DEPARTMENT OF STATE V. MUÑOZ AND THE UNBUNDLING OF SUBSTANTIVE DUE PROCESS

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The 2022 Supreme Court decision in Dobbs v. Jackson Women's Health Organization *overturned the constitutional right to abortion, thereby raising critical questions about the future of substantive due process. Justice Clarence Thomas's call for broader repudiation of substantive due process rights, including contraception access and same-sex marriage, has sparked alarm about impending legal challenges to these protections. This Case Comment explores a subtler strategy the Court might employ to curtail fundamental rights: redefining and narrowing their scope rather than overturning them entirely. This approach is exemplified in* Department of State v. Muñoz*, the first substantive due process case decided after* Dobbs*, which has not yet received scholarly attention for its contribution to substantive due process jurisprudence. As this Case Comment argues,* Muñoz *showcases the Court's ability to redefine fundamental rights in ways that diminish their practical application. By narrowing the marriage right's scope, the conservative majority left the marriage right intact in name but gutted in substance. Similar strategies, the Case Comment predicts, could diminish protections for contraception and parental rights regarding gender-affirming care for transgender children. Ultimately, this Case Comment argues that* Muñoz *represents a new avenue for eroding substantive due process protections through subtle limitation rather than overt dismantling.*

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INTRODUCTION

On June 24, 2022, the Supreme Court handed down *Dobbs v. Jackson*

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Women's Health Organization,[1] overturning half a century of precedent to conclude that the U.S. Constitution does not confer a right to abortion. In so holding, the Court not only gutted the legal and medical infrastructure undergirding abortion access in the United States,[2] it also shook the very foundation of constitutional jurisprudence by calling into question the future of substantive due process.[3]

Under *Roe v. Wade*,[4] the fundamental right to abortion was grounded in the principle of substantive due process, which bars the government from depriving a person of life, liberty, or property without a "sufficient substantive justification, a good enough reason for such a deprivation."[5] Since its inception in the *Lochner* era,[6] the Court has used substantive due process to identify and protect a series of unenumerated yet fundamental constitutional rights, including rights of parental autonomy,[7] procreation,[8] contraception,[9] marriage,[10] sexual privacy,[11] familial association,[12] and—until *Dobbs*—abortion.[13]

Despite its enduring and influential role in constitutional adjudication, substantive due process has long been controversial.[14] For decades, conservative jurists have characterized substantive due process as lacking textual grounding, regarding it as a mechanism through which judges make

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1 142 S. Ct. 2228 (2022).

2 *See* Kelly Baden, Joerg Dreweke & Candace Gibson, *Clear and Growing Evidence That Dobbs Is Harming Reproductive Health and Freedom*, GUTTMACHER (May 2024), https://www.guttmacher.org/2024/05/clear-and-growing-evidence-dobbs-harming-reproductive-health-and-freedom [https://perma.cc/7XMU-UTSH] (analyzing data from peer-reviewed studies and empirical evidence regarding the impact of *Dobbs*).

3 *See infra* text accompanying notes 18–24.

4 410 U.S. 113 (1973).

5 Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

6 *See* Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 825 (2020) (tracing "the emergence of substantive due process in the conflation of these distinct strands of legal doctrine in the federal cases interpreting the Fourteenth Amendment after the *Slaughter-House Cases*, culminating in *Lochner v. New York*").

7 Meyer v. Nebraska, 262 U.S. 390, 401 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Parham v. J. R., 442 U.S. 584, 604 (1979); Troxel v. Granville, 530 U.S. 57, 66 (2000).

8 Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

9 Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).

10 Loving v. Virginia, 388 U.S. 1, 11 (1967); Zablocki v. Redhail, 434 U.S. 374, 386 (1978); Obergefell v. Hodges, 576 U.S. 644, 651–52 (2015).

11 Lawrence v. Texas, 539 U.S. 558, 578 (2003).

12 Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

13 Roe v. Wade, 410 U.S. 113, 153 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

14 Erwin Chemerinsky, *The Future of Substantive Due Process: What Are the Stakes?*, 76 SMU L. REV. 427, 427 (2023) (describing the longstanding controversy regarding the principle of substantive due process and the "disdain" for substantive due process among conservative jurists and constitutional law scholars).

policy from the bench or "write their personal beliefs" into the Constitution.[15] Substantive due process has also been criticized as antidemocratic, with some justices contending that "in our democratic republic," decisions regarding unenumerated rights "should rest with the people acting through their elected representatives," not with unelected judges.[16] Among the doctrine's most influential critics is Supreme Court Justice Clarence Thomas, who has rejected the principle of substantive due process throughout his judicial career.[17] In his *Dobbs* concurrence, Justice Thomas reiterates that position, writing that "the Due Process Clause does not secure *any* substantive rights" and calling for the Court to "reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*" in order to "jettison[] the doctrine entirely."[18] In other words, Justice Thomas expressly calls for the overturning of rights to contraception, same-sex intimacy, and same-sex marriage—a restatement of his decades-old position imbued with new force by the overturning of the right to abortion he had long criticized.

Justice Thomas is the only sitting Supreme Court justice to expressly reject the doctrine of substantive due process writ large.[19] Nevertheless, "the Court's decision in *Dobbs*," as one scholar put it, "evinced considerable hostility to the basic project of substantive due process."[20] Not only did the

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15 ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31 (1990) (calling substantive due process "a momentous sham" that "has been used countless times since by judges who want to write their personal beliefs into a document". For other prominent conservative critics of substantive due process, see, for example, JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) (calling substantive due process "a contradiction in terms—sort of like 'green pastel redness'"); Josh Blackman & Ilya Shapiro, *Is Justice Scalia Abandoning Originalism?*, CATO INST. (Mar. 9, 2010), https://www.cato.org/commentary/justice-scalia-abandoning-originalism [https://perma.cc/H5QB-ZBMZ] ("[Justice Antonin] Scalia has attacked substantive due process as an 'atrocity,' an 'oxymoron,' 'babble,' and a 'mere springboard for judicial lawmaking.'").

16 Obergefell v. Hodges, 576 U.S. 644, 688 (2015) (Roberts, C.J., dissenting).

17 Chemerinsky, *supra* note 14, at 427.

18 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301–02 (2022) (Thomas, J., concurring).

19 The late Justice Antonin Scalia shared Justice Thomas's wholesale opposition to the doctrine of substantive due process. *See* City of Chicago v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting) ("The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so-called 'substantive due process') is in my view judicial usurpation."). While Justice Scalia has not been on the bench since his passing in 2016, his former clerk Justice Amy Coney Barrett was confirmed to the Court in 2020. While Barrett has not disparaged substantive due process in such blunt terms, she remarked in a speech following her nomination that "[Justice Scalia's] judicial philosophy is [hers] too," suggesting that she may harbor similar skepticism toward substantive due process. Emma Newburger, *Amy Coney Barrett Pays Homage to Conservative Mentor Antonin Scalia – 'His Judicial Philosophy Is Mine Too'*, CNBC (Sept. 26, 2020, 6:12 PM), https://www.cnbc.com/2020/09/26/amy-coney-barrett-pays-homage-to-mentor-antonin-scalia.html [https://perma.cc/YRB8-LKUS].

20 Leah M. Litman, *The New Substantive Due Process*, 103 TEX. L. REV. 565, 567 (2025).

Court overturn one of the most prominent substantive due process rights, but the majority opinion repeatedly suggests that the doctrine of substantive due process may rest on a shaky foundation, remarking that the doctrine "has at times been a treacherous field for this Court"[21] and "has long been controversial."[22] As a result, commentators have observed that, after *Dobbs*, "[s]ubstantive due process is very much under attack . . . put[ting] in jeopardy other constitutional rights that have been safeguarded under the liberty of the Due Process Clause."[23] Some have gone as far as to call *Dobbs* "the roar of a wave that could drown the whole world of substantive due process liberties protecting personal autonomy, bodily integrity, familial relationships (including marriage), sexuality, and reproduction."[24]

Given these indications of the Court's hostility to substantive due process, the possibility that the Court may take Justice Thomas up on his invitation to reconsider the full spectrum of substantive due process rights should not be underestimated[25]—despite Justice Alito's assurance that *Dobbs* does not endanger other rights[26] and conservatives' derision of these fears as "hysterical."[27] But even if the Court makes good on Justice Alito's

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21 *Dobbs*, 142 S. Ct. at 2247 (plurality opinion) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977)).

22 *Id.* at 2246.

23 Chemerinsky, *supra* note 14, at 427; *see also* Cass R. Sunstein, *Dobbs and the Travails of Due Process Traditionalism*, *in* ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION 129, 133 (Lee C. Bollinger & Geoffrey Stone eds., 2024) (concluding that, after Dobbs, "some or many of the existing substantive due process holdings are exceedingly vulnerable"); Seema Mohapatra, *An Era of Rights Retractions: Dobbs as a Case in Point*, AM. BAR ASS'N (July 26, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-end-of-the-rule-of-law/era-of-rights-retractions-dobbs-as-a-case-in-point [https://perma.cc/437S-MXY5] ("The parade of horribles that may lie ahead is terrifying—any existing law related to privacy, contraception, same-sex marriage, and interracial marriage is at risk, as are protections for anything that may rely on substantive due process for its protection."); Kenji Yoshino, *After the Supreme Court's Abortion Ruling, What Could Happen to Other Unwritten Rights?*, WASH. POST (Nov. 30, 2022, 5:34 PM), https://www.washingtonpost.com/magazine/interactive/2022/substantive-due-process-dobbs [https://perma.cc/78L3-W6DX] ("Many liberals mourned the loss of a fundamental right and worried that other unenumerated rights . . . were now also endangered.").

24 Linda C. McClain & James E. Fleming, *Ordered Liberty After Dobbs*, 35 J. AM. ACAD. MATRIM. LS. 623, 623 (2023).

25 Although Thomas is considered more extreme than most conservatives on substantive due process, his initially fringe positions on criminal justice, campaign finance, guns, and abortion have eventually been adopted by the conservative bloc on the Court. *See* Corey Robin, *The Self-Fulfilling Prophecies of Clarence Thomas*, NEW YORKER (July 9, 2022), https://www.newyorker.com/news/daily-comment/the-self-fulfilling-prophecies-of-clarence-thomas [https://perma.cc/L9M9-BJY9].

26 *Dobbs*, 142 S. Ct. at 2261 (2022) (calling fears that *Dobbs* would "imperil those other rights" "unfounded").

27 Paul Moreno, *Justice Thomas's 'Substantive Due Process' Dare*, NAT'L REV. (July 8, 2022, 6:30 AM), https://www.nationalreview.com/2022/07/justice-thomass-substantive-due-process-dare [https://perma.cc/2T3P-U9K9].

promise that substantive due process is not at risk, the fundamental rights which presently seem imperiled will not necessarily remain intact.

In this Case Comment, I will argue that the Supreme Court need not issue a wholesale rejection of substantive due process, nor even overturn substantive due process rights one at a time as in *Dobbs*, to deny litigants protections that have historically been central to long-established fundamental liberties. Rather, by defining fundamental liberties in narrow and formalistic terms, the Court can defang substantive due process jurisprudence by stripping away the protections which make such fundamental rights valuable in the first place. This is not an abstract prediction; the Court has already modeled this approach in the 2024 case *Department of State v. Muñoz*,[28] the first substantive due process case since *Dobbs*, which considers the fundamental right to marriage in the immigration context.

This paper will proceed in two Parts. In Part I, I will analyze the Court's treatment of the fundamental right to marriage in *Muñoz*. Through close readings of the majority and dissenting opinions, I will demonstrate how the conservative majority breaks with prior judicial treatment of the marriage right, stripping away previously acknowledged components of the right until it has been gutted of practical significance. This approach, I will argue, illustrates how the Court can effectively nullify substantive due process rights merely by narrowing the scope of how those rights are defined, a strategy which enables the Court to curtail fundamental rights without rejecting substantive due process writ large. In Part II, I will turn to two substantive due process questions disfavored by many conservatives—contraception access and parental rights to seek gender-affirming care for their transgender children—in order to imagine how the strategy of rights redefinition employed by the majority in *Muñoz* might be used to weaken legal protections without rejecting underlying fundamental liberties outright. Ultimately, this Case Comment contends that, while *Dobbs* models one approach through which the Roberts Court might strip away fundamental rights on which Americans have come to rely, *Muñoz*—which, until now, has received virtually no scholarly attention[29]—models another. Substantive due process may be necessary to safeguard our fundamental yet unenumerated rights, but it is not sufficient. As the Court's approach in *Muñoz* demonstrates, defining fundamental rights increasingly narrowly may be just as devastating as a wholesale overturning of substantive due

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28 144 S. Ct. 1812 (2024).

29 Only one work of legal scholarship has analyzed *Muñoz* thus far; that student note examines Muñoz's effect on the immigration law doctrine of consular nonreviewability, not on substantive due process. Jake Steubner, Note, *Consular Nonreviewability After* Department of State v. Muñoz*: Requiring Factual and Timely Explanations for Visa Denials*, 124 COLUM. L. REV. 2413 (2024).

process.

I
THE *MUÑOZ* APPROACH: REDEFINING FUNDAMENTAL RIGHTS TO DEFANG THEM

On June 21, 2024, the Supreme Court handed down its decision in *Department of State v. Muñoz*,[30] the first substantive due process case decided by the Court since *Dobbs*. The case concerned Sandra Muñoz, a U.S. citizen whose husband, Luis Asencio-Cordero, sought and was repeatedly denied a visa to enter the United States without being given a reason.[31] Muñoz and Asencio-Cordero ultimately sought procedural due process protections: a justification and opportunity to challenge Asencio-Cordero's visa denial.[32] But as a non-citizen without a right to enter the United States, Asencio-Cordero enjoyed no procedural due process protections in the immigration context.[33] Thus, Muñoz sued the Department of State, asserting that, as part of her substantive due process right to marriage, she "has a liberty interest in living in the United States with her husband that is sufficient to implicate procedural due process."[34]

The case came to the Supreme Court on appeal from the U.S. Court of Appeals for the Ninth Circuit, which held in Muñoz's favor.[35] At the Supreme Court, a six-justice majority found for the Department of State, concluding that Muñoz's fundamental right to marriage does not encompass substantive or procedural rights related to her husband's immigration proceedings.[36] The dissenting justices, on the other hand, cited extensive precedent from the Court's earlier decisions to suggest that the right to marriage is sufficiently capacious to encompass Ms. Muñoz's claim.[37] This disagreement between the majority and the dissent, then, turns on the breadth of the fundamental right of marriage. In this Part, I will explicate each opinion in turn, demonstrating how the conservative majority employs a strategy of redefinition to defang a fundamental right without overturning it.

A. Majority Opinion

In *Muñoz*, the majority holds that "a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country."[38] In

30 144 S. Ct. 1812.
31 *Id.* at 1818–19.
32 *Id.* at 1819.
33 *Id.* at 1815.
34 Brief for Respondent at 3, Dep't of State v. Muñoz, 144 S. Ct. 1812 (2024) (No. 23-334).
35 Muñoz v. Dep't of State, 50 F.4th 906, 908–09 (9th Cir. 2022).
36 Dep't of State v. Muñoz, 144 S. Ct. at 1817–18.
37 *Id.* at 1833–36. (Sotomayor, J., dissenting).
38 *Id.* at 1821.

so holding, the Court obscures the fact that Muñoz asserts no such right to bring her husband into the United States; rather, she argues that her "liberty interest in her marriage" triggers procedural protections—namely, the right to be advised of the factual basis for the consular officer's finding of inadmissibility—not afforded to immigrants without U.S. citizen spouses.[39] Muñoz expressly states that she "does not advance a substantive right to immigrate one's spouse."[40] Rather, her "argument . . . is procedural. She maintains that her marital right is sufficiently important that it cannot be unduly burdened without procedural due process as to an inadmissibility finding that would block her from residing with her spouse in her country of citizenship."[41]

Nevertheless, the majority opinion time and time again suggests that Muñoz asserts a fundamental "right to bring her noncitizen spouse to the United States."[42] The Court arrives at that formulation of her claim by making the following argument: First, the Court defines the right to marriage extraordinarily narrowly—a definition in support of which they cite no precedent.[43] Ms. Muñoz "is already married," the Court points out, suggesting that the right begins and ends with the formation and legal recognition of the marriage relationship. Second, the Court asserts that Ms. Muñoz's claim "involves more than marriage."[44] Because Muñoz is already legally married to her husband, the Court reasons, her right to marriage cannot possibly be burdened. Finally, because the Court's narrow definition of the right to marriage—a definition in support of which they cite no precedent—cannot support Ms. Muñoz's claim, they conclude that she must have meant to assert some other fundamental right, which they take the liberty of describing as "the right to have her noncitizen husband enter (and remain in) the United States."[45] In so arguing, the majority constructs a straw man of Muñoz's assertion of her fundamental right, which they handily defeat under the *Glucksberg* test, concluding on the basis of a historical recognition of the "Government's sovereign authority to set the terms

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39 Brief for Respondent, *supra* note 34, at 19, 37–38.

40 *Id.* at 19 n.10.

41 *Id.*

42 Dep't of State v. Muñoz, 144 S. Ct. 1812, 1818 (2024); *see also id.* at 1821 ("[S]he argues that the State Department abridged her fundamental right to live with her spouse in her country of citizenship[.]"); *id.* at 1822 ("Muñoz claims . . . the right to *reside with her noncitizen spouse in the United States*." (emphasis in original)); *id.* ("Muñoz cannot . . . demonstrat[e] that the right to bring a noncitizen spouse to the United States is 'deeply rooted in this Nation's history and tradition.'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))). The Court repeats this formulation of the right asserted despite acknowledging that Muñoz "disclaim[ed] that characterization" and "disavowed that argument." *Id.* at 1822, 1827.

43 *Id.* at 1822 (differentiating the "fundamental right of marriage"—defined as the status of being married—from "distinct" rights "involv[ing] more than marriage").

44 *Id.*

45 *Id.*

governing the admission and exclusion of noncitizens" that no fundamental right to bring one's spouse into the country exists.[46] However, as the dissent demonstrates, had the majority considered the robust precedential cases on the right to marriage, they could not have so easily disposed of Muñoz's claim.[47]

B. Dissenting Opinion

Whereas the majority adopts a sui generis definition of the right to marriage coextensive with the granting and recognition of the legal status of marriage, Justice Sotomayor, writing in dissent, articulates a robust fundamental right of marriage. This right, grounded in substantive due process, is sufficient to entitle Muñoz to procedural due process with respect to her husband's immigration proceedings. Rejecting the majority's stance that the fundamental right to marriage does not include some right to make a home with one's spouse in the United States, Justice Sotomayor writes that "[t]he constitutional right to marriage is not so flimsy. The Government cannot banish a U.S. citizen's spouse and give only a bare statutory citation as an excuse."[48]

While the majority stipulates without justification the narrowest possible definition of the marriage right, Sotomayor quotes extensive precedent supporting a fundamental marriage right more expansive than mere legal status. Quoting from *Maynard v. Hill*, Sotomayor asserts that marriage "is something more than a mere contract," "the most important relation in life," and "the foundation of the family."[49] Turning to *Meyer v. Nebraska*, Sotomayor recounts how the Court "has described [the fundamental right to marriage] in one breath as the right 'to marry, establish a home and bring up children,' a right 'long recognized at common law as essential to the orderly pursuit of happiness by free men.'"[50] Sotomayor goes on to cite *Loving v. Virginia*, in which the Court asserts that marriage is "one of the 'basic civil rights of man,' fundamental to our very existence and

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46 *Id.* at 1823. Under the two-prong test established in *Washington v. Glucksberg*, courts will only recognize a new implied fundamental right—and thus subject any restrictions on that right to strict scrutiny—if the right is "objectively, deeply rooted in this Nation's history and tradition." 521 U.S. 702, 720–21 (1997). Since the Court characterizes Muñoz as asserting a novel right, she must satisfy this history-and-tradition test in order to have a substantive due process claim at all.

47 *See infra* Section I.B.

48 Dep't of State v. Muñoz, 144 S. Ct. 1812, 1833 (2024) (Sotomayor, J., dissenting).

49 *Id.* (quoting Maynard v. Hill, 125 U.S. 190, 205, 210–11 (1888) (holding that marriage is more than a contract and thus state law can regulate marriage and divorce without running afoul of the Contracts Clause of the Constitution)).

50 *Id.* at 1833–34 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (striking down a state law prohibiting foreign language instruction in schools on the grounds that parents have an unenumerated right to control the upbringing of their children)).

survival."[51] Finally, she turns to *Obergefell v. Hodges*, quoting Justice Kennedy's assertions that the fundamental right of marriage "fulfils yearnings for security, safe haven, and connection that express our common humanity," "responds to the universal fear that a lonely person might call out only to find no one there," and "offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."[52] These landmark cases all articulate a vision of marriage which exceeds a valid marriage certificate, pointing to how the interpersonal intimacy of the marriage relationship can support human flourishing. It is not the mere legal status of marriage which confers these benefits; rather, it is the practices of home-establishing, family-building, and mutual care facilitated and celebrated by marriage that ultimately make it so essential to the lives of many. These practices all rely in large part upon—or are at least built around—physical proximity and cohabitation.

According to Sotomayor, Muñoz's claim falls squarely within "the right to marry in its comprehensive sense"[53] which precedent implores the Court to consider; after all, the abilities to establish a home, raise a family, and care for one another are core to the marriage right as articulated by the Court,[54] and these abilities are clearly hampered by a visa denial that excludes one's spouse from the country where the couple had established a home.[55] To be sure, the legal status conferred by marriage is an essential component of the right, but simply because that status is recognized does not mean the right to marriage has not been burdened. And, as Justice Sotomayor explains,

> This Court has never held that a married couple's ability to move their home elsewhere removes the burden on their constitutional rights. It did not tell Richard and Mildred Loving to stay in the District of Columbia or James Obergefell and John Arthur to stay in Maryland. It upheld their ability to exercise their right to marriage wherever they sought to make their home.[56]

Furthermore, the fundamental right of marriage, even broadly construed, "has deep roots" capable of withstanding the *Glucksberg* test.[57]

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51 *Id.* at 1834 (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding unconstitutional laws prohibiting interracial marriage) (quoting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (striking down a law providing for the compulsory sterilization of criminals on the basis of an unenumerated fundamental right to procreation))).

52 *Id.* (quoting Obergefell v. Hodges, 576 U.S. 644, 666–67, 675 (2015) (extending the fundamental right of marriage to same-sex couples)).

53 *Id.* (quoting Obergefell v. Hodges, 576 U.S. 644, 671 (2015)).

54 *See id.* (describing the "right 'to marry, establish a home and bring up children' with [one's spouse]") (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

55 *Id.* at 1835 ("There can be no real question that excluding a citizen's spouse from the country 'burdens' the citizen's right to marriage as this Court has repeatedly defined it.").

56 *Id.*

57 *Id.* at 1833.

Indeed, the fundamental right to marriage is uncontested; as the majority concedes, the State Department acknowledges Muñoz's fundamental right to marriage.[58] Moreover, Sotomayor cites historical evidence, dating back to 1888, to support her robust definition of the marriage right. She even cites Tocqueville's 1835 remark that "[t]here is certainly no country in the world where the tie of marriage is so much respected as in America."[59] Thus, Sotomayor demonstrates that the centrality of marriage has been recognized since the birth of the United States—a historical tradition sufficient to support the right to marriage's status as fundamental under the doctrine of substantive due process.

Justice Sotomayor's dissent makes visible the sleight of hand upon which the majority's analysis rests. By stipulating a narrow definition of a fundamental right which clashes with the analyses of earlier cases, the Court reframes a substantive due process claim as beyond the bounds of the fundamental right which it implicates, thereby denying relief without expressly invalidating the fundamental right. While this tactic for the denial of a substantive due process claim is formally distinct from that employed in *Dobbs*, Sotomayor recognizes that both approaches are part of the same effort to limit substantive due process rights, writing that "[d]espite the majority's assurance two Terms ago that its eradication of the right to abortion 'does not undermine . . . in any way' other entrenched substantive due process rights . . . , the Court fails at the first pass."[60] As the next Part will demonstrate, the tactic of narrowing the definition of substantive rights so as to strip away precisely the dimensions of those rights that make them valuable could be applied in other substantive due process contexts—at great cost.

II
THE *MUÑOZ* "NARROWING" APPROACH APPLIED

As the previous Part illustrates, the majority in *Department of State v. Muñoz* employed a strategy of redefining and narrowing fundamental rights—an approach which enabled them to reject "at the threshold" a right to marriage claim without overturning the fundamental right to marriage.[61] The utility of this approach is not limited to the marriage-and-immigration context.

The *Muñoz* strategy of narrowly defining fundamental rights may prove

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58 *Id.* at 1822 (majority opinion).

59 *Id.* at 1840 (Sotomayor, J., dissenting) (quoting Obergefell v. Hodges, 576 U.S. 644, 669 (2015) (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 309 (H. Reeve transl., rev. ed. 1900)).

60 *Id.* (quoting Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257–58 (2022)).

61 *Id.* at 1817.

potent across substantive due process contexts because successfully arguing that the law burdens a fundamental, substantive right is crucial to a plaintiff's chance of prevailing on a substantive due process claim. Fundamental rights are subject to strict scrutiny, the highest standard of constitutional review, which requires the government to demonstrate that the law in question (1) serves a compelling state interest and (2) is narrowly tailored to achieve that interest.[62] While a statute may be found to burden a fundamental right yet still survive strict scrutiny review, this is a high bar to meet.[63] However, if the challenged law does not burden a fundamental right but only a mere "liberty interest," only rational basis review is triggered.[64] This standard, requiring only that the challenged statute further a "legitimate government interest" and be "rationally related" to doing so, is so deferential that Courts "all but automatically uphold[] the statute[s] in question."[65] Because it shifts the standard of review from strict scrutiny to rational basis, narrowly defining a fundamental right to exclude that which is burdened by the challenged statute all but dooms a due process challenge.

This Part will imagine how the redefinition tactic employed in *Muñoz* could be applied to narrow other unenumerated yet fundamental rights. The first Subpart will consider how a *Muñoz*-style redefinition of rights might curtail the fundamental right to contraception, even if *Griswold v. Connecticut*[66] is left standing: The Court may narrow its definition of the right to contraception to encompass only protections from bans on use, not regulations which restrict access to contraception or even eliminate the availability of some forms of contraception altogether. The second Subpart will demonstrate how the scope of parental rights may be narrowed with regard to parents' ability to consent to gender-affirming care for their transgender children. Together, these Subparts demonstrate that the survival

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62 Reno v. Flores, 507 U.S. 292, 302 (1993) (holding that the Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283 (2007) (noting that the application of strict scrutiny to a fundamental due process right first emerged in *Griswold v. Connecticut* and that, since *Roe v. Wade*, courts have evaluated fundamental rights under strict scrutiny).

63 Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) ("[E]ven a burdensome regulation may be validated by a sufficiently compelling state interest."). One empirical study found that, in substantive due process cases considered in federal courts between 1990 and 2003, 78 percent of challenged laws were defeated under strict scrutiny. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 864 (2006).

64 McClain & Fleming, *supra* note 24, at 633.

65 *Id.*; *see also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (describing rational basis review as "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one").

66 381 U.S. 479 (1965).

of substantive due process is not enough to protect the fundamental rights currently under attack by right-wing lawmakers and jurists. Rather, the survival of robust fundamental rights protections depends on the definitions of those fundamental rights remaining full in scope rather than artificially narrowed.

A. The Right to Contraception

Following nearly ninety years of federal and state restrictions on the transportation and use of contraception,[67] the Supreme Court established the fundamental right to contraception for married couples in the 1965 landmark case *Griswold v. Connecticut*.[68] In that case, the Court struck down Connecticut's "Little Comstock" act, concluding that, although the Constitution contains no enumerated right to contraception or privacy, a married couple's use of contraception is protected by the "zone of privacy created by several fundamental constitutional guarantees."[69] In the 1972 case *Eisenstadt v. Baird*, the Supreme Court extended *Griswold*'s holding to unmarried people on equal protection grounds.[70] In 1977, the Court handed down the third case in the contraception-rights trilogy—*Carey v. Population Services International*.[71] In *Carey*, the Court affirmed the fundamental right to contraception (tied to the fundamental right to privacy) and found that this right may implicate "[r]estrictions" as well as "total prohibition[s] against sale of contraceptives."[72] Read together, this line of cases suggests a robust privacy right to contraceptive decision-making—a right not (yet) unsettled by the Court.

Contraception, however, is increasingly under attack by conservatives. Policymakers have propagated misinformation characterizing certain forms of contraception as abortifacients.[73] Conservative influencers have spread alarmist—and acontextual—anecdotes about hormonal birth control's health consequences.[74] In June 2024, Senate Republicans blocked the Right to

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67 *See* Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-First Century*, 47 CONN. L. REV. 971, 981 (2015) ("[A] legal framework restricting contraceptives was not established in the United States until 1873 with the enactment of the Comstock Act . . . ."); Lauren MacIvor Thompson & Kelly O'Donnell, *Contemporary Comstockery: Legal Restrictions on Medication Abortion*, 37 J. GEN. INTERNAL MED. 2564, 2566 (2022) ("[S]tate statutes and local ordinances known as the 'Little Comstock Laws' also followed in the wake of the 1873 federal statute to further regulate sex and sexual material.").

68 381 U.S. 479 (1965).

69 *Id.* at 485.

70 405 U.S. 438, 453 (1972).

71 431 U.S. 678 (1977).

72 *Id.* at 687.

73 Jill Filipovic, *How American Women Could Lose the Right to Birth Control*, TIME (May 20, 2024, 7:00 AM), https://time.com/6977434/birth-control-contraception-access-griswold-threat [https://perma.cc/GDS6-XQZZ].

74 Kat Tenbarge, *Conservative Influencers are Pushing an Anti-Birth Control Message*, NBC

Contraception Act,[75] legislation which would have instituted federal protections of "an individual's ability to access contraceptives and to engage in contraception" and "a health care provider's ability to provide contraceptives, contraception, and information related to contraception."[76] The emerging effort to restrict access to birth control would be facilitated by overturning the substantive due process cases, including *Griswold*, as Justice Thomas urged in his *Dobbs* concurrence.[77] But rather than overturn *Griswold*, the Court may instead choose to narrow the definition of the fundamental right to privacy as applied to contraception.

Under current law, the fundamental right to privacy broadly guarantees the right to "be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[78] Not only has the Court found outright bans on contraception use unconstitutional,[79] but it has recognized that despite *Griswold*'s language ostensibly permitting restrictions on the manufacture or sale of contraceptives, "less than total restrictions on access to contraceptives that significantly burden the right to decide whether to bear children must also pass constitutional scrutiny."[80] "[A]ccess," the Court explains in *Carey*, "is essential to exercise of the constitutionally protected right of decision in matters of childbearing."[81] Thus, restrictions which "render[] contraceptive devices considerably less accessible to the public, reduce[] the opportunity for privacy of selection and purchase, and lessen[] the possibility of price competition" trigger strict scrutiny.[82]

The Court, however, may seek to narrow the fundamental privacy

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(July 1, 2023, 6:00 AM), https://www.nbcnews.com/tech/internet/birth-control-side-effects-influencers-danger-rcna90492 [https://perma.cc/38ML-QKVG]. For example, one prominent anti-contraception influencer, Turning Point USA's Alex Clark, has called hormonal birth control "poison" and suggested that it is an abortifacient, causes cancer, has long-term effects on fertility, accelerates aging, and can even "falsely make women feel bisexual." Justin Horowitz, *Turning Point USA's Alex Clark is on a Misinformation Campaign Against Hormonal Birth Control*, MEDIA MATTERS FOR AM. (Feb. 14, 2023, 9:00 AM), https://www.mediamatters.org/health-care/turning-point-usas-alex-clark-misinformation-campaign-against-hormonal-birth-control [https://perma.cc/EM6W-BUA4].

75 Mary Clare Jalonick, *Republicans Block Bill to Protect Contraception Access as Democrats Make Election-Year Push*, AP (June 5, 2024, 4:03 PM), https://apnews.com/article/contraception-senate-abortion-biden-trump-reproductive-rights-3f9e8546624a3acf8e64d1138fcb84b1 [https://perma.cc/MBX2-L7PX].

76 S. 4381, 118th Cong. (2024).

77 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

78 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

79 *Id.*; *see also* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

80 Carey v. Population Servs. Int'l, 431 U.S. 678, 697 (1977).

81 *Id.* at 688–89.

82 *Id.* at 689.

interest to merely *the right to use contraception*. In advocating for this redefinition, the Court may cite *Griswold*, in which the Court describes the law found to be unconstitutional as "a law which, *in forbidding the use of contraceptives rather than regulating their manufacture or sale*, seeks to achieve its goals by means having a maximum destructive impact upon that relationship."[83] Laws "regulating the[] manufacture or sale" of contraceptives, the Court might reason, are different from laws "forbidding the use of contraceptives"; under *Griswold*, the former is presumed not to burden the fundamental privacy interest, while the latter does burden that fundamental right.

This construction is clearly contrary to the holding in *Carey*, which emphasizes how "less than total restrictions on access" to contraceptives may still burden the fundamental liberty if those restrictions make it harder to exercise one's right to make reproductive choices.[84] But the Court may attempt to salvage their *Muñoz*-style redefining analysis by characterizing the problem with the restrictions in *Carey* as the fact that they mounted such a high barrier to contraceptive access that they constituted a de facto ban. In *Carey*, the Court might reason, extreme barriers to accessing "any contraceptive of any kind,"[85] rather than only prescription contraception, may have precluded many individuals from using any sort of contraception, leaving them with no way to prevent pregnancy whatsoever. In contrast, restrictions which do not apply to all varieties of contraception, or which make accessing contraception inconvenient but not excessively burdensome, would not be considered to burden the fundamental right to contraception.

By concluding that individuals have a fundamental liberty interest only in the ability to use contraception—but not in discretion over methods of contraception, nor in the convenience of access—the Court may authorize any number of laws with the effect of significantly reducing individuals' ability to exercise agency over reproduction. Bans on forms of contraception—for instance, the bans on IUDs and emergency contraception which are already being contemplated in some red states[86]—may be deemed permissible because individuals are still free to use contraception like the

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83 Griswold v. Connecticut, 381 U.S. at 485 (emphasis added). Reva Siegel and Mary Ziegler have argued that this language was included "sub silentio to distinguish and to distance Comstock" by permitting restrictions such as those on the mailing of contraceptives. *See* Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. 1068, 1151 (2025).

84 *Carey*, 431 U.S. at 688–89, 697.

85 *Id.* at 681.

86 *See Don't Be Fooled: Birth Control Is Already at Risk*, NAT'L WOMEN'S L. CTR. (June 17, 2022), https://nwlc.org/resource/dont-be-fooled-birth-control-is-already-at-risk [https://perma.cc/65UN-5MR7]. If IUDs and emergency contraception are deemed abortifacients, the belief upon which these laws are premised, the holding in *Dobbs* may allow states to proscribe them, regardless of the legal status of contraception-related rights. *See* Filipovic, *supra* note 73.

pill, the subdermal implant, or barrier methods. Prohibitions on telecontraception,[87] over-the-counter birth control pills,[88] and extended-supply birth control[89]—innovations which have done much to expand access to birth control in so-called "contraceptive deserts"[90]—do not prevent individuals from using birth control but rather merely require them to see their physicians in person and refill their prescriptions monthly; as such, these restrictions may be characterized as imposing inconvenience rather than burdening access. These hypothetical restrictions are by no means exhaustive; under this standard, any regulation which does not pose a de facto barrier to contraception use would fall beyond the fundamental liberty established in *Griswold*.[91]

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[87] *See* Jenna Nitkowski, *State-Level Conditions and Telecontraception Platform Availability*, 12 HEALTH POL'Y & TECH. 1, 1 (2023) (analyzing telecontraception availability across state lines). State licensing laws have already impeded telecontraception services from operating in some states, including Louisiana and Tennessee. *See* Melissa Daniels, *Online Birth Control Providers Are Booming Amid Restrictive Care Laws*, MODERNRETAIL (Sept. 4, 2024), https://www.modernretail.co/marketing/online-birth-control-providers-are-booming-amid-restrictive-care-laws [https://perma.cc/4DUV-8MSJ].

[88] *See A New Birth Control Pill Is Available Over the Counter. Who Is It For?*, COLUM. U. IRVING MEDICAL CTR. (July 20, 2023), https://www.cuimc.columbia.edu/news/new-birth-control-pill-available-over-counter-who-it [https://perma.cc/X2JT-LRGU] (describing the over-the-counter birth-control pill as helping to overcome "significant barriers to access" to contraception).

[89] *See* Maria I. Rodriguez, Thomas H. A. Meath, Ashley Daly, Kelsey Watson, K. John McConnell & Hyunjee Kim, *Twelve-Month Contraceptive Supply Policies and Medicaid Contraceptive Dispensing*, 5 JAMA HEALTH FORUM 1, 2, 6 (2024) (finding that "dispensing only 1 month of pills at a time is associated with decreased continuation of contraception and increased unintended pregnancies" and describing that "[t]o address this barrier to contraceptive use, policymakers have enacted 12-month contraceptive supply policies in 19 states").

[90] *See Contraceptive Deserts*, POWER TO DECIDE, https://powertodecide.org/what-we-do/contraceptive-deserts [https://perma.cc/UGD6-3KQD].

[91] One hypothetical restriction that would not fall within this narrowing strategy in the contraception context is the revival of the Comstock Act to prohibit the shipping of contraception. In recent years, "opponents of abortion have made raising Comstock from the dead a key part of their current strategy," hoping to use the nineteenth-century law's restrictions on shipping abortion-related materials (including abortion medications, instruments, and other equipment) to reduce or ban abortion nationwide. David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. 317, 345, 346–47 (2024). For further discussion of efforts to revive the Comstock Act to restrict abortion, see Siegel & Ziegler, *supra* note 83 at 1071; Danny Y. Li, *The Comstock Act's Equal Protection Problem*, 123 MICH. L. REV. ONLINE 42 (2025). The Comstock Act, however, is moot in the contraception context, because following *Griswold v. Connecticut*, "Congress deleted references to birth control from the statute in 1971." Cohen, Donley & Rebouché, *supra* note 91, at 343. And even if Congress were to restore the language referencing contraception in a revived Comstock Act, the Court would almost certainly need to overrule *Carey* to ratify such a total ban on shipping contraception—a change in law that would look more like a *Dobbs*-style overturning than a *Muñoz*-style narrowing. A total ban on shipping, after all, is much broader in scope than the law struck down in *Carey*, which only made it a crime for three reasons: "(1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years; (2) for anyone [except a] licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives." Carey v. Population Servs. Int'l, 431 U.S. 678, 681 (1977).

Because such regulations would be deemed to burden liberties beyond the contraception right established in *Griswold* and extended in *Eisenstadt* and *Carey*, the Court would then turn to the *Glucksberg* test to determine whether this newly asserted fundamental right to contraception without restriction or inconvenience passes muster. The Court would almost certainly find that this right is not "deeply rooted in this Nation's history and tradition," given the history of laws like the Comstock Act that have harshly regulated contraception.[92] To be sure, there is a long history of unrestricted contraceptive use in the United States prior to the Comstock Act and its state equivalents.[93] But as Martha Minow argues, "[n]one of this actual history . . . is likely to matter in litigation challenging future contraception restrictions, given how the *Dobbs* majority selected particular historical moments of the late nineteenth century and ignored both prior and subsequent practice."[94]

Having defeated their strawman fundamental right to contraception under the *Glucksberg* test, the Court would consider any such restriction under rational basis review. Because the aforementioned restrictions could be connected to efforts to avoid inadvertent compromise of fetal life or the health and safety of the would-be contraception user, they would pass muster. Thus, sweeping restrictions on contraception could be upheld by the Court even while *Griswold* is ostensibly left intact.

B. Parental Rights & Gender-Affirming Care

In his call for the rejection of substantive due process, Justice Thomas singled out for reconsideration cases regarding the issues of reproduction and LGBTQ life. Another less obviously divisive right falls under the substantive due process umbrella and yet escapes Justice Thomas's condemnation: the fundamental liberty interest of parents to control the upbringing of their children.

Parental rights are the oldest of the existing substantive due process rights.[95] In *Meyer v. Nebraska*, the first of the parental rights cases, the Court

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92 *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)) (summarizing the primary features of the Court's method of substantive due process analysis: (1) whether the fundamental rights and liberties in question are rooted in the nation's history, and (2) whether there is a description of the fundamental liberty interest being asserted). Scholars have hypothesized that, if the Court reconsidered *Griswold* as they did *Roe*, they would find that no right to contraceptive privacy was sufficiently "deeply rooted" to survive *Glucksberg* on these grounds. *See, e.g.*, Martha Minow, *The Unraveling: What* Dobbs *May Mean for Contraception, Liberty, and Constitutionalism*, *in* ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION 318, 329–30 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024).

93 Minow, *supra* note 92 at 329.

94 *Id.*

95 *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (describing parental rights as "perhaps the oldest of the fundamental liberty interests recognized by this Court").

struck down a statute prohibiting the teaching of German to schoolchildren, finding that parents' decision-making regarding their children's education falls within the fundamental right "to marry, establish a home and bring up children."[96] Two years later, the Court relied on their holding in *Meyer* to settle *Pierce v. Society of Sisters*.[97] In that case, the Court found unconstitutional a statute requiring children to attend public rather than private schools, reasoning that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[98] As the Court explained, "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[99]

In *Prince v. Massachusetts*, the Court reaffirmed the paramount importance of this fundamental right, writing that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[100] More recently, in *Troxel v. Granville*, the Court struck down a state statute permitting judges to order grandparent visitation against the wishes of parents, finding the statute repugnant to the widely recognized "fundamental right of parents to make decisions concerning the care, custody, and control of their children."[101] The Court has found that this fundamental right to parental authority extends to medical decision-making, even against the wishes of an adolescent; in *Parham v. J.R.*, the Court upheld parents' right to commit their children to mental hospitals on the basis of the fundamental "broad parental authority over minor children," which includes the right to "recognize symptoms of illness and to seek and follow medical advice."[102]

Conservative jurists' objection to the principle of substantive due process in general has not been used to challenge parental rights explicitly—perhaps because the idea of parental rights is frequently employed to advance conservative causes.[103] In recent years, parental rights have been invoked to

96 262 U.S. 390, 399 (1923).
97 268 U.S. 510 (1925).
98 *Id.* at 534–35.
99 *Id.* at 535.
100 321 U.S. 158, 166 (1944).
101 530 U.S. 57, 66 (2000).
102 442 U.S. 584, 602 (1979).
103 Interestingly, the majority opinion in *Dobbs* describes *Meyer* and *Pierce* as establishing "the right to make decisions about the education of one's children"—an uncommonly narrow construal of parents' substantive due process rights that may be taken to signal an appetite for a narrowed conception of fundamental parental rights. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022).

impose restrictions on public school curricula,[104] Title IX protections for transgender minors,[105] minors' access to reproductive healthcare,[106] vaccination requirements,[107] and school mask mandates.[108] Conservative judges, legislators, and advocacy groups have rallied around this growing parental rights movement.[109] Most recently, the Supreme Court held in *Mahmoud v. Taylor* that including LGBTQ+-themed storybooks in public-school curricula without inviting parental opt-outs "strip[s] away the critical right of parents to guide the religious development of their children."[110]

Parental rights, however, bear on a controversial issue to which conservative judges, legislators, and activists have been hostile: the right of parents to consent to gender-affirming care for their transgender children. About half of U.S. states, within which at least 39 percent of American trans teenagers reside, have passed bans on gender-affirming care for minors.[111] Over the course of the past several years, challenges to these laws have percolated through federal courts.[112] Plaintiffs have alleged that, in addition to discriminating on the basis of sex in violation of the Equal Protection Clause, such laws substantially burden parents' right "to make medical

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104 *See generally* Cecilia Giles, Comment, *Parental Rights or Political Ploys? Unraveling the Deceptive Threads of Modern "Parental Rights" Legislation*, 92 U. CIN. L. REV. 1171, 1172 (2024) (describing the use of parental rights narratives to push a conservative political agenda into public schools). A notable example of this trend is Florida's infamous "Don't Say Gay" law. *Id.* at 1180.

105 *See* Cris Mayo, *Distractions and Defractions: Using Parental Rights to Fight Against the Educational Rights of Transgender, Nonbinary, and Gender Diverse Students*, 35 EDUC. POL'Y 368, 369 (2021).

106 *See* Elizabeth Tobin-Tyler, *The Past and Future of Parental Rights: Politics, Power, Pluralism, and Public Health*, 30 VA. J. SOC. POL'Y & L. 312, 323–25 (2023).

107 *See id.* at 325–27.

108 *See id.* at 328–29.

109 *See, e.g.*, *id.* at 329; Emilie Kao, *Safeguarding Parental Rights and Protecting Children from Federally Mandated Gender Ideology*, HERITAGE FOUND. (Jan. 10, 2023), https://www.heritage.org/gender/report/safeguarding-parental-rights-and-protecting-children-federally-mandated-gender [https://perma.cc/YZ4W-9G42]. *See generally* Ira C. Lupu, *The Centennial of* Meyer *and* Pierce*: Parents' Rights, Gender-Affirming Care, and Issues in Education*, 26 J. CONTEMP. LEGAL ISSUES 147, 198 (2025) (documenting the uptake of parental rights messaging by conservatives).

110 No. 24-297, slip op. at 31 (U.S. June 27, 2025). As Justice Sotomayor notes in her dissent, the majority based this decision exclusively on the Free Exercise Clause of the First Amendment, "mak[ing] no mention of substantive due process rights or the Fourteenth Amendment Due Process Clause" even though the precedents cited in support of their decision are "hybrid rights" cases relying on Free Exercise and Substantive Due Process in conjunction. *Id.* at 35 (Sotomayor, J., dissenting). Perhaps this signals the beginning of the Court's retreat from a substantive due process jurisprudence of parental rights that would enable some assertions of parental agency to endure, even if substantive due process as a whole perishes.

111 Hila Keren, *Due Care in a Conservative Court*, 2025 WISC. L. REV. 1, 3–4 (2025).

112 *See, e.g.,* L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 668 (M.D. Tenn. 2023) *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023); Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (M.D. Ala. 2022), *vacated sub nom.* Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th Cir. 2023); Poe *ex rel.* Poe v. Labrador, 709 F. Supp. 3d 1169 (D. Idaho 2023).

decisions for their minor children, including the right to obtain established medical treatments to protect their children's health and well-being."[113]

District courts have found this argument convincing. The District Court for the Middle District of Tennessee, for one, "agree[d] with Plaintiffs that under binding Sixth Circuit precedent, parents have a fundamental right to direct the medical care of their children, which naturally includes the right of parents to request certain medical treatments on behalf of their children," thus issuing a preliminary injunction of the law.[114] On appeal, however, the Sixth Circuit Court of Appeals reversed the trial court's preliminary injunction.[115] Of three other recent cases which successfully challenged similar bans under a Due Process theory at the district-court level, two were likewise reversed at the circuit level.[116] Plaintiffs appealed the Sixth Circuit's decision to the Supreme Court, which granted certiorari in June 2024, making *United States v. Skrmetti* the vehicle for the Court's consideration of the constitutionality of gender-affirming care bans for minors.[117]

On June 18, 2025, the Supreme Court handed down its decision in *Skrmetti*, upholding on equal-protection grounds the Tennessee ban on gender-affirming care for minors.[118] The Court, however, did not address the parental rights theory of the bill's constitutional impermissibility, despite the fact that the petition for certiorari, like the briefing below, included both due process and equal protection arguments.[119] As a result, it remains unresolved

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113 Complaint at 20, Doe 1 v. Thornbury, 679 F. Supp. 3d 576 (W.D. Ky. 2023) (No. 3:23CV-230).

114 *Skrmetti*, 679 F. Supp. 3d at 684. For scholarly accounts of the Due Process argument against child gender-affirming healthcare bans, see *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2183–85 (2021) [hereinafter *Outlawing*]; Amy Vedder, *Not a Mere Creature of the State: Protecting Parental Rights in the Era of Anti-Trans Legislation*, 19 HARV. L. & POL'Y REV. 279, 295–305 (2024).

115 *Skrmetti*, 83 F.4th at 491.

116 The three cases are: Doe 1 v. Thornbury, 679 F. Supp. 3d 576 (W.D. Ky. 2023), *rev'd and remanded sub nom.* L. W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), and *cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024); Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (M.D. Ala. 2022), *vacated sub nom.* Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th Cir. 2023); and Poe *ex rel.* Poe v. Labrador, 709 F. Supp. 3d 1169 (D. Idaho 2023). While *Poe* has not yet been reversed, it has been appealed to the U.S. Court of Appeals for the Ninth Circuit and is awaiting disposition.

117 Lupu, *supra* note 109, at 180–81.

118 United States v. Skrmetti, No. 23–477, slip op. at 24 (U.S. June 18, 2025) (holding that Tennessee's SB1 "does not violate the equal protection guarantee of the Fourteenth Amendment").

119 Both the Department of Justice and the ACLU litigated the case at the Sixth Circuit and sought certiorari at the Court, but the Court only granted the government's petition. The Department of Justice is only statutorily authorized to intervene with regard to the plaintiff's equal protection argument, not their due process parental rights claim. As a result, the Court only addressed the equal protection argument. *See* Mark Joseph Stern, *Transgender Rights Advocates' Last Best Hope Is Neil Gorsuch and John Roberts*, SLATE (June 24, 2024, 1:20 PM), https://slate.com/news-and-politics/2024/06/transgender-supreme-court-neil-gorsuch-john-roberts.html

whether parents have a due process right to make decisions regarding gender-affirming care for their minor children. Challenges to recent federal restrictions on gender-affirming care for minors may soon come to the Court, presenting it with the opportunity to settle the due process issue not reached in *Skrmetti*.[120]

Parental rights may be the most viable remaining basis on which to challenge gender-affirming care bans moving forward. Despite its holding in *Skrmetti*, there is reason to suspect that the Roberts Court may be more sympathetic to a parental-rights argument for the unconstitutionality of gender-affirming care bans. As scholar Hila Keren has argued, the justices' conservative orientation may be more amenable to substantive due process parental rights arguments than to antidiscrimination arguments.[121] According to Keren, "parental rights stand a better chance, as they are uniquely important to conservatives who care about keeping the government out of parents' choices in settings such as homeschooling and vaccination."[122] This argument, however, does not take into account the way in which the Court could employ a strategic redefinition of parental rights to foreclose this alternative avenue to challenge gender-affirming care bans without disturbing parental rights more broadly.

Even though parental-rights precedent gives parents wide latitude to make decisions for children, including medical decisions, the Court may employ a narrow, *Muñoz*-like construction of fundamental parental rights that excludes the ability to consent to gender-affirming care. For instance, the right to make "decisions concerning the care, custody, and control of [one's] children" may be said to encompass only traditional concerns of child-rearing, not "the use of innovative, and potentially irreversible,

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[https://perma.cc/D4FU-VXK2]; *see also* 42 U.S.C. § 2000h-2 (1964) (authorizing the Attorney General to intervene "[w]henever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion, or national origin"—but not in due process cases)).

120 *See, e.g.*, Complaint for Declaratory and Injunctive Relief, PFLAG v. Trump, No. 1:25-cv-00337-BAH (D. Md. Feb 4, 2025) (challenging Donald Trump's January 28, 2025 Executive Order restricting gender-affirming care for young people). The complaint argues that, "[b]y directing agencies to withhold grants from entities that provide gender affirming medical care to minors, the Gender Identity and Denial of Care Orders infringe upon parents' fundamental rights by overriding the aligned judgment of parents, adolescents, and their doctors regarding medically necessary care." *Id.* at 40. The District Court for the District of Maryland granted a preliminary injunction. PFLAG, Inc. v. Trump, 769 F. Supp. 3d 405 (D. Md. 2025). Defendants appealed to the Fourth Circuit, which subsequently granted defendants' motion to hold the case in abeyance for a decision in *United States v. Skrmetti*. Order Granting Motion for Abeyance, PFLAG, Inc. v. Trump, No. 25-1279 (4th Cir. May 12, 2025).

121 Keren, *supra* note 111, at 9–10, 39.

122 Hila Keren, *Parental Rights Face a Surprising Moment of Truth at the Supreme Court*, SLATE (Sept. 19, 2024, 5:45AM), https://slate.com/news-and-politics/2024/09/supreme-court-term-trans-rights-parental-rights.html [https://perma.cc/KUH4-QN3H].

medical treatments for children" which concern "new norms, new drugs, and new public health concerns."[123] Just as the *Muñoz* Court reasoned that the fundamental right of marriage does not extend so far as to curtail the government from regulating immigration at their discretion, the Court may reason—as the Sixth Circuit did in *Skrmetti* before the case reached the Supreme Court—that the substantive due process right of parental discretion does not extend so far as to "prevent[] governments from regulating the medical profession in general or certain treatments in particular, whether for adults or their children."[124] This construction of parental rights would enable the Court to seemingly maintain parental rights while excluding gender-affirming health care from that package of rights.

Under this narrowed conception of parental rights, gender-affirming care restrictions would not be classified as burdening the fundamental liberty interests of parents to make decisions regarding their children. The Court could defeat the right to consent to gender-affirming care under *Glucksberg* by pointing out, as the Sixth Circuit did in *Skrmetti*, that "[s]tate and federal governments have long played a critical role in regulating health and welfare"; as such, legislation would only need to satisfy rational basis review.[125] Given the low bar of rational basis and states' interest in "protecting minors' health and welfare,"[126] the laws would be deemed constitutional. Thus, the Court could significantly curtail parental rights in the gender-affirming care context while leaving the "fundamental right of parents to make decisions concerning the care, custody, and control of their children" intact.[127] This would bolster *Skrmetti*'s authorization of state legislation denying trans youth the healthcare which every major U.S. medical association has deemed the appropriate treatment for gender dysphoria and which research associates with "decreased anxiety, depression, suicidal behavior, and psychological distress, and increased quality of life."[128]

CONCLUSION

Since the Supreme Court handed down *Dobbs v. Jackson Women's*

123 L. W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 471, 475 (6th Cir. 2023) (quoting Troxel v. Granville, 530 U.S. 57, 66 (2000), *cert. dismissed in part sub nom*. Doe v. Kentucky, 144 S. Ct. 389 (2023), and *cert. granted sub nom*. United States v. Skrmetti, 144 S. Ct. 2679 (2024).

124 *Id.* at 473.

125 *Id.*

126 United States v. Skrmetti, No. 23–477, slip op. at 4 (U.S. June 18, 2025). The Court found such an objective to satisfy rational basis review in *Skrmetti*, *id.* at 22 (stating that rational basis review is met since, because there is an "ongoing debate among medical experts regarding the risks and benefits[,] . . SB1's ban on such treatments responds directly to that uncertainty.").

127 Troxel v. Granville, 530 U.S. 57, 66 (2000).

128 *See Outlawing*, *supra* note 114, at 2165, 2168.

Health Organization,[129] overturning the fundamental right to abortion, observers of the Court have anticipated its repudiation of other unenumerated Due Process rights. Looking to Clarence Thomas's concurrence, many commentators fear the Court's wholesale rejection of substantive due process or *Dobbs*-style overturning of specific rights.[130] But as this Case Comment has demonstrated, the Court need not follow Justice Thomas's recommended course to chip away at substantive due process rights. In *Department of State v. Muñoz*,[131] the first substantive due process case decided by the Court since *Dobbs*, the Supreme Court models an alternative approach to the contraction of fundamental rights.

The legal concept of property is famously described as a "bundle of rights," a metaphor which highlights how ownership encompasses related yet distinct entitlements that can be differentiated in concept and disaggregated in practice.[132] The fundamental liberties protected by substantive due process are likewise bundles of rights. The fundamental liberty interest in marriage, for example, combines legal recognition, material and dignitary benefits, physical proximity, emotional intimacy, and family-building. In *Muñoz*, the Court preserves the liberty interest in marriage but thins the bundle of rights which comprise it, leaving behind only the "stick" which corresponds to the legal status of marriage. This approach—while seemingly less radical than the wholesale rejection of substantive due process or the constitutional marriage right—nevertheless denies the plaintiff protections to which she is entitled and weakens the marriage right more broadly. As this Case Comment has demonstrated, this approach has implications beyond the facts of *Muñoz*. The fundamental liberty interests which have thus far protected access to contraception and parental autonomy are likewise bundles of rights which the Court could disaggregate and selectively discard.

The *Muñoz* approach, in short, enables fundamental rights to be formally maintained but practically diminished—in other words, reduced from a robust constellation of substantive rights to a legal protection in name only. In the wake of *Dobbs*, progressives have feared that the demise of fundamental rights protections would come in the form of the repudiation of substantive due process writ large. But these commentaries fail to apprehend

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129 142 S. Ct. 2228 (2022).

130 *See supra* note 23 and accompanying text.

131 144 S. Ct. 1812 (2024).

132 *See, e.g.*, GREGORY S. ALEXANDER, COMMODITY & PROPRIETY 319 (1997) ("No expression better captures the modern legal understanding of ownership than the metaphor of property as a 'bundle of rights.'"); J. E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712 (1966) ("The currently prevailing understanding of property in what might be called mainstream Anglo-American legal philosophy is that property is best understood as a 'bundle of rights.'").

that the assault on fundamental rights may come through a subtler yet equally insidious strategy: the Court's narrowing of how fundamental rights are defined, which allows protections currently taken for granted to be stripped away. Fundamental rights protections, then, depend not just on the survival of the substantive due process doctrine but upon the survival of full and robust definitions of substantive due process rights. If *Muñoz* is any indication of the future of substantive due process jurisprudence, fundamental rights may be stripped away not with a bang but with a whimper—but stripped away nonetheless.[133]

[133] *See* T.S. Eliot, *The Hollow Men*, POETS.ORG, https://poets.org/poem/hollow-men [https://perma.cc/PN5W-BYZK].