right to abortion is also an opportunity to rethink Fourteenth Amendment doctrine more generally.

IV
REFRAMING THE CONSTITUTIONAL RIGHT TO ABORTION: INSTITUTIONS

A campaign to rebuild the constitutional right to abortion needs to focus not only on the legal arguments that lawyers might advance in the courts but also on the institutions—including but not limited to courts—that are responsible for the processes of constitutional development.

The best way for the right to abortion to be fully and truly embedded as a constitutional right is for Congress to pass robust federal legislation defining and defending abortion rights. For this to happen would require a broad-based movement to advance a right to abortion that succeeds in changing minds and laws across the nation—something comparable to the transformational activism and politics that preceded the major legislative initiatives of the New Deal and Civil Rights Era.[91] In the years since *Dobbs*, there have been signs that such a development may be underway.[92]

Congress has three potential sources of constitutional authority for reproductive rights legislation. It could try to incentivize states to adopt more protective policies through its power under the Spending Clause.[93] It could rely on its regulatory authority under the Commerce Clause.[94] Or it could rely on its authority under Section 5 of the Fourteenth Amendment, which empowers Congress to "enforce, by appropriate legislation," the rights guaranteed in the amendment.[95]

The Spending Power gives the federal government the most latitude in determining the scope of abortion protections since it allows

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https://moconstitutionalfreedom.org/missourians-vote-yes-on-amendment-3-enshrining-a-fundamental-right-to-reproductive-freedom/ [https://perma.cc/RJ2N-LH7M].

91 *See*, *e.g.*, LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919–1939 (1990); SCHMIDT, *supra* note 22.

92 *See supra* Part II.

93 U.S. CONST. art. I, § 8, cl. 1.

94 *Id.* art. I, § 8, cl. 3.

95 *Id.* amend. XIV, § 5.

Congress the ability to indirectly regulate in ways that it cannot directly regulate.[96] The Spending Power also has the benefit of taking a cooperative approach to advancing federal policy, allowing states an opportunity to join in the implementation and enforcement effort. But since it is an indirect method of regulation, incentivizing states to adopt federal abortion rights policy with promises of federal funding (or threats to withhold federal funding), Spending Power comes with the risk that states refuse to adopt the federal policy. Considering the political geography of views on abortion and the polarized nature of our political world, this is a real concern. Even with a successful national reproductive rights campaign that achieves lawmaking majorities in Congress, certain states would likely still refuse financial incentives to protect abortion rights.

Legislation based on the Commerce Power offers the most secure constitutional foundation for direct federal protection of abortion rights under longstanding Commerce Clause doctrine. The medical service providers that offer abortion procedures are part of a nationwide network that falls comfortably within the reach of Congress's authority to regulate interstate commerce. Congress has used, and courts have upheld, the Commerce Clause as authority for past abortion-related legislation.[97]

Finally, for reasons I detail below, legislation based on Section 5 of the Fourteenth Amendment would be the most vulnerable to constitutional challenge in the courts. But it would also be the most powerful option in advancing a congressional claim on the meaning of the Fourteenth Amendment. Section 5 thus offers the riskiest option, but also one with the most transformative potential, both for protecting

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96 *See* United States v. Butler, 297 U.S. 1, 66 (1936). *See generally* South Dakota v. Dole, 483 U.S. 203 (1987).

97 The Freedom of Access to Clinic Entrances (FACE) Act of 1994 and the Partial-Birth Abortion Ban Act (PBABA) of 2003 rely on the Commerce Clause for authority. 18 U.S.C. § 248; 18 U.S.C. § 1531. Lower courts held that the FACE Act was a valid exercise of the Commerce Clause power to regulate activities that substantially affect interstate commerce. United States v. Wilson, 73 F.3d 675, 683 (7th Cir. 1995). In the PBABA, Congress included a jurisdictional element to prohibit any physician "who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion . . . ." 18 U.S.C. § 1531(a). In Fourteenth Amendment challenges to the PBABA, the parties did not dispute Congress's authority to enact the law under the Commerce Clause, and the Supreme Court did not address the matter. Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) ("[W]hether the Partial-Birth Abortion Ban Act of 2003 constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.").

abortion rights under the Constitution and for advancing a new approach to recognizing constitutional rights.

Here is how this project of constitutional reconstruction might work: In response to a widespread and productive campaign to expand recognition of abortion rights, a future Congress uses its authority under the Commerce Clause and the Fourteenth Amendment to create a federal statutory right to abortion.[98] Building on the debates over the foundations of this right that have taken place across the nation, Congress uses its lawmaking authority to assert that the nation's foundational commitments to principles of liberty and equality require basic protections for reproductive rights, including access to abortion. (The scope of these protections would be worked out through legislative debate and compromise, which would be responsive to the achievements of the broader reproductive rights campaign taking place.) If the work of norm transformation has been successful, such legislation would receive some level of support across party lines.

The drafters of this legislation could look to the Civil Rights Act of 1964 as a model for framing the constitutional basis for this law.[99] Lawyers in the John F. Kennedy administration who took responsibility for drafting this landmark civil rights legislation were uncertain about whether the courts would uphold a federal prohibition on racial discrimination in public accommodations if passed under Congress's Section 5 authority.[100] They decided to frame the public accommodations provision (Title II) as based on two independent constitutional bases: the Commerce Power and Section 5.[101] A similar approach could be employed for federal reproductive rights legislation.

At this point, our future Supreme Court would have its role to play. Any federal abortion rights legislation would be challenged in the courts, and eventually the legal challenge would arrive at the Supreme Court. Challengers would ask the Court to decide whether the Constitution gives Congress the authority to protect access to abortion. Here the Court would have a choice. One path it could take was the one the Warren Court chose when the Justices confronted the public

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98 This is the approach taken in the abortion rights bills that have recently been introduced in Congress. *See* Women's Health Protection Act of 2023, S. 701, 118th Cong. (2023); Women's Health Protection Act of 2023, H.R. 12, 118th Cong. (2023).

99 On the constitutional debate over the public accommodations provision of the 1964 Civil Rights Act, see SCHMIDT, *supra* note 22, at 152–79; Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 802–23 (2010).

100 SCHMIDT, *supra* note 22, at 154–57.

101 *Id.* at 152–79.

accommodations provision of the 1964 Civil Rights Act: uphold the law under the Commerce Power.[102] This path was the doctrinally cautious option in 1964, and it would be so again if the Court used it to uphold an abortion-rights statute—the Court has already read the Commerce Power as giving broad powers to Congress to regulate health care providers,[103] and this option would sidestep any questions about the constitutional right to abortion under the Fourteenth Amendment. This option would produce a national right to abortion, its constitutional basis affirmed by the Supreme Court—a landmark achievement for the cause of reproductive rights.

Alternatively, the Court could take the path that several Justices considered when evaluating Title II of the 1964 Civil Rights Act and recognize that Section 5 of the Fourteenth Amendment grants Congress interpretive latitude in defining and protecting Fourteenth Amendment rights. Justice Hugo Black was willing to uphold Title II under Congress's Section 5 authority, even though he was adamant in his belief that Section 1 did not prevent business owners from having racially discriminatory service policies; he rejected this option only because he believed Congress had not chosen to base Title II on the Fourteenth Amendment.[104] Justices William Douglas and Arthur Goldberg wrote concurring opinions in which they found authority for Title II in both the Commerce Clause and Section 5 of the Fourteenth Amendment.[105]

How a future Court may chart an analogous path when considering a federal abortion rights law could take two possible forms. One would require reconsidering current Section 5 doctrine; the other would require reconsidering current abortion doctrine.[106]

The first option would be for the Court to revisit its decision in *Boerne v. Flores*,[107] the case that defines modern Section 5 doctrine. The core holding of *Boerne* is that it is the Court's responsibility to give meaning to the Fourteenth Amendment and that Congress, in using its Section 5 authority, cannot give its own interpretation of the rights

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102 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253–58 (1964); Katzenbach v. McClung, 379 U.S. 294, 299–300, 304–05 (1964).

103 *See* Women's Health Protection Act of 2023, S. 701, 118th Cong. (2023); Women's Health Protection Act of 2023, H.R. 12, 118th Cong. (2023); *see also supra* text of note 98.

104 Schmidt, *supra* note 4, at 80.

105 *Heart of Atlanta Motel, Inc.*, 379 U.S. at 286–91 (Douglas, J., concurring); *id.* at 291–93 (Goldberg, J., concurring).

106 I discuss a possible third option at *infra* note 117.

107 521 U.S. 507 (1997).

provisions of that amendment. The Court thus rejected a broad reading of *Katzenbach v. Morgan*,[108] the 1966 decision in which Justice William Brennan suggested that Section 5 gave Congress some level of independent authority to interpret the meaning of the Fourteenth Amendment.[109] In *Boerne*, the Court held that Section 5 gives Congress the authority to deter or remedy Fourteenth Amendment violations, but that Congress had to defer to judicial determinations of what constitutes a Fourteenth Amendment violation.[110] One option for a future Court would be to revive the idea from *Morgan* that Congress and the Supreme Court share responsibility in giving meaning to the provisions of the Fourteenth Amendment. The Court could then conclude that in passing federal abortion rights legislation, Congress acts upon its independent conclusion that certain state restrictions on abortion access violate the Due Process and Equal Protection Clauses. *Dobbs* would remain a valid judicial interpretation of Section 1 of the Fourteenth Amendment, but the Court would accept that Congress had come to a different conclusion about its meaning as applied to abortion rights. Since *Dobbs* would still be good law, individuals who sought judicial relief from state abortion restrictions would have limited ability to make constitutional claims; however, they would have considerably broader protections when they relied on federal statutory claims.

A central advantage of this option is that it avoids having the Supreme Court reverse course once again on the constitutional right to abortion. This option could prove attractive to Justices who recognize the institutional damage of the *Dobbs* ruling for the Court but sympathize with longstanding critiques of reading the Fourteenth Amendment to protect abortion rights. It could prove attractive to Justices who fear that another judicially initiated reversal on this question would damage the institutional credibility of the Supreme Court. It could also prove attractive to Justices who support protecting

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108 384 U.S. 641 (1966).

109 *Id.* at 648 ("A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment."); *id.* at 651 ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.").

110 *Boerne*, 521 U.S. at 519 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. . . . Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.").

abortion access as a matter of policy but who have qualms about judges reading the Constitution to remove the issue from the process of democratic decision-making. Although reviving a broad reading of *Morgan* would be a radically different approach to the status quo for constitutionalism writ large, this option would provide a more cautious step for the judiciary.

This option would also have systemic benefits for American constitutional development. It is premised on a commitment to constitutional interpretive pluralism—the idea that the constitutional system allows different institutional actors responsibility for determining the meaning of the Constitution and that no single institution can or should be the only source of legitimate constitutional interpretation.[111] Constitutional pluralism refutes the idea of judicial interpretive supremacy. It revives a venerable but too often overlooked tradition in American constitutionalism, one that has roots in both conservative and liberal jurisprudence.[112]

In the 1950s and 1960s, several Justices endorsed a constitutional pluralist approach when they endorsed broad judicial deference to Congress's Section 5 authority as an institutionally conservative alternative to bold judicial innovation in constitutional interpretation. In the years directly preceding the Court's decision in *Brown v. Board of Education*,[113] Justices Felix Frankfurter and Robert H. Jackson suggested that the nation would be better off if Congress, rather than the Supreme Court, took the initiative in banishing de jure racial segregation in public education. Although white southern control of Congress relegated this option to the realm of hypotheticals, they indicated that they were open to the idea that Congress could use its Section 5 authority to prohibit state segregation laws even before the Court in *Brown* held that the Equal Protection Clause demanded this.[114] Their belief that Congress was better positioned to lead such a foundational change to American constitutionalism led Justices

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111 *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997); David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31 (1997).

112 *See* Schmidt, *supra* note 4.

113 347 U.S. 483 (1954).

114 Schmidt, *supra* note 4, at 64–67.

Frankfurter and Jackson to grant Congress broad latitude to interpret and refine Fourteenth Amendment rights. Prominent legal scholars, including some who criticized the Court's handling of the *Brown* decision, expressed support for this option.[115] This is a tradition worth reviving.[116]

A second option for upholding a federal abortion law under Congress's Section 5 authority would be to reaffirm the core holding of *Boerne*—that the Supreme Court, not Congress, is responsible for defining the meaning of the Fourteenth Amendment—but then revise the Court's interpretation of the meaning of the Fourteenth Amendment as applied to reproductive rights. This option would entail overruling *Dobbs* and recognizing that the Fourteenth Amendment protects reproductive rights, including access to abortion.[117] This was the path suggested, but not taken, in *Brown*.[118]

This scenario would have the benefit of relieving institutional stress on the Supreme Court. For those interested in resurrecting a constitutional right to abortion, one of the most important factors will be to assuage Justices of a future Court who might be sympathetic to the idea that the Constitution protects a right to abortion but are

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115 *Id.* at 68–69.

116 *See id.* at 99–108.

117 A possible third option for a future Supreme Court would be to hold onto *Boerne* and *Dobbs*, but to rule that Congress has authority under its Section 5 authority to prohibit certain constitutionally permissible abortion regulations to better protect against constitutional violations. Under the standard the Court established in *Boerne*, Congress has the power under Section 5 to pass legislation to protect Fourteenth Amendment rights as long as these statutory remedies are premised on court-defined interpretations of these rights. Boerne v. Flores, 521 U.S. 507, 539 (1997). When Congress uses its Section 5 authority to protect against rights violations, these preventative measures must be proportional and congruent to the scope of any record of constitutional violations by the state. *Id.* This would assume some elaboration on the limits of states to completely prohibit abortions, even under *Dobbs*. The idea would be that a Court would recognize that a complete ban on abortions would fail even the deferential standard established in *Dobbs*; i.e., the Supreme Court would hold that a complete ban fails rational basis review. But if doctors and law enforcement officials were uncertain about the boundaries of this right, they may fail to protect this core abortion right. A showing of the existence of this constitutional violation could justify Congress in going beyond protecting against constitutional violations under the *Boerne* congruence and proportionality standard.

118 Schmidt, *supra* note 4, at 64–73. An alternative approach can be found in Steven G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1431 (2009). Calabresi and Stabile argue that Section 5 should be read to allow Congress to play a role in identifying rights in Section 1 of the Fourteenth Amendment when the Court has yet to rule on an issue, but only when the Court eventually agrees with Congress's reading of that right. *Id.* at 1433. They portray this approach as a middle ground between broad congressional interpretive latitude and the Court-centric approach of *Boerne*. *Id.* at 1435.

concerned about protecting the image of the Court. Under my scenario, the Court would recognize a judicially enforceable right to abortion, but it would do so in the context of upholding a congressional assertion of the right. This scenario would be far from the "exercise of raw judicial power" that Justice Byron White decried in his dissent in *Roe*'s companion case .[119] In recognizing a constitutional right by way of deferring to Congress, this pathway to constitutional change would provide a sturdier basis for the right and would be less stressful to the Court as an institution.

In sum, faced with a challenge to a future federal law protecting access to abortion against state regulation, the Court would have three options. It could avoid the Fourteenth Amendment issue altogether and uphold the statute on Commerce Clause grounds. Alternately, the Court could uphold the law under Section 5 and in the process overturn *Dobbs*. Or the Court could abandon *Boerne*'s judicial interpretive supremacist commitments and uphold the law on Section 5 grounds without overturning *Dobbs*.

Note that a campaign to rebuild a constitutional right to abortion can produce important benefits for reproductive rights even if it falls short of the optimistic endgame scenarios I describe. The best possible outcome for the cause of abortion rights under the Constitution would be for the Court to use congressional abortion rights legislation as an opportunity to overturn *Dobbs* and hold that Section 1 of the Fourteenth Amendment protects a woman's right to an abortion in certain circumstances. But even if the Court ends up striking down a national abortion rights law, the mobilization efforts that went into it will have expanded the right at the state level. If Congress fails to pass such a bill, the effort to pass it would have value to the cause of reproductive rights.

CONCLUSION

This Article is an exercise in aspirational constitutionalism. In the current environment, with a Court firmly under conservative control and a political scene defined by partisan tribalism and polarized posturing, it may feel more imaginary than aspirational. Yet my arguments are grounded in existing doctrine and built on historical experience. The scenarios I offer for potential pathways to rebuild the constitutional right to abortion are premised on a foundational principle of American constitutionalism: that the meaning of the Constitution

[119] Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting).

cannot be confined to the views of a majority of the Supreme Court at a given point in time; that constitutional meaning emerges from contestation and mobilization and a dialogue in which the justices are participants but never have the last word. This principle is a venerable part of our constitutional heritage. My goal in this Article is to revisit where we have been in order to present the possibility of a better future.

The future I describe is one in which abortion rights are more secure and the process by which the Court has recognized the right to abortion follows the path by which other constitutional rights have been recognized and secured. It is a future in which constitutional law is better able to capture the intertwined values of liberty and equality and better able to recognize the shared responsibility of nonjudicial and judicial actors in securing constitutional rights. It is a future in which the Court can play a central role in defending constitutional rights, but it does so in a way that places it not above but alongside our representative institutions. In defeat comes an opportunity to rethink and rebuild.