LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

VOLUME 11 SPRING 2023 ISSUE 1

ORIGINALISM'S TIME MACHINE: A RESURRECTED RELATIONSHIP TO THE STATE

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I. INTRODUCTION

In May 2022, a United States ("U.S.") news organization published a draft opinion of a case pending before the U.S. Supreme Court ("Court") revealing that the Justices were likely to overrule fifty years of the Court's jurisprudence.[1] More specifically, the draft opinion overruled the Court's *Roe v. Wade* decision, which held that women have a constitutional right to an abortion.[2] The Chief Justice issued a press release admitting the genuineness of the draft and lamenting its release as a "betrayal of the confidences of the Court . .

[*] The author would like to thank Professor Kamil Baraník and Professor Dorota Lis-Staranowicz for the opportunity to present this paper at the International Legal Conference on Contemporary Problems of Constitutional Interpretation hosted by the University of Warmia and Mazury in Olsztyn and Matej Bel University in Banská Bystrica. The views expressed herein are the author's alone and do not necessarily reflect the official policy or position of the United States Air Force Academy, the United States Air Force, the Department of Defense, or the U.S. Government.

[1] *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[2] *Id.*

. intended to undermine the integrity of [its] operations . . . ."[3] The publication of the draft was noteworthy not only because of the unprecedented disclosure of the private, deliberative work of the Court, but also because it foreshadowed a seismic shift in constitutional interpretation, impacting unenumerated rights established by the Court.

One month later, the Court issued its final decision in *Dobbs v. Jackson Women's Health Organization*, which did not differ appreciably from the draft opinion.[4] Employing originalism, the Court overturned a half-century of cases recognizing, defining, and refining a woman's right to an abortion.[5] Though the final decision supplanted the draft opinion leaked to the press, the final decision was also a draft in a different sense. It not only had the practical effect of overruling specific precedents related to abortion rights, but it also provided an originalist formula for overruling the expansion of other unenumerated rights in the U.S. Constitution ("Constitution").[6] This formula threatens the Court's evolutive interpretation of the Constitution that expanded fundamental liberties throughout the latter part of the twentieth century. During that time, the Court posited that through the application of broad principles and reasoned judgment, the past would not rule the present.[7] The Court had held that each generation could discover and expand the meaning of freedom for itself.[8] However, the *Dobbs* decision, and its originalist understanding of fundamental rights, conceals and retracts those twentieth century discoveries.

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[3] Press Release, Chief Justice John G. Roberts, Jr., Justice Roberts Describes the Breach of Confidentiality of the Supreme Court's Operations (May 3, 2022), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22.

[4] Adam Feldman, *Comparing the Draft and Final Opinions in Dobbs*, EMPIRICALSCOTUS (June 24, 2022), https://empiricalscotus.com/2022/06/24/comparing-dobbs/.

[5] Steven G. Calabresi and Lauren Pope, *Judge Robert H. Bork and Constitutional Change: An Essay on Ollman v Evans*, 80 U. CHI. L. REV. ONLINE 155, 155 (2017) (Originalism is defined as "the theory of constitutional interpretation that calls on judges to give the words of the Constitution the original public meaning that they had when the Constitution or its relevant amendments were enacted into law.").

[6] *See Dobbs*, 142 S. Ct. 2244-61.

[7] *See* Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

[8] *Id.*

II. THE U.S. SUPREME COURT'S EVOLUTIVE EXPANSION OF UNENUMERATED CONSTITUTIONAL RIGHTS

Unlike many European constitutions, the Constitution does not reference privacy, human dignity, or the inviolability of the person.[9] Instead, beginning in the mid-twentieth century, the Court incorporated those concepts into U.S. constitutional law through its jurisprudence.[10] Starting with the seminal decision of *Griswold v. Connecticut* in 1965, the Court used dialogic reasoning to identify various enumerated rights that establish unenumerated "zones of privacy."[11] Positing that the right to privacy between a married couple predated the Constitution's enumerated rights, the Court determined that the marital relationship lies within an unenumerated zone of privacy.[12] The Court's discovery of this zone of privacy prohibited the state from outlawing the use of contraception by married couples.[13]

After the Court identified the existence of these unenumerated privacy rights in *Griswold*, it used this evolutive approach to extend the constitutional protection of liberty in the Fifth and Fourteenth Amendments to a variety of other unenumerated rights throughout the latter part of the twentieth century. This included the unenumerated right of extended families to live together, the unenumerated right to refuse life-saving medical treatments, and the unenumerated right to marry a person of another race.[14] In finding that the Constitution protected these unenumerated rights, the Court acknowledged the need for restraint in its evolutive approach.[15] At the same time, the Court also recognized that the nation's history, tradition, and fundamental values guide its expansion of constitutional rights to privacy and personal inviolability.[16] Three of the most noteworthy examples of the Court's evolutive jurisprudence regarding privacy, bodily integrity, and human dignity are its decisions finding that the

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[9] *See* U.S. CONST.

[10] *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (seminal case extending the concept of liberty into the realm of non-economic freedom).

[11] Griswold v. Connecticut, 381 U.S. 479, 484 (1965); ANDRÁS JAKAB ET AL., COMPARATIVE CONSTITUTIONAL REASONING 735 (2017).

[12] *Griswold*, 381 U.S. 485-86.

[13] *Id.* at 485.

[14] Moore v. City of East Cleveland, 431 U.S. 494 (1977); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990); Loving v. Virginia, 388 U.S. 1 (1967).

[15] *Moore*, 431 U.S. 494.

[16] *Id.* at 503; *Cruzan*, 497 U.S. at 342.

Constitution protects the right to engage in consensual sex, the right to same-sex marriage, and (formerly) the right to an abortion.[17]

A. ROE *V.* *WADE* AND THE RIGHT TO AN ABORTION

In *Roe v. Wade*, the Court considered whether the Constitution prohibited states from outlawing abortion.[18] The Court revisited its previous dialogic reasoning from *Griswold* and reaffirmed that there is an unenumerated right to privacy protected by the Constitution.[19] The Court then identified various relevant intimate activities, including marriage, procreation, the use of contraception, family relationships, and child-rearing, which it had previously found were protected by the Constitution's right to privacy.[20] Noting the intimate social, physical, and mental implications surrounding a woman's decision to obtain an abortion, the Court found that the right to privacy was "broad enough to encompass" the right to terminate a pregnancy.[21]

Upon finding a constitutional right to an abortion, the Court recognized that the right to bodily integrity and personal inviolability is not absolute, and that the government maintains an interest in establishing medical standards and prenatal life.[22] Therefore, the Court limited the constitutional right to an abortion.[23] More specifically, the Court held that prior to fetal viability, the right to an abortion was absolute.[24] Only after viability could the state regulate and, ultimately, proscribe abortion.[25] Before the *Dobbs* decision, in the years following *Roe*, the Court continually upheld the core tenants of *Roe* regarding a woman's right to an abortion with one exception, which, while deviating from *Roe* in its application, still protected a woman's right to abortion.[26] In *Planned Parenthood v. Casey*, the Court

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[17] Lawrence v. Texas, 539 U.S. 558 (2003); *Obergefell*, 576 U.S. at 664; *see generally* Roe v. Wade, 410 U.S. 113 (1973) *overruled by Dobbs*, 142 S. Ct. 2228.

[18] *Roe*, 410 U.S. at 116.

[19] *Id.* at 726.

[20] *Id.*

[21] *Id.* at 727.

[22] *See id.*

[23] *See id.*

[24] *Id.*

[25] *Id.* at 732.

[26] Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992); *see also* Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 592 (2016).

abandoned the constitutional recognition of the trimester approach.[27] In its stead, the Court created the "undue burden" test, which prohibited states from regulating abortions where the regulations were motivated by placing a "substantial obstacle" on women seeking abortions.[28] Even with its abandonment of the trimester approach from *Roe*, the Court effectively reaffirmed a woman's constitutional right to an abortion before the fetus was viable outside her womb.[29]

B. *LAWRENCE V. TEXAS* AND THE RIGHT TO SEXUAL INTIMACY

In *Lawrence v. Texas*, the Court overruled its precedent from 1986, which permitted the state to criminalize homosexual sodomy.[30] The Court found its precedent was wrongly decided for various reasons, including the emerging national understanding that the Constitution "gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[31] In expanding the Constitution's protection to include adults' right to engage in consensual sexual intimacy, the Court reasoned that the state infringes on personal dignity and autonomy when it criminalizes private decisions regarding consensual sexual conduct.[32] In one of its most evolutive interpretations of the Constitution, the Court recognized the usefulness of originalism in interpreting the Constitution but established that history and tradition are only starting points for identifying unenumerated rights.[33] The Court posited that those who drafted and ratified the Constitution avoided specifics and intended that each generation be able to "invoke its principles in their own search for greater freedom."[34]

C. *OBERGEFELL V. HODGES* AND THE RIGHT TO SAME-SEX MARRIAGE

In *Obergefell v. Hodges*, the Court found that the state could not deny same-sex couples the right to marry.[35] The Court began its

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[27] *Casey*, 505 U.S. at 873.
[28] *Id.* at 877.
[29] *Id.* at 878.
[30] *Lawrence,* 539 U.S. at 578-79.
[31] *Id.* at 572.
[32] *Id.* at 574.
[33] *Id.* at 572.
[34] *Id.* at 579.
[35] *Obergefell*, 576 U.S. at 681.

analysis by noting marriage's social and emotional significance and impact on one's sense of dignity.[36] The Court detailed the historical change in marriage laws that rejected outdated beliefs regarding a woman's legal relationship with her husband in favor of society's recognition of women's human dignity.[37] The Court also detailed the comparable social and legal barriers homosexual people historically faced regarding their intimate relationships, as well as barriers to government employment, military service, and other associations.[38] Each of these barriers, the Court suggested, denied the human dignity of homosexual people.[39] The Court posited that, while not explicitly enumerated, certain personal choices are so central to an individual's human dignity and autonomy that they are part of the liberties protected by the Constitution.[40] The Court determined that identifying those rights falls within its judicial responsibility to interpret the Constitution.[41]

When interpreting the Constitution's broad principles, the Court again noted the usefulness of identifying history and tradition to guide, but not limit, its judgment.[42] The Court reasoned that such an approach allows it to learn from history, but not be beholden to it.[43] Moreover, the Court noted that limiting constitutional interpretation to the historical record entrenches the indignities that may not have been apparent centuries ago.[44] Indeed, the Court asserted that those who drafted and ratified the Constitution vested future generations with the authority to protect liberty as they learn its meaning.[45] The Court recognized that previous constitutional protections of marriage presupposed a union of opposite-sex couples.[46] However, the Court reasoned that limiting the right to marriage to those who exercised it in the past not only prohibited the expansion of rights based solely on past preferential treatment but also denied homosexual people the ability to make one of the most profound choices central to an individual's dignity and autonomy.[47]

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[36] *Id.* at 656.
[37] *Id.* at 660.
[38] *Id.* at 660-61.
[39] *Id.*
[40] *Id.* at 663.
[41] *Id.*
[42] *Id.* at 644.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 665.
[47] *Id.* at 666, 671.

D. *DOBBS V. JACKSON WOMEN'S HEALTH ORG.* AND A REVERSAL OF *ROE*

The evolutive understanding of the Constitution's protection of autonomy and dignity ended when the Court relied on an originalist interpretation of the Constitution to overturn its jurisprudence protecting a woman's right to an abortion. In finding that its abortion jurisprudence was "egregiously wrong," the Court first observed that the text of the Constitution lacks an express reference to abortion.[48] Moreover, despite recognizing various unenumerated rights throughout the twentieth and twenty-first centuries, including the right to same-sex marriage only seven years earlier, the Court professed a long-standing reluctance to recognize unenumerated rights.[49] For these reasons, the Court asserted that a right to an abortion could only be constitutionally protected if it was deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty.[50] Unlike its earlier cases extending unenumerated rights as discovered by each generation, the Court relied on history and tradition to set the limits and define the boundaries when reconsidering whether a right to an abortion may be inferred from the Constitution.[51] After the Court recited historical evidence, beginning in the thirteenth century, that abortion had been prohibited and banned throughout Anglo-American law, the Court determined that the Constitution did not protect the right.[52]

III. ORIGINALISM'S RETRENCHMENT OF RIGHTS

The Court's decision in *Dobbs* presents an originalist analytical framework that, if applied consistently in the future, halts the development of unenumerated rights and divests previously identified rights. More specifically, as the Court reconsiders its previous expansion of unenumerated rights, which have little or no basis in the history and tradition of U.S. law, its originalist approach will unlearn the aspects of individual privacy, human dignity, and

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[48] *Dobbs,* 142 S. Ct. at 2243, 2245.
[49] *Id.* at 2247.
[50] *Id.* at 2242.
[51] *Id.* at 2257 (by ignoring history as a limiting element of its analysis, the Court reasoned that it is too easy to engage in judicial policymaking).
[52] *Id.* at 2249-51, 2279.

autonomy previously discovered. For example, in *Griswold*, where the Court found a fundamental right to use contraceptives, the dissenting Justices noted that the state had a history and tradition of outlawing the use of contraceptives since 1879.[53] In *Lawrence*, where the Court found a right to engage in consensual sex, the dissenting Justices noted that homosexual sodomy was illegal across the nation from the late eighteenth century until the mid-twentieth century.[54] Finally, in *Obergefell*, where the Court found a right to same-sex marriage, the dissenting Justices noted the history of limiting marriage to one man and one woman.[55] Originalism did not learn these constitutional rights when they were discovered and undoubtedly remains unschooled.

Instead, the Court's evolutive interpretation of the Constitution recognized, even if implicitly, basic modern concepts of constitutionalism found throughout the world. The European experiences with the debasement and objectification of human beings under totalitarianism in the twentieth century resulted in an international turning point in constitutionalism and elevating human dignity to a constitutional right. Specifically, because of the atrocities committed in World War II, the Federal Republic of Germany was at the vanguard of codifying the recognition of human dignity in its constitution.[56] Human dignity is not only the first right identified in Germany's Basic Law, a "forever clause" renders it unamendable.[57] Human dignity has become such an integral part of modern constitutionalism., the Constitutional Court of Romania identified it as a "supreme value" and one of the two bedrock rights upon which all other fundamental rights and freedoms are based.[58] The Court realized similar constitutional truths through its evolutive jurisprudence.[59]

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[53] *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting).
[54] *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting).
[55] *Obergefell*, 576 U.S. at 718.
[56] Doron Shulztiner & Guy E. Carmi, *Human Dignity in National Constitutions: Functions, Promises, and Dangers*, AM. J. OF COMP. L. 461, 465 (2014).
[57] Grundgesetz [GG] [Basic Law], art. 1, 79 (as amended), May 23, 1949, BGBl. I at 1,3 (Ger.).
[58] IZABELA BRATILOVEANU, CONSIDERATIONS ABOUT HUMAN DIGNITY IN THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT 486-87 (2019), https://www.ceeol.com/search/article-detail?id=832282 (The Romanian Constitutional Court identified the development of human personality as the second bedrock principle.).
[59] *Id.* at 486.

In finding human dignity to be a contemporary component of constitutional law, the Court recognized individual rights as more than a textual, positivist list of freedoms that facilitate economic, political, and religious affairs. Instead, it sought a teleological understanding of the Constitution by interpreting general textualized principles, like liberty. In doing so, the Court constitutionalized the individual's right to self-actualization and decision-making in the most intimate decisions. It recognized the individual as an autonomous person entitled to constitutional protection from state action that interfered with personal authority over decisions integral to the human condition. However, as with any fundamental right, the Court also recognized that competing interests require a proportional approach to interpreting and apportioning the right.

More specifically, in the context of the right to an abortion, the Court found that the right was not absolute.[60] Instead, the Court identified a continuum of interests throughout a woman's pregnancy in *Roe*.[61] The Court started with the beginning of a pregnancy and found a woman has complete, unencumbered autonomy over her body and her reproductive decisions until the end of her first trimester.[62] The Court then recognized a period after the first trimester where the state had an interest in, and authority to, regulate abortion in ways related to maternal health.[63] Finally, the Court held that after fetal viability, the state's interest in potential life was compelling, and thus its authority to regulate abortions was virtually absolute.[64] Similarly, while the German Constitutional Court has held that protecting the potential for human life is a "superior" state interest, it also found that a pregnant woman is entitled to the constitutional protection of her own dignity and physical autonomy.[65] Before *Dobbs*, the U.S. and German Courts shared the opinion that, at least at a high level of abstraction, pregnancy does not transform the woman into a tool of the state, subservient to its interest in protecting the potential for human life.[66] Instead, she retained her own, separate — even if curbed — dignity and autonomy.[67] Originalism's directive to rescind these

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[60] *Roe*, 410 U.S. at 155.
[61] *Id.* at 153-55.
[62] *Id.* at 163-65.
[63] *Id.*
[64] *Id.*
[65] DONALD P. KOMMERS & RUSSEL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 390 (3d ed. 2012).
[66] *Roe*, 410 U.S. at 162-63.
[67] *Id.*

findings returns U.S. constitutionalism to an era when, ostensibly, individual human dignity was not an explicitly constitutionalized value. Originalism enables the state to exert a once-lost, but renewed, authority to control a person's body without regard to the individual's independent will. All because bodily integrity is not an explicitly listed constitutional right and was not — as the Court understands it — part of the U.S.'s legal custom before the mid-nineteenth century.[68]

Where a constitutional court declares and clarifies an unenumerated constitutional right through constitutional interpretation, some in society may fall outside the reach of constitutional protection. This undoubtedly impacts those not protected by the demarcated right while they see others benefit from its protections. Nevertheless, in this situation, the absence of constitutional protection is simply a continuation of the *status quo*. Those who fall outside the protection of the right have no feeling of legal reorientation regarding their relationship to the state. However, the constitutional recognition of a specific and defined fundamental right followed by the retraction of the right impacts the previous holder. It constitutes a unique constitutional affront to human dignity and autonomy, disrupting the individual's legal identity. A specific portion of the individual's inviolable agency vanishes, resulting in a repositioning of his or her place in the legal order.

A *post hoc* application of originalism in U.S. constitutional law dispossesses individuals of the increased human dignity they secured as the Court developed its understanding of liberty. The U.S. Supreme Court's regressive constitutional interpretation in *Dobbs* divests individuals of a legal understanding of the human dignity they possessed the day before the *Dobbs* decision was published and shrinks the sphere of autonomy individuals possess in relation to the state. Originalism's history and tradition paradigm takes a twenty-first-century relationship between the individual and the state and returns it to the eighteenth century. Once a constitutional liberty is recognized, its retrenchment presents a situation where a loss for one is an advantage to the other. Thus, where the Court's application of originalism strips the individual of a previously attained increase in human autonomy and dignity it necessarily consigns it to the whims of the state. In this way, originalism's retrenchment undermines constitutional resiliency, particularly with a 233-year-old Constitution that is comparatively difficult to amend.

Some scholars posit that as a constitution ages, it becomes less plausible that the prevailing constituent authority views its

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[68] *Dobbs*, 142 S. Ct. at 244-61.

constitution as a manifestation of its own decisions.[69] Thus, inclusion and flexibility in constitutional interpretation can add to a constitution's endurance.[70] Through evolutive reasoning in the mid and late twentieth century, the Court envisioned an adaptable constitution with expanded constitutional protections that included a twentieth-century understanding of rights. In doing so, the constitution became a less remote, and thus more authentic, expression of the will of the contemporary constituent authority.[71] Originalism's reliance on history and tradition as the appropriate analytical paradigm for U.S. constitutional law provides neither flexibility nor inclusion. Instead, it unbendingly supplants twentieth and twenty-first-century inclusions with eighteenth-century exclusions.

The constituent authority that ratified the Constitution in the late eighteenth century realized its constitutional court might adapt it and identify new fundamental rights.[72] The debate regarding the proposed role of the Court included concerns and criticism by the Anti-Federalists that the Court would "give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution."[73] Those who supported the proposed constitution, the Federalists, responded by arguing that judges would indeed be empowered to interpret the constitution and ascertain its meaning to ensure the legislative branch did not violate the people's Constitutional rights.[74] The Federalist acknowledged that judges often rely on rules of construction that are "not derived from any positive law, but adopted by themselves . . . ."[75] Confronted with these parallel, though not altogether contradictory, observations about the proposed role of the judicial branch, the constituent authority adopted the Constitution either because, or in spite, of them.

Approximately thirty years after the adoption of the Constitution, the Court recognized the teleological difference between

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[69] Richard S. Kay, *Constituent Authority*, 59 AM. J. OF COMP. L. 715, 748 (2011).

[70] *See* TOM GINSBURG & JAMES MELTON, NORWAY'S ENDURING CONSTITUTION: IMPLICATIONS FOR COUNTRIES IN TRANSITION 1 (2014).

[71] *See* KAY, *supra* note 69 at 749.

[72] THE FEDERALIST NO. 78 (Alexander Hamilton).

[73] Brutus No. XI (Jan. 31, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST 417 (Herbert J. Storing ed., 1981).

[74] THE FEDERALIST NO. 78 (Alexander Hamilton).

[75] *Id.*

interpreting the Constitution and ordinary law.[76] The Court posited that those who drafted the Constitution provided general principles and goals, leaving the Court to deduce its specific doctrines.[77] Other constitutional courts, like the Supreme Court of India, have also acknowledged this distinction between the unique nature of a constitution and "ephemeral legal document[s]."[78] They recognize the need to adopt constitutional principles that conform to the changing conditions of the human experience.[79] In doing so, a constitution avoids being "fossilized" and can adjust to contemporary understandings of a citizen's relationship to the state.[80] Within the U.S. constitutional structure, it is the Court's responsibility to ensure the text of the Constitution is rights-protecting.[81] Originalism, however, results in a rights-withdrawing Court that justifies its interpretation of the Constitution by conforming with a concept of human dignity laid down in the time of King George III.[82]

[76] McCulloch v. Maryland, 17 U.S. 316, 406 (1819).

[77] *Id.* (While the Court in *McCulloch* was not analyzing "the great principles of liberty," it nonetheless recognized the importance of any "exposition of the constitution . . . .").

[78] Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1, 92 (India).

[79] *See id.*

[80] *Id.*

[81] *See generally* THE FEDERALIST NO. 78 (Alexander Hamilton).

[82] *See* Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting), *overruled by Lawrence*, 539 U.S. 558.