CAN STATES RESTRICT THE CONSTITUTIONAL RIGHT TO BEAR ARMS BY FOLLOWING THE DESIGN OF TEXAS BILL 8?

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ABSTRACT

In September 2021, the Texas Bill 8 ("the act") or ("S.B. 8") was put into effect. The act banned abortion in Texas that takes place after six weeks of pregnancy — reversing the US Supreme Court decision of Roe v. Wade. To achieve that end, the Texas legislature uniquely designed the act to withstand legal and constitutional challenges. The Texas legislature conferred the enforcement of the act upon private individuals rather than Texas state officials. By transferring enforcement to private individuals, Texas officials cannot be subject to injunctions preventing them from enforcing the act. Further, private individuals cannot be subject to injunctions either, as they lack an official capacity to represent Texas in enforcing the act. This leaves the act immune against most challenges. On the other hand, the number of gun-violence deaths and injuries have spiked in the United States. The correlation between the Second Amendment right of bearing arms and the prevalent gun violence in the United States cannot be denied. In this research, we attempt to answer the question of whether states may adopt the Texas Bill 8 unique design as a backdoor to block or restrict the Second Amendment right of bearing arms to achieve public safety.

INTRODUCTION

At first glance, it follows from a logical point of view that allowing *anyone* in the street to possess lethal weapons only results in more homicides, assassinations, and general chaos even when initial purchasers meet the arm licensing conditions. In a society where it is not only acceptable, but also constitutional to carry weapons from a pistol to building an assault rifle,[1] it becomes extremely difficult to control gun violence. Yet, the potential dangers surrounding bearing arms did not enter public discourse until after

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1 *See, e.g.*, Allen Brown, *Can You Legally Build an AR 15 in California?*, SONOMA VALLEY SUN (Feb. 18, 2021), https://sonomasun.com/2021/02/18/can-you-legally-build-an-ar-15-in-california/ [https://perma.cc/U4XL-9DWC].

the assassination of John F. Kennedy in 1963.[2] Ten years later, women's right to bodily autonomy and control over their reproductive systems entered public discourse after *Roe v. Wade* was decided in 1973.[3] As a predictable consequence of the second amendment, the U.S. has become the land of homicides—the American nightmare.[4]

In 1961, over 50% of the homicides were committed by a firearm.[5] In the 1990s, firearm homicides spiked to 65% and remained between 63% to 70% for the next 24 years.[6] In 2015 and 2016, firearm homicides ranged between 70% to 73%.[7] New York City was called the "fear city" due to the number of homicides taking place in its five boroughs.[8] Chicago suffered from the same consequences.[9]

The Second Amendment still stands in the face of social and cultural change in America. A vexing issue that adds to the survival of the Second Amendment is the U.S. Supreme Court Justices originalist interpretation of

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2 GARY KLECK, POINT BLANK GUNS AND VIOLENCE IN AMERICA, 5 (1991).

3 Janet R. Jakobsen, *Struggles for Women's Bodily Integrity in the United States and the Limits of Liberal Legal Theory*, 11 J. FEMINIST STUD. 2, 5 (1995).

4 "In the United States there are approximately thirty-three thousand gunshot fatalities per annum. Roughly 95% of these fall into the category of either homicide or suicide. The remaining 5% is divided between fatalities which are classified as 'accidental' or a smaller number that are deemed to fall under the category of 'lawful' (or 'justifiable') homicide. The majority of 'justifiable' homicides are the result of 'legal intervention' by law enforcement agencies as opposed to private citizens." John McNamara, *The Fight to Bear Arms: Challenging the Second Amendment and the U.S. Constitution as a Sacred Text*, EUR. J. AM. STUD., Summer 2017, at 2. *See also* Peter Squires et al., *The Fixation with Guns is an American Nightmare*, THE GUARDIAN (June 2, 2022), https://www.theguardian.com/us-news/2022/jun/02/the-fixation-with-guns-is-an-american-nightmare [https://perma.cc/BQW9-RSTH]; Belén Fernández, *Uvalde School Massacre: The American Nightmare*, ALJAZEERA (May 26, 2022), https://www.aljazeera.com/opinions/2022/5/26/the-american-nightmare [https://perma.cc/7YFR-YG28]; Henry A. Giroux, *Gun Culture and the American Nightmare of Violence*, TRUTHOUT (Jan. 10, 2016), https://truthout.org/articles/gun-culture-and-the-american-nightmare-of-violence/ [https://perma.cc/QJR3-8VS7] (referring to American homicides as the "American nightmare").

5 Jeff Asher, *The U.S. Murder Rate Is Up But Still Far Below Its 1980 Peak*, FIVETHIRTYEIGHT (Sept. 25, 2017, 9:55 AM), https://fivethirtyeight.com/features/the-u-s-murder-rate-is-up-but-still-far-below-its-1980-peak/ [https://perma.cc/W85Z-4ZYY].

6 *Id.*

7 *Id.*

8 Kevin Baker, *'Welcome to Fear City' – the inside story of New York's civil war, 40 years on*, THE GUARDIAN (May 18, 2015, 6:43 AM), https://www.theguardian.com/cities/2015/may/18/welcome-to-fear-city-the-inside-story-of-new-yorks-civil-war-40-years-on [https://perma.cc/9Q27-VCVZ].

9 Kyle Bentle, Jonathan Berlin, Ryan Marx, & Kori Rumore, *40,000 Homicides: Retracing 63 Years of Murder in Chicago*, CHI. TRIB. (Apr. 27, 2021, 12:14 PM), https://www.chicagotribune.com/news/breaking/ct-history-of-chicago-homicides-htmlstory.html [https://perma.cc/3BCC-PQNL].

the Second Amendment.[10] In 2008, the U.S. Supreme Court considered a challenge to the Second Amendment in *District of Columbia v. Heller*.[11] Justice Scalia wrote the majority opinion upholding the Second Amendment right to bear arms inside the home and emphasized the general right to self-defense under the Second Amendment.[12] This took place after the majority interpreted the Second Amendment in light of the history of its drafting.[13] Nonetheless, the question persists, what must be done to constrain the dangerous Second Amendment in a changed American society that may not want to follow the obsolete thoughts of James Madison and Thomas Jefferson regarding bearing arms?

In Part I, we discuss the S.B 8 and all relevant U.S. Supreme Court decisions regarding constitutional challenges to the act. In part II, we scrutinize the two recent U.S. Supreme Court landmark cases of *New York Rifle* (regarding Second Amendment rights) and *Dobbs* (concerning abortion rights). In Part III, we argue that the U.S. Supreme Court adopted a double standard in reaching its decisions in both cases simultaneously. Further, we argue that the Supreme Court should have adopted a strict scrutiny standard of review regarding the constitutionality of banning abortion and an intermediate standard of review as to the Second Amendment right of bearing arms. Finally, we answer the question of whether following Texas Bill 8 unique design to restrict the application of the Second Amendment right would be beneficial to states in curbing gun-violence death rates.

I. ANALYZING TEXAS BILL 8 AND RELEVANT U.S. SUPREME COURT CASE LAW:

Texas Bill 8 ("the act") or ("S.B. 8") was issued by the Texas legislature and became binding starting September 1, 2021.[14] The act bans abortion after six weeks of pregnancy, or once a fetal heartbeat is detected, whichever comes first.[15] The Texas act was designed to withstand *prima facie* constitutional scrutiny by giving the right to sue anyone who performs, aids

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10 *See* District of Columbia v. Heller, 554 U.S. 570 (2008) (ruling that the Second Amendment protects the possession of handguns inside the home and the use of handguns inside the home for self-defense purposes).

11 *Id.*

12 *Id.* at 636.

13 *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008) (supporting the Constitutional interpretation with drafting history and scholarly research examining the law around the time of ratification).

14 S.B. No. 8, 87th Leg. (Tex. 2021).

15 TEX. CODE ANN. § 171.204 (West 2021).

or abets an abortion, or intends to do so, with $10,000 collected from that party.[16] Thus, any private party who opposes an abortion procedure can apply for injunctive relief to prevent such a procedure.[17] The terms "performs," "aids or abets," and "intends to do," make the act so expansive that it can apply to abortion, "a clinic, a doctor a person giving advice, or a friend driving a woman to a clinic."[18] Further, by granting the right to private individuals to report abortion incidents instead of law enforcement, institutions and persons targeted by this bill will not be able to sue state officials or the state, since states enjoy sovereign immunity and state officials are not mentioned in the act.[19] Further, the design of the act also prevents abortion clinics or doctors from invoking the unconstitutionality of this act since they lack Article III standing to future injury, until it applies to them.[20]

At its face, the Texas act astonishingly reversed *Roe v. Wade* right to abortion – a constitutional right that was not limited to the first six weeks of pregnancy.[21] Moreover, the act withstood the initial consideration by the U.S. Supreme Court, after the majority of the Court rejected granting an injunctive relief.[22] Justice Roberts, in his dissent, indicated his complete understanding of the Texas legislature's desire in bending the law "to insulate the State from responsibility" for enforcing the act.[23] In addition, Justice Breyer's dissent pointed to the undisputable constitutional principle that a state cannot delegate a veto right to private individuals, when the state itself cannot veto it.[24] Finally, in Justice Sotomayor's strong words:

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16 TEX. CODE ANN. § 171.208 (a)-(b) (West 2021). *See also* Erwin Chemerinsky, *Op-Ed: How the Texas Abortion Law Could Spawn Threats to Other Constitutional Rights*, L.A. TIMES (Sept. 6, 2021, 3:15 AM), https://www.latimes.com/opinion/story/2021-09-06/op-ed-how-texas-abortion-law-could-threaten-other-constitutional-rights [https://perma.cc/FCK2-63JN] (discussing the ability of private citizens to bring a civil action against anyone who performs, aids, or abets an abortion).

17 *See* TEX. CODE ANN. § 171.208 (b)(1) (West 2021).

18 Chemerinsky, *supra* note 16.

19 *Id.*

20 In *Clapper v. Amnesty International USA*, the Court held that, in order to demonstrate Article III standing, a plaintiff seeking injunctive relief must prove that the future injury, which is the basis for the relief sought, must be "certainly impending"; a showing of a "reasonable likelihood" of future injury is insufficient. Moreover, the Court in *Amnesty International* held that a plaintiff cannot satisfy the imminence requirement by merely "manufacturing" costs incurred in response to speculative, non-imminent injuries. 568 U.S. 398, 401 (2013).

21 *See* Roe v. Wade, 410 U.S. 113, 164 (1973) (holding that the decision to perform an abortion should be left to the determination of the physician for the first trimester of pregnancy).

22 Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).

23 *Id.* at 2496 (Roberts, J., dissenting).

24 "And a 'State cannot delegate a veto power over the right to obtain an abortion which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.'

> The Court's order is stunning. Presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand. Last night, the Court silently acquiesced in a State's enactment of a law that flouts nearly 50 years of federal precedents. Today, the Court belatedly explains that it declined to grant relief because of procedural complexities of the State's own invention. *Ante*, at 2495. Because the Court's failure to act rewards tactics designed to avoid judicial review and inflicts significant harm on the applicants and on women seeking abortions in Texas, I dissent. [25]

On December 10, 2021, the Supreme Court issued its decision in *Whole Woman's Health v. Jackson* and in *U.S. v. Texas*.[26] The court affirmed in part and reversed in part the District Court's Order and remanded the case.[27] In *Whole Woman's Health v. Jackson*, the justices held in an 8-1 decision (with Justice Thomas dissenting) that the abortion provider's lawsuit could go forward against a group of Texas state medical licensing officials, but not against the state-court judges and clerks and the private citizen, the latter whom the abortion providers had also tried to sue.[28] While the Court declined to take up the constitutionality of S.B. 8, they held that the abortion providers could pursue a pre-enforcement challenge against the certain named defendants but not others.[29]

First, in an opinion authored by Justice Gorsuch, the Supreme Court reviewed the order at issue in the interlocutory appeal, the District Court's order denying the Texas's motion to dismiss. In the appeal against the Texas's state official, defendants' motion to dismiss argued that the abortion providers' suit should be dismissed based on grounds of sovereign immunity and justiciability—they argued that none of the named plaintiffs could enforce the law because it was to be enforced by private citizens.[30]

One of the defendants was a private citizen, Mr. Dickson. He argued that petitioners lacked standing to sue him, because he had not actually filed

Indeed, we have made clear that 'since the State cannot regulate or proscribe abortion during the first stage the State cannot delegate authority to any particular person to prevent abortion during that same period.'" Whole Woman's Health v. Jackson, 141 S. Ct. at 2497 (Breyer, J., dissenting) (cleaned up) (quoting Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 69 (1976)).

25 Whole Woman's Health v. Jackson, 141 S. Ct. at 2498 (Sotomayor, J., dissenting).

26 United States v. Texas, 142 S. Ct. 522 (2021).

27 Whole Woman's Health v. Jackson, 13 F.4th 434, 447–48 (5th Cir. 2021).

28 The lone private defendant, Mark Lee Dickson, was dismissed from the lawsuit due to the petitioner's lack of standing to sue him. Whole Woman's Health v. Jackson, 23 F.4th 380, 387 (5th Cir. 2022).

29 Whole Woman's Health v. Jackson, 13 F.4th 434, 447–48 (5th Cir. 2021).

30 Whole Woman's Health v. Jackson, 142 S. Ct. 522, 537 (2021).

suit under S.B. 8 yet.[31] The Court ruled that the petitioners could not establish injury against him and that the petitioners lacked standing to sue him under S.B. 8.[32] Pursuant to the sovereign immunity doctrine under the Eleventh Amendment, the named parties Clarkston (a state-court clerk) and Jackson (a state court judge) could not be sued in this instance.[33]

Article III was also at issue for suing state officials because federal courts only have the power to resolve "actual controversies arising between adverse litigants."[34] In the context of this case, there was no controversy between the judge and state court clerk and the abortion providers. The abortion providers wanted to enjoin the state court clerks from accepting cases pursuant to S.B. 8. But the majority opinion held that court clerks do not qualify as "adverse litigants" because they only docket cases as part of the "machinery of courts" and so not proper defendants in a pre-enforcement action for injunctive relief.[35] The Court determined that the Attorney General of Texas is also not a proper defendant because the office is not responsible for enforcing the law.[36] Lastly, on the issue of proper defendants, the Court held that sovereign immunity does not bar the abortion providers' suit against the defendants Stephen Carlton, Katherine Thomas, Allison Benz, and Cecile Young at the motion to dismiss stage in the litigation.[37] These state officials are in charge of regulating abortion in Texas and have enforcement authority for S.B. 8.[38] The "savings clause" within S.B. 8 provided that the law does not limit the enforceability of any other laws regulating or prohibiting abortion, which would fall to the responsibility of the Texas Medical Board to enforce under the Texas Code §164.055.[39] The

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31 *Id.*

32 *Id.*

33 *Id.* at 532.

34 *Id.* at 532 (citing Muskrat v. United States, 219 U.S. 346, 361 (1911)).

35 *Whole Woman's Health v. Jackson*, 142 S. Ct. at 532.

36 *Id.* at 534.

37 *Id.* at 539. Justice Thomas, writing separately in a dissent to Part II-C, argued that none of the named defendants were proper and would remand the case back to district court to be dismissed for lack of subject-matter jurisdiction. He argued that TX S.B. 8 barred governmental enforcement so any government officials were not proper defendants. Additionally, Justice Thomas held that the abortion providers lack Article III standing, because he contends that they cannot assert the constitutional rights on behalf of their clients. Further, he wrote that even if there was a proper defendant, an action brought under *Ex parte Young* can only commence when a lawsuit is about to be filed under the controversial law so litigation would be imminent. The petitioners would have to show credible and specific threat of enforcement to rescind their medical licenses. *Id.* at 540-541, 542 (Thomas, J., dissenting) (citing June Medical Services L.L.C. v. Russo, 140 S. Ct. 2103, 2148–49 (2020) (Thomas, J., dissenting).

38 *Id.* at 536.

39 *Id. See also* TEX. HEALTH & SAFETY CODE ANN. § 171.207(b)(3).

abortion providers had to plausibly allege that S.B. 8 has already impacted their day-to-day operations and that Texas state law has provisions where health officials can bring disciplinary actions against them if they violated this law.[40]

However, the Court ruled that S.B. 8 would remain in effect, but that abortion providers – as litigants – can turn to lower federal courts for questions regarding the enforceability of the S.B. 8.[41] It opined that the Court had not recognized "an unqualified right to pre-enforcement review of constitutional claims in court."[42] Further, constitutional rights are often asserted as defenses to state-law claims and not in federal pre-enforcement cases.[43]

In his opinion, concurring in part and dissenting in part, Justice Roberts noted that S.B. 8 "chilled" the constitutional right to abortion. He wrote that several other defendants would be proper state officials to sue, including the Attorney General and the state court clerk, because their positions fall within the scope of *Ex parte Young*'s exception to sovereign immunity.[44] Despite the law's design to be enforced by private citizens, both parties "enforce" S.B. 8 through other means, whether by the law or through court citations and docketing cases. He determined, however, that judges are not proper defendants because they are not "adverse" parties.[45] Justice Roberts further opined those decisions issued after *Ex parte Young* enjoined courts from docketing cases brought under an unconstitutional state law.[46]

Justice Sotomayor, who concurred in the judgment in part and dissented in part and joined by Justice Breyer and Justice Kagan, contended that S.B. 8 "chills" the exercise of federal constitutional rights and so the court should provide a remedy for the violation.[47] She reiterated her stance that the Court should have put a stop to this law months ago when it first reviewed it.[48] While the law "chills" constitutional right to abortion, it also introduces many procedural anomalies not common in court procedure, purports to limit substantive defenses to the watered-down version of "undue burden,"

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40 *Whole Woman's Health v. Jackson*, 142 S. Ct. at 537.

41 *Id.* at 537.

42 *Id.*

43 *Id.* at 538.

44 *Id.* at 544 (Roberts, C.J., dissenting).

45 *Id.*

46 *Id.* at 544 (citing Mitchum v. Foster, 407 U.S. 225, 243 (1972); *see also* Pulliam v. Allen, 466 U.S. 522, 525 (1984)).

47 *Whole Woman's Health v. Jackson*, 142 S. Ct. at 545 (Sotomayor, J., dissenting).

48 *Id.*

and installs retroactive liability for conduct done by abortion providers.[49] Additionally, she asserted that TX S.B. 8 took away an abortion provider's ability to get a pre-enforcement adjudication as well as depriving them of an effective post-enforcement adjudication, thereby potentially violating procedural due process.[50] Further, the holding in *Ex parte Young* can be used by courts to vindicate federal rights and hold state officials responsible to the constitution. The consequences of the penalties as designed in TX S.B. 8 will cause abortion to face monetary fines in addition to countless lawsuits where they cannot get reimbursement for attorneys' fees or properly defend their rights in the lawsuit.[51]

Further, Justice Sotomayor wrote that the state-court clerks are proper defendants in this action, because actions done in their official capacities is to be regarded as an action of the state.[52] When the state-court clerks docket a lawsuit filed under TX S.B. 8, they are participating in the "chilling" effect of the law and their act is not a neutral action so they can be considered "sufficiently adverse" parties.[53] The main issue between Justice Sotomayor and the majority is "over whether States may nullify federal constitutional rights by employing schemes like the one at hand" and that the Court's opinion indicates that they can as long as state legislatures write laws that disclaim enforcement by state officials, including licensing officials.[54] She opines that Texas is outright challenging federal supremacy, and the Court's decision to not review the law will have major consequences. "I doubt the Court, let alone the country, is prepared for them."[55] Pre-enforcement review will be unavailable, and it will not matter the amount of the financial penalty or the type of individual constitutional right under attack. The only way to get a remedy is for an individual to go through many tough burdens—to violate the unconstitutional law and be sued, go through all the appellate courts, all the way to the Supreme Court to grant certiorari.

The logic echoes the proposition used often by defendants of slaveholders—"States had the right to 'veto' or 'nullif[y]' any federal law with which they disagreed."[56] These theories have not been extinguished, she opined, and experienced a revival in the post-war South leading to the

49 *Id.* at 546–47.
50 *Id.* at 547.
51 *Id.* at 5–6.
52 *Id.* at 548 (citing Shelley v. Kraemer, 334 U.S. 1, 14 (1948)).
53 *Whole Woman's Health v. Jackson*, 142 S. Ct. at 549.
54 *Id.* at 550.
55 *Id.*
56 *Id.* (citing Address of J. Calhoun, *in* SPEECHES OF JOHN C. CALHOUN 17–43 (1843)).

enactment of 42 U.S.C. §1983. "Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights."[57] Justice Sotomayor wrote that the "Court's delay in allowing the case to proceed has catastrophic consequences for women seeking to exercise their constitutional right to an abortion in Texas."[58] By shutting the door to sue Texas's state attorney general, other states can copycat Texas's regime and perfect it, to specifically target the exercise of constitutional rights they do not like through crushing "private" litigation, including other rights such as gun rights, freedom of religion, right to privacy, and more.

> Today's fractured Court evinces no such courage. While the Court properly holds that this suit may proceed against the licensing officials, it errs gravely in foreclosing relief against state-court officials and the state attorney general. By so doing, the Court leaves all manner of constitutional rights more vulnerable than ever before to the great detriment of our Constitution and our Republic.[59]

Can the private citizen enforcement provision in S.B. 8 be used to attack other constitutional rights? The answer is likely going to be yes, at least on the short term. Perhaps the lasting effect of the holding in this case is the failure of the Court to address the "chilling" of constitutional rights by state law designed to circumvent federal court review. States can perfect S.B. 8 so no state official can be sued by an individual whose constitutional rights are being trampled by an unconstitutional state law. Today's case deals with abortion rights, but tomorrow will likely be the Second Amendment rights, or First Amendment rights of free speech and religion. Both red states and blue states will call on their state legislators to start designing these bills to bypass federal review and effectively neutralize certain constitutional rights. Already, the governor of California called on the state legislature to design a law like S.B. 8 for gun control.[60]

Many legal scholars and judges at the fourth, sixth, and seventh circuits have attempted to suggest a legal opening to limit the Second Amendment right – as a constitutional right to bear arms for personal self-defense. They tried to achieve that end by arguing that the Second Amendment right shall

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57 *Whole Woman's Health v. Jackson*, 142 S. Ct. at 551 (citing Mitchum v. Foster, 407 U. S. 225, 240 (1972)).

58 *Whole Woman's Health v. Jackson*, 142 S. Ct. at 551.

59 *Id.* at 552.

60 Claire Hansen, *Newsom's California Gun Ploy Tests GOP's Texas Abortion Law Strategy*, U.S. NEWS (Dec. 14, 2021), https://www.usnews.com/news/national-news/articles/2021-12-14/newsoms-california-gun-ploy-tests-gops-texas-abortion-law-strategy [https://perma.cc/DX5L-WHX3].

only be restricted to a regulated militia to protect the state; or what is generally referred to as an army.[61] Although such argument could have played a prominent role in restricting the usage of arms only to army members (currently police), which is the norm in most world countries, it was dismantled by the Fifth Circuit and Justice Scalia in *Heller*.[62] Justice Scalia and the majority rejected this argument by interpreting the Second Amendment after resorting to the history of its drafting.[63] Again, this reveals that the U.S. Constitutional text is treated as sacred as religion – or even more – and its extreme inflexibility, especially when interpreted by originalist and conservative justices at the U.S. Supreme Court.

There is one possible suggestion to put an end to the toxicity of the Second Amendment and reduce homicide rates in America. Although we agree with the dissent opinion of Justice Breyer, Justice Roberts, and Justice Sotomayor in the S.B. 8 U.S. Supreme Court case, the majority of the Court had already issued a binding decision—rejecting to issue an injunction against Texas or its people at large.[64] By following the design of the S.B. 8, each state may also adopt a statute that heavily regulates bearing arms and grant the right to report to private individuals rather than the state officials or the state. By doing that, each state can insulate the statute against the constitutional review of the U.S. Supreme Court, until a substantive challenge is brought through the courts system by a private individual. Even when a substantive constitutional challenge is brought to the Court, it would not be simple to nullify such statute since the government has no role in enforcing it. How would the Court balance between the government interest and the fundamental right to bearing arms when the government officials are

61 *See, e.g.*, Stevens v. United States, 440 F.2d 145, 149 (6th Cir. 1971) ("Since the Second Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm."); United States v. Johnson, 497 F.2d 549, 549 (4th Cir. 1974) (holding that the Second Amendment protects the collective right to maintain a militia). The most sweeping acceptance of the Collective Rights Theory comes from *Quilici v. Village of Morton Grove*, where the Seventh Circuit held that the Second Amendment applies to the preservation of the militia and upheld a local ban on handguns. 695 F.2d 263, 270 (7th Cir. 1982).

62 United States v. Emerson, 270 F.3d 210, 260 (5th Cir. 2001). After an extensive discussion, the Court upheld the statute under which Emerson was charged but held that the Second Amendment protects an individual's right to bear arms. The Fifth Circuit concluded: "We find that the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training." *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 659 (2008)).

63 *Id.*

64 Whole Woman's Health v. Jackson, 142 S. Ct. 522, 535 (2021).

not the ones enforcing the statute? Now, the adoption of such statute might count as a Machiavellian argument—justifying the "unconstitutional" backdoor to strictly limit the fundamental right to bearing arms under the Second Amendment of the U.S. Constitution—in the footprints of the Texas Bill 8 statute. The only difference from the Texas Bill 8 is that such statute would promote public safety, reduce gun violence related deaths, and increase welfare in the US.

The U.S. Supreme Court had the opportunity to substantively review the Mississippi's Gestational Age Act ("Mississippi Act") regarding abortion rights, which did not have Texas Bill 8 unique design.[65] The Mississippi Act limited the abortion right to fifteen weeks of pregnancy, and it did not adopt the Texas Bill 8 unique design. Thus, the U.S. Supreme Court faced no legal obstacles in reviewing the Mississippi Act in *Dobbs v. Jackson Women's Health Organization*.[66] Astonishingly, the U.S. Supreme Court, in reviewing the constitutionality of the Mississippi Act, reversed two prominent U.S. Supreme Court landmark cases that lasted almost half a century: *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*.[67] The Court decided to leave a constitutional right and a sensitive matter – women's constitutional right to their bodily autonomy and liberty under the Fourteenth Amendment – to state legislatures to set their own abortion limitations or even ban abortion.[68] The Court's reasoning in *Dobbs* shook the stoned legal principles that have existed centuries before the U.S.'s own existence such as *stare decisis,* the role of judicial review, and the role of judges in preserving and promoting the constitutional rights of people. The Court, in around 150 pages, had transformed its role from protecting people's constitutional rights against the government's intervention to enabling the government to interfere as much as it pleases, whenever it pleases, and in the manner it sees fit. The *Dobbs* decision is not only disastrous for women but also disastrous for judicial review and the formidable legal principles that have long governed the constitutional and legal review process for centuries.

In contrast, in *New York State Rifle & Pistol Association Inc. v. Bruen*, the Court stood up to even the slightest inconvenience to the Second Amendment right – a New York statute requiring an applicant to furnish a proper cause to

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

66 *Id.*

67 Roe v. Wade*,* 410 U. S. 113 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

68 *Dobbs,* 142 S. Ct. at 1.

obtain an unlimited open carry or concealed license to bear an arm.[69] According to the NY Court of Appeals, an applicant satisfies the "proper cause" requirement if he could "demonstrate a special need for self-protection distinguishable from that of the general community."[70] While the Court had left abortion to be regulated by state legislatures in *Dobbs* on the premise that governments have substantial interest in protecting potential lives, the Court repealed the NY Statute as breaching the Second and Fourteenth Amendment for placing a proper cause limitation on the right to bear arms. Both *Dobbs* and *NY Rifle* were decided at the same time – *Dobbs* decision date is one day after the *NY Rifle* decision. As such, one would have expected the same treatment by the Court towards constitutional rights. For instance, if the Court decided to leave the matter of women's bodily autonomy and liberty under the Fourteenth Amendment for state legislatures to decide on, it should have also left the matter for gun control to state legislatures to do as they please. But that did not happen. The Court stood fiercely against the NY statute that places a proper cause limitation on the Second Amendment to protect people's lives in New York. Yet, the Court denied its ability to stand at all in the face of state legislatures regulating women's constitutional right to their bodily autonomy on the premise that the government has interest in protecting potential life. The Court's stance on both matters put side by side proves contradictory. How can protecting a potential life be an important governmental interest in one decision, while protecting an existing life against gun violence does not? We will scrutinize both decisions in detail below.

Accordingly, adopting the Texas Bill 8 design to withstand any constitutional review may work for gun control under the Second Amendment. Placing heavy restrictions on bearing arms may withstand the Court's procedural scrutiny if adopted in the design of the Texas Bill 8, and substantive scrutiny if the Court adopted an intermediate scrutiny standard such as the Second Circuit.[71] Nonetheless, such design may not stand the Court's review if it chose to adopt a historical and textual test such as in *Heller* and *New York Rifle*.

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69 N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2022).

70 *In re* Klenosky, 75 A.D.2d 793, 793 (N.Y. App. Div. 1979).

71 Kachalsky v. Cnty. of Winchester, 701 F.3d 81, 93 (2d Cir. 2012).

II. WHAT PROPER STANDARD OF REVIEW SHOULD HAVE THE US SUPREME COURT ADOPTED IN REVIEWING THE RIGHT TO BEARING ARMS AND THE RIGHT TO ABORTION?

The U.S. Supreme Court has decided two new landmark cases: one on abortion rights and the second on the right to bear arms. We will begin by discussing the Second Amendment case heard on November 3, 2021, and decided on June 23, 2022, as it concerns the limitations on gun licensing and whether that breaches the Second Amendment of the Constitution. Finally, we will discuss the abortion right case (*Dobbs v. Jackson Women's Health Organization*) that was decided on June 24, 2022.

1. New York State Rifle & Pistol Association Inc. v. Bruen: The Second Amendment Case:

A. Appellant's and Appellee's Arguments in New York State Rifle & Pistol Association, Inc. v. Bruen:

In the oral hearing that took place on November 3, 2021, Justice Gorsuch questioned the level of scrutiny that should be adopted by the Court in assessing the Second Amendment restrictions. Justice Gorsuch stated:

> Some of your amici have asked us to provide further guidance to lower courts in cases beyond your own. And so, putting aside your case for the moment, they've pointed out that some lower courts have refused to apply the history test, for example, and said they will not extend *Heller* outside the home until this Court does. Other courts have applied intermediate scrutiny and variations of that. Some have suggested that strict scrutiny would be appropriate to treat this right comparably to other rights under our modern tiers of scrutiny. I'd just be curious what views you have about all that.[72]

We will first review the appellants and appellees briefs in *New York Rifle & Pistol Association v. Bruen*, then scrutinize its decision, and finally conclude with what should have been the proper review standard in that case.

In *NY Rifle*, plaintiffs/appellants challenge New York's law that bans the open carry of handguns without the special showing of "proper cause."[73] Plaintiffs/Appellants are Robert Nash, Brandon Koch, and New York State Rifle and Pistol Association, Inc. In their Petition for Certiorari, the

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72 Transcript of Oral Argument, New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2021) (No. 20-843).

73 Brief for Petitioners at 18, *Bruen*, 142 S. Ct. 2111, No. 20-843 (July 13, 2021).

Appellants laid out several arguments as to why New York's law violated their Second Amendment rights.[74] Robert Nash had applied for an unrestricted license to carry a concealed weapon in public for self-defense and other purposes.[75] Their license was issued for the limited purpose of hunting and target practice only.[76] His application for unrestricted concealed carry was denied by the licensing officer, Appellee McNally, stating that Nash failed to demonstrate a special need for self-defense that distinguished him beyond the general public and so did not show proper cause to carry a firearm in public for the purpose of self-defense.[77]

Appellant Brian Koch also applied for a concealed-carry permit to allow him to carry a gun for self-defense purposes. Appellee McNally denied his application as well and limited his license to "hunting and target" purposes only.[78] He cited Koch's failure to show "proper cause" to carry a firearm in public for the purpose of self-defense due to his lack of demonstrating how his need was distinguished from the general public.[79] Both Appellants were granted gun licenses for concealed carry but limited to certain places including off-road backcountry, outdoor activities similar to hunting.[80] New York State Rifle and Pistol Association is a group who supports the right of New York residents to keep and bear arms. They claim that many New York residents would carry guns but cannot satisfy the "proper cause" standard as established by the courts.[81] Further, they argue that New York's law "flatly prohibits ordinary law-abiding citizens from carrying a handgun for self-defense outside the home cannot be reconciled with the Court's affirmation of the individual right to possess and carry weapons in case of confrontation."[82]

Plaintiffs/Appellants were denied a concealed-carry permit by the licensing officer, and so filed this lawsuit in the Northern District of New York.[83] The Defendants/Appellees' Motion to Dismiss was granted on December 17, 2018. The trial court determined that the right of self-defense is subject to state regulation. The trial court held that the Plaintiff's claims

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74 *Id.*

75 *Id.* at 19.

76 *Id.*

77 Petition for Writ of Certiorari at 5–6, *Bruen*, 142 S. Ct. 2111 (No. 19-156).

78 Brief for Appellees at 11, New York State Rifle & Pistol Ass'n, Inc. v. Beach, No. 19-156 (2d Cir. Apr. 24, 2019).

79 Petition for Writ of Certiorari, *supra* note 77, at 6.

80 Brief for Appellees, *supra* note 78, at 11.

81 Petition for Writ of Certiorari, *supra* note 77, at 6.

82 *Id.* at 1.

83 New York State Rifle & Pistol Ass'n, Inc. v. Beach, 354 F. Supp. 3d 143, 145 (N.D.N.Y 2018).

were foreclosed by the Second Circuit's decision in *Kachalsky*, 701 F.3d at 83-84.[84]

Further, Plaintiffs/Appellants appealed the decision to the Second Circuit Court of Appeals. The Second Circuit Court of Appeals affirmed the trial court's decision and issued its order on August 26, 2020.[85] Then, the Appellants filed their Petition for Certiorari on December 17, 2020.[86] The Supreme Court granted cert on April 26, 2021 and oral argument was held on November 3, 2021.[87] The issue on appeal is whether the state of New York's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.[88]

On appeal, Appellants argued that New York's law violates their Second Amendment right to bear arms for self-defense outside the home.[89] Specifically, they argued that New York's "proper cause" requirement in the statute is impermissible pursuant to the holdings in the Supreme Court cases *Heller* and *McDonald*.[90] Also, they brought attention to the circuit split between the First, Second, Third, and Fourth Circuits.[91] They argued that these decisions conflict with the Seventh Circuit's *Moore* decision.[92]

Appellants contended that the case law developed by the New York courts on the term "proper cause" within the statute has deprived ordinary citizens of their individual right to carry arms outside the home.[93] They claimed that the law allows for the government to regulate guns at the homeowner's door. In order to be issued a concealed-carry license, an applicant has to demonstrate that they are somehow "special" and show an "atypical reason" for wanting to carry a handgun for self-defense. To satisfy the proper cause requirement, applicants must demonstrate that they face some kind of special or unique danger to their life that is different than the general public.

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84 *Id.* at 148, 149.

85 New York State Rifle & Pistol Ass'n, Inc. v. Beach, 818 F. App'x 99 (2d Cir. 2020) (unreported).

86 Petition for Writ of Certiorari, *supra* note 77.

87 New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

88 *Id.* at 8.

89 *Id.* at 7.

90 *Id.* at 1.

91 *See* Gould v. Morgan, 907 F.3d 659, 677 (1st Cir. 2018) (upholding the constitutionality of a Massachusetts law); Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013) (holding that a "justifiable need" standard survives intermediate scrutiny); Woollard v. Gallagher, 712 F.3d 865, 868 (4th Cir. 2013) (holding that a good-and-substantial-reason requirement does not violate the Second Amendment).

92 Brief for Petitioners, *supra* note 73, at 39.

93 Petition for Writ of Certiorari, *supra* note 77, at 6.

The crux of their argument is that the Second Amendment guarantees the right to keep arms for self-defense and extends beyond the four walls of one's home.[94] They argued that the holdings in *Heller* and *McDonald* support their position. *Heller*, in particular, strongly supports that the Second Amendment protects a right to carry outside the home.[95] "[N]othing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."[96]

A small minority of states still deny citizens the right to conceal carry outside the home and only allows a subset of citizens to conceal carry, as exemplified in the New York law.[97] In particular, Appellants argued that the "proper cause" test is subjective based on a finding of "need" that must be atypical, special, and unique to the individual.[98] Further, they claimed that the Second Circuit has disregarded the holdings in *Heller* and *McDonald* and failed to undertake any meaningful analysis of the history of the right to bear arms.[99] Appellants advocated that the right to bear arms does not diminish at the doorstep.[100] Additionally, they argued that historically the Second Amendment guaranteed the right to bear arms beyond the home.[101] Therefore, they contended that New York's "proper cause" regime plainly violates the Second Amendment because it regulates the right to bear arms outside the home for self-defense. It is a right that belongs to all "the people" and not to only a subset of people who have distinguished their needs from their peers.

In Appellant's Brief, they argued that the text, history, and tradition confirm that the Second Amendment protects the right to carry common arms like handguns for self-defense, the state cannot fully prohibit law-abiding citizens from exercising that right.[102] They promoted the idea that the right to carry a firearm for self-defense is maintained outside the home and that the majority of states (at least 43) allow citizens to carry a firearm outside the home for self-defense.[103]

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94 *Id.* at 23.

95 *Id.* at 23–25.

96 *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (explaining that, while guns should be permitted in the home, they might be limited outside of the home).

97 Petition for Writ of Certiorari, *supra* note 77, at 5, 8.

98 *Id.*

99 *Id.* at 7.

100 *Id.* at 14.

101 *Id.*

102 Brief for Petitioners, *supra* note 73, at 22.

103 *Id.* at 13.

Further, they advocated that the holding in the Second Circuit case, *Kachalsky*—upon which the trial and appellate courts based their decisions on—is incompatible with Supreme Court precedent in *Heller*.[104] Appellants make two main arguments. First, Second Amendment regulations should be subject to heightened scrutiny given the text, history, and tradition for Second Amendment rights or move towards a heightened scrutiny.[105] Second, that history and tradition confirm that the Second Amendment protects the right to carry arms outside the home for self-defense.[106] In the past, only if this right was abused would arms be taken away, but otherwise people could carry guns outside the home. Based on the historical context, *Heller* accepted the premise that the Second Amendment protects the right to carry a gun outside the home and the right to bear arms extends beyond the curtilage of one's home. The right to self-defense is a central component of the Second Amendment right.[107]

Further, they argued that New York's law default is that law-abiding citizens may not carry handguns for self-defense and the exercise of that fundamental right is a crime.[108] By having to satisfy the "proper cause" standard, this discretionary determination by a licensing officer is the only way to get out from under a criminal penalty. If the applicant has not met this burden, then the licensing officer will deny their application. They claimed that the administrative decision is "practically unreviewable"[109] Appellants contended that a law that enacts a complete prohibition on carrying a handgun is presumptively invalid based on the constitutional right to carry arms.[110]

On the other hand, defendant/appellees are Keith M. Corlett, sued in his official capacity as Superintendent of the New York State Police, and Richard J. McNally, Jr., sued in his official capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County. They refute the notion that Appellants were denied licenses when Nash and Koch did receive concealed-carry licenses that do allow them to carry handguns for self-defense in certain places and

104 *Id.* at 22.
105 *Id.* at 24.
106 *Id.*
107 *Id.* at 39.
108 *Id.* at 41.
109 *Id.* at 42.
110 *Id.* at 22.

circumstances.[111] Appellees contend that neither history nor precedent supports Appellants' claims under the Second Amendment that they can carry handguns whenever and wherever they feel like it. They argue that New York's law is less restrictive than other gun regulations.

New York courts have defined "proper cause" to include "carrying a handgun for target practice, hunting, or self-defense."[112] Conceal-carry licenses shall be issued when applicants meet general eligibility requirements and have certain kinds of employment or other kinds of applicants must meet the "proper cause" standard.

Under the New York law, as Appellees explain in their brief, in order to show a need for self-defense, an applicant must demonstrate that this need is "actual and articulable," as opposed to "speculative or specious."[113] It must be a non-speculative reason to believe that they will encounter "objective circumstances [to] justify the use of deadly force."[114] There needs to be a consideration of all relevant factors bearing on the need to carry a firearm for self-defense purposes. Applicants have the opportunity to submit evidence and to respond to factors raised by the licensing officer.[115]

For an applicant to distinguish themselves from the community, they must proffer facts that are particular to that individual, are particularized facts specific to their circumstances to establish a self-defense need that is not speculative.[116] The need to carry a gun for self-defense outside the home must be more than a mere generalized desire to carry a handgun. If the applicant is denied, they can challenge the denial in state court. Appellees acknowledge that *Heller* recognized the Second Amendment right to "keep and bear arms" for the "core lawful purpose of self-defense."[117] However, this right is limited in scope because not all individuals are entitled to carry handguns as a matter of course in all or nearly all public spaces. The right to carry a firearm is "not unlimited" but instead incorporates the limitations embedded within the "historical understanding of the scope of the right."[118] And many states have regulated firearm possession in public over time.[119]

111 Brief for Respondents at 2, New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2021) (No. 20-843).

112 *Id.* at 7 (citing Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 86 (2d Cir. 2012)).

113 *Kachalsky*, 701 F.3d at 98.

114 *Id.* at 100.

115 Brief for Respondents, *supra* note 111, at 9.

116 *Id.* at 10.

117 *Id.* at 16.

118 *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 595, 625 (2008)).

119 Brief for Respondents, *supra* note 111, at 9.

They further argue that gun regulation is within the scope of the Second Amendment and intermediate scrutiny is the proper standard for reviewing public-carry laws like New York's.[120] They found that the law is substantially related to important "indeed compelling, governmental interests in public safety and crime prevention" based on statistics of gun violence and the state's interest in reducing violent crimes and gun-related deaths.[121] So, New York's law falls within the range of gun control measures that are permissible under the Second Amendment.[122] Because the New York gun law is not an outright ban on carrying a firearm, intermediate scrutiny should apply.[123] They argue that if means-end scrutiny were to apply, the intermediate scrutiny analysis is the appropriate standard because *Heller* foreclosed the rational-basis review.[124]

Appellees further contend that states have possessed the longstanding authority to limit public carrying of firearms.[125] Therefore, New York satisfies intermediate scrutiny because it has compelling interests in reducing violent crime and gun violence.[126] The law is tailored by allowing individuals to carry guns in a time, place, and manner where they have established a non-speculative need for self-defense, hunting, or target shooting.[127] Appellees ask for the Court to remand the case for further fact-finding if there is any doubt that the law does not satisfy intermediate scrutiny.[128]

It is worth noting that in *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010), an action was brought against the City of Chicago alleging that the City's handgun ban left plaintiffs vulnerable to criminals. The U.S. Supreme Court reversed the Seventh Circuit, holding that the Fourteenth Amendment makes the Second Amendment right to keep and bear arms for the purpose of self-defense applicable to the states.[129] The Due Process Clause incorporates the Second Amendment right as recognized in *Heller* and owning a firearm was a "liberty" interest protected by the Due Process Clause.[130]

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120 *Id.* at 17.

121 Brief for Respondents, *supra* note 111, at 15, 18 (citing Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 97 (2d Cir. 2012)).

122 Brief for Respondents, *supra* note 111, at 17.

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.* at 18.

127 *Id.*

128 *Id.*

129 McDonald v. City of Chicago, 561 U.S. 742, 750–51 (2010).

130 *Id.* at 778, 791.

B. Scrutinizing the US Supreme Court Decision in New York State Rifle & Pistol Association, Inc. v. Bruen:

The U.S. Supreme Court held that New York's proper-cause requirement violates the Fourteenth Amendment since it prevents "law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense."[131]

The Court's legal reasoning does not hold up against scrutiny. The Court dismantled the second step of a two-step framework that has been successfully used by the New York Courts of Appeals since *Heller*.[132] The two-step framework included a careful examination of the Second Amendment text and its historical roots (first step) and a means-end scrutiny towards the Second Amendment (second step).[133] New York Courts of Appeals distinguished between two aspects of the Second Amendment right under the second step.[134] It considered bearing arms at home to be subject to a strict scrutiny standard, whereas bearing arms in public to be subject to intermediate scrutiny standard of review.[135] The U.S. Supreme Court, in *New York State Rifle*, rejected the second step (means-end scrutiny) adopted by New York Courts of Appeals altogether on the premise that the second step was never adopted by the US Supreme Court under *Heller,* which only relied on a textual and historical review of the Second Amendment.[136]

The Court further opined that "[h]istorical analysis can sometimes be difficult and nuanced, but reliance on history to inform the meaning of constitutional text is more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field."[137] The Court explained that although the current regulations of firearms might not have preoccupied the Founders, the Constitutional text must apply to circumstances that go beyond what the Founders anticipated despite the fixation of the Second Amendment meaning at time of ratification.[138] Finally, the Court concluded that the Second Amendment

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131 New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2156 (2022).

132 *Id.* at 2125–26.

133 *Id.*

134 *Id.*

135 *Id.* at 2126–27.

136 *Id.*

137 *Bruen*, 142 S. Ct. at 2118 (citing *McDonald*, 561 U.S. at 790–91 (plurality opinion)).

138 *Bruen*, 142 S. Ct. at 2118.

right to bear arms in public for self-defense is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees."[139] The Court continues:

> [t]he exercise of other constitutional rights does not require individuals to demonstrate to government officers some special need. The Second Amendment right to carry arms in public for self-defense is no different. New York's proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms in public.[140]

Yet, the question that should be asked here is why did the Court reject the second step in New York's two-step framework? Even if the right to bear arms is considered a fundamental right under the Second Amendment and is applicable on states through the Fourteenth Amendment, does not each state have an important − or rather vital and compelling − interest in regulating it in a manner that promotes public safety and preserve human lives? That was the longstanding stance of New York Courts of Appeals under *Kachalsky*, under which New York's proper-cause requirement was sustained for being "substantially related to the achievement of an important governmental interest."[141] Holding that the Second Amendment right is absolute as a fundamental right by reading the text and history of the right to bear arms under *Heller* does not in itself deprive states of their significant interest in regulating such fundamental right. That is why the varying scrutiny tests of the U.S. Supreme Court exist to balance between constitutional rights and states' interests in regulating such rights according to a hierarchical importance of rights. Yet, disregarding the state interest altogether by evading all scrutiny tests to exclusively uphold the Second Amendment right under the textual and historical test only reflects a one-sided flawed legal reasoning. Put simply, the Court repealed the New York Statute because it limits a fundamental constitutional right without considering NY's interests in limiting such right.

Would the Supreme Court approach in *NY Rifle* be acceptable if adopted towards the First Amendment right to freedom of speech, the Fourth Amendment right against search and seizure, or the Fifth Amendment right against self-incrimination? Following the Court's legal reasoning in *NY Rifle*,

139 *Id.* at 2156 (citing *McDonald*, 561 U.S. at 780 (plurality opinion)).

140 *Bruen*, 142 S. Ct. at 2121.

141 Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2d Cir. 2012).

perhaps the Court shall also prevent any regulation of hate speech or defamation, any search and seizure even upon a valid warrant, and any police attempt to obtain a confession even after a Miranda warning. Under these examples, it becomes unimaginable for the Supreme Court to evade considering a state interest, let alone outrightly rejecting it without applying any scrutiny balancing test. The Court might only have one seemingly valid reply to our argument: because the *Heller* precedent did not adopt the second step (the intermediate scrutiny standard) of New York Courts of Appeals and only used a textual and historical review test for the Second Amendment, the Court is bound by *Heller* as a precedent. Yet, that reply is extremely questionable in light of *Dobbs* as we will discuss below. The Supreme Court cannot simply select and pick between precedents to uphold one (*Heller*) against the heavy backdrop of longstanding scrutiny tests, social change, and recent adverse public opinion towards bearing arms, and reverse two others (*Roe. v. Wade* and *Casey*) in *Dobbs* by disturbing legal stability and legitimate expectations of American women without any social or legal need for such reversal.

Justice Breyer filed a dissenting opinion, in which Justices Sotomayor and Kagan joined. The dissenting opinion relies on three main arguments and an abundance of prevailing statistics on gun violence that renders the US, embarrassingly, one of the leading world countries in that regard.[142] The three main arguments can be summarized as follows. First, that the majority erred because they decided the case without any discovery or evidentiary record, which would have allowed the Court to better understand the application of the concerned New York statute in practice.[143] Second, the Court's analysis and legal reasoning were solely based on historical explanations of the Second Amendment text, without considering the compelling governmental interest in regulating guns to curb the epidemic of gun violence and substantial related deaths in the US.[144] Third, the Court inadvertently revealed the limitation of the exclusive historic test when it

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142 *See* Aaron Karp, *Estimating Global Civilian-Held Firearms Numbers*, SMALL ARMS SURVEY 4 (June 2018), https://www.smallarmssurvey.org/resource/estimating-global-civilian-held-firearms-numbers [https://perma.cc/9N4Q-NEQ7] (finding that the U.S. has about "120.5 firearms for every 100 residents" and that "[m]any studies of crime and violence collect information on the presence of firearms in households.").

143 *See* Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States,* 107 AM. J. PUB. HEALTH 1923, 1926–29 (2017) (examining the relationship between "shall-issue" and "may-issue" laws and homicide rates and finding that there is a "robust association between shall-issue laws and higher rates of firearm homicides").

144 *Bruen*, 142 S. Ct. at 2164 (Breyer, J., dissenting) (discussing how "the Court wrongly limits its analysis to focus nearly exclusively on history.").

failed to reflect on the history of New York in heavily regulating guns.[145] Afterwards, the dissenting opinion thoroughly reviews recent important and frightening statistics of gun violence in the US to argue that the government indeed has compelling interests in regulating the constitutional right to bear arms and that the Court erred in not balancing such interest in reaching its decision.[146] The dissenting opinion concluded that it would be best if state legislatures are given the chance to regulate gun control as they see fit since the "consideration of facts, statistics, expert opinions, predictive judgments, relevant values, and a host of other circumstances, which together make decisions about how, when, and where to regulate guns more appropriately legislative work."[147]

We agree with the dissenting opinion in *NY Rifle* as such approach would allow the legislature of each state to thoroughly consider the state's peculiar needs in restricting and licensing the right to bear arms under the Second Amendment. Yet, the majority opinion in *NY Rifle* has deprived people's representatives in each state from placing restrictions needed to curb gun violence by rendering the right to bear arms absolute—aiding and abetting gun violence related murders. Now, the Second Amendment right to bear arms—despite being obsolete, barbarian, and extremely dangerous—has become absolute. No state government is allowed to argue a compelling interest in imposing peculiar restrictions on the right to bear arms, otherwise its statute would be repealed as New York's under *NY Rifle*.

2. Dobbs v. Jackson Women's Health Organization: The Abortion-Viability Case:

A. Appellants' and Appellees' Arguments in Dobbs:

This case involves a Mississippi State law that bans abortions after 15 weeks, which directly implicates the viability standard set by the Supreme Court in 1973 under *Roe v. Wade*.

The case involves an appeal from the Fifth Circuit Court of Appeals regarding a state law passed in Mississippi in 2018. Called the "Gestational Age Act" ("the Act"), the law forbids a pregnant person from obtaining an

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145 *Id.* at 2164 (Breyer, J., dissenting) ("Only by ignoring an abundance of historical evidence supporting regulations restricting the public carriage of firearms can the Court conclude that New York's law is not 'consistent with the Nation's historical tradition of firearm regulation.'").

146 *Id.* at 2164–68 (Breyer, J., dissenting) (listing many statistics about civilian firearm usage and crime rates in the U.S. and concluding that "the [Second] Amendment allows States to take account of the serious problems posed by gun violence. . . .").

147 *Id.* at 2167.

abortion after 15 weeks' gestation, with a few exceptions allowed.[148] Mississippi HB 1510 bans most abortions past 15 weeks, which is well short of the 24 to 28 weeks "viability" range set by *Roe v. Wade*.[149] Additionally, the Act contains severe penalties for abortion providers, "including license suspension or revocation."[150] The Act was signed into law on March 19, 2018 and went into immediate effect.[151] The state already has a law in place that bans abortion after 20 weeks, which is also pre-viability, but is not the focus of this case.[152]

Defendants/Appellants are the State of Mississippi, Dr. Thomas Dobbs in his official capacity as State Health Officer of the Mississippi State Department of Health and Dr. Kenneth Cleveland in his official capacity as Executive Director of the Mississippi State Board of Medical Licensure. Plaintiff/Appellees, the Jackson Women's Health Organization (hereinafter the "Clinic"), the only abortion provider in Mississippi, filed a temporary restraining order (TRO) in the U.S. District Court for the Southern District of Mississippi on March 19, 2018.[153] The clinic provided abortions up to 16 weeks.

In the case, the district court first determined that the only issue before it was "whether the 15-week mark is before or after viability" and that "evidence about any other issue . . . is irrelevant."[154] Allowing discovery for the one issue, the district court followed the viability test, which is a bright-

148 *Dobbs v. Jackson Women's Health Organization*, Oyez, https://www.oyez.org/cases/2021/19-1392 [https://perma.cc/HP6N-K53F] (last visited Oct 14, 2021)*; see also* Miss. Code Ann. § 41-41-191 (West 2018) ("Abortion limited to fifteen (15) weeks' gestation except in medical emergency and in cases of severe fetal abnormality.").

149 *See* Roe v. Wade, 410 U.S. 113, 160 (1973) (stating that "viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.").

150 Brief in Opposition at 3, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

151 *See* Brief for Petitioners at 6, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) ("Enacted in 2018, Mississippi's Gestational Act prohibits abortion after 15 weeks gestation . . .").

152 *See* Miss. Code Ann. § 41-41-137 ("Except as otherwise provided . . . a person may not perform . . . an abortion on a woman if it has been determined[] by the physician . . . that the probable gestational age of the unborn child is twenty (20) or more weeks.").

153 Brief in Opposition, *supra* note 150, at 3–4 (discussing that one of the clinic's doctors, Dr. Sacheen Carr-Ellis, also joined the lawsuit on behalf of herself and her patients); *see also* Jackson Women's Health Org. v. Dobbs, 379 F. Supp. 3d 549, 553 (S.D. Miss. 2019) (establishing that "S.B. 2116 threatens immediate harm to women's rights . . ." and "[a]llowing the law to take effect would force the clinic to stop providing most abortion care[,] . . . prevent[ing] a woman's [right to] free choice.").

154 Brief for Petitioners, *supra* note 151, at 9 ("The district court issued a TRO blocking the Act.").

line rule established by *Roe v. Wade*.[155] The lower court was not interested in hearing any of Mississippi's interests as to why the abortion law was necessary—only in the viability argument. On November 20, 2018, the court granted summary judgment to the Clinic and entered a permanent injunction against the Act.[156] The district court held that the law was unlawful because states may not ban abortions prior to viability and the 15-week cut-off was prior to viability.[157] While Mississippi was arguing for state's interests to be considered, the lower court rejected the more "fact-based" approach as to why the law was beneficial for legitimate state interests and considered the law on the viability standard only.

The state appealed to the Fifth Circuit Court of Appeals.[158] On December 13, 2019, the Fifth Circuit Court of Appeals affirmed, determining that the law directly contradicts the precedent of another pivotal abortion ruling, and that the state's interests are not considered for pre-viability abortions.[159] It held that legal precedent created a categorical right to a pre-viability abortion and the 15-week law intrudes on that right because it bans pre-viability abortions.[160] The Fifth Circuit denied the state's petition to have a rehearing en banc.[161] On June 15, 2020, the state filed a petition for a writ of certiorari, arguing that both the district court and the Fifth Circuit erred when it determined that Mississippi HB 1510 violated legal precedent as established in *Casey* and *Roe* based on the viability test.[162] The Supreme Court granted certiorari on May 17, 2021, on question presented number one, "'[w]hether all pre-viability prohibitions on elective abortions are unconstitutional.'"[163] The Supreme Court heard oral arguments on December 1, 2021.

Appellants, the State of Mississippi, contend that the State has important interests in regulating the pre-viability abortion services, such as protecting

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155 *See* Roe v. Wade, 410 U.S. 113 (1973) ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability.").

156 Brief in Opposition at 4, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

157 *See* Dobbs v. Jackson Women's Health Org., 945 F.3d 265, 268-69 (5th Cir. 2019) (affirming that "[s]tates may *regulate* abortion before viability . . . so long as they do not impose an undue burden on the woman's right, but they may not ban abortions . . . . [and] [t]he law at issue is a ban.").

158 *Id*.

159 *Id.* at 272-73.

160 *Id.* at 273-74.

161 Brief in Opposition at 5, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

162 Petition for Writ of Certiorari at 1-2, 6, 12-13, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

163 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022).

the life of the mother, preventing fetal pain, and regulating inhumane procedures.[164] They advocate that the Gestational Age Act "protects the health of the mother, the dignity of the unborn child, and the integrity of the medical profession by allowing abortions after 15 weeks' gestational age only in medical emergencies or severe fetal abnormality."[165] Appellants make three primary arguments.[166] First, the State argues that the Court must "clarify that the right to a pre-viability abortion is not absolute."[167] They assert that the Court's pre-viability standard has "proven unsatisfactory."[168] Further, that the state's interest exists throughout the pregnancy.[169] Appellants assert that the viability standard was "self-conscious dictum from the get-go" and failed to consider implications for maternal health.[170] Going further, Appellants argue that *Roe*'s viability line is arbitrary and constantly moves as technology improves understanding of fetal life, and that states have substantial interests of their own to curb abortion access.[171] They contend that the "strict viability line ties 'a state's interest in unborn children to developments in obstetrics, not development in the unborn . . . .'"[172] Appellants assert that "imposing an inflexible viability standard" erases the state's ability to accept advances in medical and scientific technology that shows new fetal characteristics, such as feeling pain or responding to external stimuli.[173] Appellants contend that maternal health is in jeopardy and so the bright line viability rule is in conflict with the state's interest in protecting the health of the mother and unborn children in addition to being outdated.[174]

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164 Petition for Writ of Cert. at 2, *Dobbs v.* Jackson Women's *Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392).

165 *Id.* at 6.

166 *Id.* at i. The Supreme Court only granted certiorari to the viability issue, so their arguments on third-party standing will not be discussed.

167 *See id.* at 15 ("[T[he Court should grant review and reject 'viability' as the bright line for determining when a state may legislate to advance its substantial interests in health, safety, and dignity.").

168 *Id.* at 3 (citing MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 773-74 (8th Cir. 2015)) (internal quotation marks omitted).

169 *Id.* (citing City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting) ("[T]he State's interest in protecting potential human life exists throughout the pregnancy.") (internal quotation marks omitted).

170 *Id.* at 16 (internal quotation marks and citation omitted).

171 *See id.* at 14 ("*Roe*'s viability line is arbitrary, constantly moves as medical knowledge increases, and fails to honor the reality that states have substantial interests of their own beginning 'from the outset of the pregnancy.'") (internal citation omitted).

172 *Id.* at 3 (internal citation omitted).

173 *Id.* at 4.

174 *See id.* at 16-18 (stating three times that Appellants believe a bright line viability rule can be against the state's interest to protect maternal health and can also pose a danger to mothers).

Second, the Appellants contend that courts should consider the state's interests when assessing pre-viability abortion laws.[175] They argue that they have legitimate interests "from the outset of pregnancy" to protect the health and life of the mother and the life of the fetus that may become a child and this interest conflicts with the Supreme Court's precedent that states cannot regulate pre-viability abortions as established in *Roe v. Wade*.[176] They claim that their State interests include the health and safety of the mother, concern for the growing baby, and protection of the medical profession and society.[177]

Yet, arguing that their stance does not require the Court to overturn *Roe v. Wade*, the State wants "the Court to reconcile a conflict in its own precedents."[178] Appellants argue that the lower court did not apply the undue burden test nor considered any of Mississippi's legitimate government interests furthered by the 15-week law.[179] They also argue that the *Gonzales* decision has already changed the landscape of abortion rights when the Court did not use the viability rule but instead did a balancing test.[180] Interestingly, the crux of their argument is for the Court to adopt more of a *Whole Woman's Health* "fact-based" approach to justify abortion restrictions, similar to a strict scrutiny test where the state has to prove the benefits of the law.[181] In sum, Appellants are asking the Court to "revisit" the pre-viability standard set in *Roe v. Wade* and adopt the *Whole Woman's Health* approach.[182]

On the other hand, Appellees, Jackson Women's Health Organization, argue that the District Court and the Fifth Circuit Court of Appeals correctly decided that Mississippi HB 1510 was correctly decided because the courts used the pre-viability standard (as set in *Roe* and *Casey*) to determine that the law was unconstitutional. They argue that there is strong legal precedent

175 *See id.* at 20 ("The district court failed to consider [the state's] interests, deeming them irrelevant under the dubious viability rule. But these strong interests show why the viability standard cannot survive . . . .").

176 *Id.* at 2-3 (citing Gonzales v. Carhart, 550 U.S. 124, 145 (2007)) (internal quotations omitted).

177 *See id.* at 20-26 ("[T]his Court has recognized Mississippi's legitimate interests in protecting maternal health, safeguarding unborn babies, and promoting respect for innocent and vulnerable life.").

178 *Id.* at 5.

179 *See id.* at 12 ("The district court did not apply the undue burden test, and it refused to consider any of the legitimate government interests furthered by the 15-week law.").

180 *See id.* at 18-19 ("[T]his Court's *Gonzales* decision has already called the viability rule into serious question . . . up[holding] a complete ban on partial-birth abortion, except when 'necessary to save the life of the mother.'") (internal quotation marks and citations omitted).

181 *See id.* at 5 ("the *Hellerstedt* analysis was akin to strict scrutiny, a standard that Casey rejected in favor of the undue burden standard . . . . this case is an ideal opportunity to resolve the confusion.") (internal citations omitted).

182 *Id.* at 20.

supporting the pre-viability test, which has been an "unbroken line of decisions over the last fifty years."[183] Further, they assert that the law violates the rights of their clients to obtain an abortion at 15 weeks.[184]

As Appellees contend, Mississippi HB 1510 law violates the pre-viability standard by banning abortion after 15 weeks, which is actually months before viability and renders their abortion services near impossible.[185] Additionally, they assert that *Roe* and *Casey* are clear, legal precedents establishing that the pregnant person has the right to determine whether or not to continue the pregnancy pre-viability and not the State.[186] The Clinic argues that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion."[187] However, the Clinic points out that the State argues "that its own interests should override the liberty and autonomy interests inherent in an individual's right to decide whether to continue a pre-viability pregnancy."[188] As established in *Casey*, "[b]efore viability, the State's interests are not strong enough to" interfere with the Constitutional right to protect an individual's right to liberty to decide for themselves if they want to continue their pregnancy pre-viability.[189] The Clinic argues that the viability test is a bright line rule where the balance of interest tips from the individual's right to the State's interests.[190]

In addition, Appellees assert that there is no conflict between the *Casey* and *Whole Woman's Health* decisions as contended by the Appellants.[191] They argue that the Act implements an outright ban on abortion after 15 weeks (with very limited exceptions) and, by design, imposes a "substantial obstacle" for a pregnant person to obtain an abortion after 15 weeks.[192] So,

183 Brief in Opposition at 1, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

184 *See id.* (declaring that Mississippi, in passing a law banning abortions after 15 weeks of pregnancy has violated people's constitutional rights to decide whether they want to continue a pre-viability pregnancy).

185 *See id.* ("Mississippi passed a law banning abortion after 15 weeks of pregnancy *months* prior to viability.").

186 *See id.* ("*Roe* and *Casey*, and the Court's subsequent cases, are clear that, before viability, it is for the pregnant person, and not the State, to make the ultimate decision whether to continue a pregnancy.").

187 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

188 Brief in Opposition at 7, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

189 *Id.* (internal quotation marks and citations omitted).

190 *See id.* at 8 ("the viability line has proved enduringly 'workable,' representing as it does a simple limitation beyond which a state law is unenforceable.") (internal citation omitted); *see also Casey*, 505 U.S. at 860, 933 (determining that viability has been established at 23 to 24 weeks).

191 Brief for Appellee at 8; Dobbs v. Jackson Women's Health Organization, 141 S. Ct. 2619 (2022).

192 Appellee Br. at 12 (internal quotation marks omitted).

this pre-viability abortion ban triggers the pre-viability test rather than the undue burden test, as advocated by the Appellants.[193] Legal precedent is very clear on which test to use according to the type of law being reviewed, so there is no conflict between these two Supreme Court decisions.[194]

Further, the Clinic notes that appeals courts across the U.S. have uniformly applied the pre-viability standard as a bright-line rule and the Fifth Circuit's decision is entirely consistent with legal precedent.[195] Despite what the State argues, they contend that there is no conflict amongst the Federal Circuit courts of appeals for the Supreme Court to resolve.[196] Appellees also contend that the right to pre-viability abortion is not mere dictum as the State argues—the holding has been reaffirmed multiple times since *Roe* and *Casey*.[197] In the *Gonzales* case, the Clinic argues that the holding did not diminish the pre-viability line.[198] Rather, the government can regulate abortion to protect the life within a pregnant person but cannot "strike at the right itself."[199] Countering the Appellant's argument that the *Gonzales* decision changed the pre-viability test, the Appellees assert that Justice Ginsburg's dissent criticized the majority decision because it blurred the line between pre-viability and post-viability.[200] Mississippi's ban of pre-viability abortion is at its core, a "substantial obstacle" to obtaining an abortion beyond 15 weeks.[201] Ultimately, the Clinic asks the Court to affirm the lower court's decision that determined the 15-week abortion ban violated the viability standard as established in *Roe* and subsequent Supreme Court cases.[202]

Previously, the Court has held that a pregnant person has the right to determine their personal health choices, which includes whether or not to

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193 *See id.* ([T]here is no state interest strong enough to justify a pre-viability abortion ban, which controls the outcome here.") (internal citation omitted).

194 *See id.* at 8 ("Nothing 'ha[s] rendered viability more or less appropriate as the point at which the balance of interest tips.'") (internal citation omitted).

195 *Id.* at 13.

196 *Id.* at 12, 17, 19.

197 *See id.* at 16 ("Mississippi incorrectly argues that the right to pre-viability abortion recognized in *Roe*, affirmed in *Casey*, and reaffirmed time and time again since, is mere dictum.") (internal citation omitted).

198 *Id.* at 15.

199 Appellee Br. at 17 (citing Gonzales v. Carhartt, 550 U.S. 124,157-58 (2007)) (internal quotation marks omitted).

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

201 *See* Appellee Br. at 12 ("[T]he Act at issue here is an outright ban—it necessarily imposes a 'substantial obstacle' in the path of a pregnant person seeking a pre-viability abortion.").

202 *Id.* at 8.

terminate a pregnancy, until viability.[203] The State cannot force a pregnant person to carry a pregnancy to term before viability because of its own interests to protect life.[204] The Appellants are asking the Court to resolve the contradictions in its own decisions over its use of "viability" as a bright line for measuring abortion regulations and should apply the undue burden test to all abortion regulations instead. Basically, Appellants are asking the Court to abandon decades worth of legal precedent applying the pre-viability standard on laws that ban pre-viability abortions. Appellants referred to a "conflict" of case law in their brief in the *Whole Woman's Health* opinion that blurred the "viability" test established in *Roe* and *Casey*, however they conflate the issues.

In this case, the Act is an outright ban on abortion post 15 weeks whereas the Texas law in *Whole Woman's Health* dealt with regulating how abortion clinics performed services. The bright-line, pre-viability test was not applied because *Whole Woman's Health* was an "undue burden" case determining whether the abortion regulations of clinics presented a substantial obstacle for a pregnant person to obtain a pre-viability abortion—it did not ban pre-viability abortion like the Act does.

However, in *Whole Woman's Health*, the law at issue was fundamentally different than the Act in this case. The *Whole Woman's Health* case dealt with a Texas law that required abortion clinics to have hospital admitting privileges at a hospital no farther than 30 miles and the "surgical center requirement" whereby abortion clinics had to meet minimum ambulatory surgical clinic standards. As stated in Justice Ginsburg's plurality opinion in *Whole Woman's Health*, the legal standard for the undue burden test "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[205] The "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient."[206] But "a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."[207] Yet, "if the '*purpose or effect*' of the [regulatory] provision '*is to place a substantial obstacle* in the path of

203 *Roe*, 410 U. S. at 113.

204 Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 846, 852 (1992).

205 Whole Woman's Health v. Hellerstedt, 136 U.S. 2292, 2309 (2016) (internal quotation marks omitted).

206 *Id.* at 2296 (citing *Roe*, 410 U. S. at 150) (internal quotation marks omitted).

207 *Id.* (citing *Casey*, 505 U.S. at, 877) (internal quotation marks omitted).

a woman seeking an abortion before the fetus attains viability'" and that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right," then that legal provision is unconstitutional.[208] The case did not involve a ban on pre-viability abortions, so the undue burden analysis applied.[209]

However, in this case, Appellants ask the court to apply the undue burden test analysis because they want the Court to consider State interests as to why they want to ban abortions after 15 weeks. With a more fact-based approach, they contend, the Act will be constitutional because the State's interests of protecting the health of the mother, preserving the life of the fetus, and regulating the medical profession will outweigh the abortion-seeker's constitutional right to terminate their pregnancy.

B. Scrutinizing the US Supreme Court Decision in Dobbs:

In *Dobbs*, the US Supreme Court held that: "[t]he Constitution does not confer a right to abortion; Roe and Casey are overruled; and the authority to regulate abortion is returned to the people and their elected representatives."[210]

The US Supreme Court faced several challenges to reach that decision. First, whether the Fourteenth amendment provides for the right to abortion under either "liberty" or the equal protection of law.[211] As such, the Court had to dismantle two landmark precedents: *Roe v. Wade* and *Planned Parenthood v. Casey*.[212] In *Roe,* the Court found that the right to abortion emanates from the right to privacy that exists under the Constitution's first, fourth, fifth, ninth, and the fourteenth amendments.[213] In *Casey,* the Court followed the ruling of *Roe v. Wade* as a precedent, yet used "liberty" under the Fourteenth amendment to incorporate the right to abortion.[214] The *Dobbs* Court attempted to dismantle both precedents for the most part of the majority

208 *Id.* at 2300 (citing *Casey*, 505 U.S. at 878).

209 *See id.* (applying the undue burden analysis) (citing *Casey*, 505 U.S. at 878).

210 Dobbs v. Jackson Women's Health Organization, 141 S. Ct. 2228, 2234 (2022).

211 Id. at 2235.

212 *See id.* at 2235-36 ("[T]he Court finds the Fourteenth Amendment clearly does not protect the right to an abortion. . . . *Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty analysis.").

213 *See* Roe v. Wade, 410 U.S. 113, 154 (1973) ("[T]he right of personal privacy includes the abortion decision.").

214 *Casey*, 505 U.S. at 846-47.

decision.[215] Yet, the Court used other precedents, without questioning or distinguishing them, to argue that the right to abortion is not protected by the Equal Protection Clause of the Fourteenth Amendment.[216] This selective treatment of following selective precedents and reversing others is questionable as we will discuss in the final part of this research. What concerns us here is how did the *Dobbs* Court refute both *Roe* and *Casey*. The Court simply reversed both because history and tradition did not refer to the right to abortion before *Roe. v. Wade* and that "liberty" under the Fourteenth amendment is limited to the traditional meaning of depriving a person of their liberty (such as imprisoning them) without the due process of law.[217]

Second, the Court reviewed "history and tradition" to assess whether a constitutional right to abortion exists.[218] The Court found that such right never existed in the history of the U.S., and that abortion was largely criminal in nature, punishable by penal codes.[219] The Court further argued that *Roe's* division of trimesters had created workability issues and *Casey*'s undue burden standard (which places a threshold between permissible and unconstitutional restrictions) "has proved to be impossible to draw with precision."[220]

The Court committed a significant blunder in such approaches, simply because it selectively and biasedly chose between precedents – it complied with favorable precedents and rejected unfavorable ones.[221] Further, nothing in history or tradition provides any clue about many other constitutional rights that are not explicit in the Constitution. Was it in the history or tradition, before the U.S. Supreme Court decision in *Texas v. Johnson*, that burning the American flag is a protected speech under the First Amendment?

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215 *Dobbs*, 142 S. Ct. at 2228.

216 *Id.* at 2235.

217 *Id.* at 2300 (Thomas, J., concurring).

218 *Id.* at 2244 (majority opinion).

219 *Id.* at 2248.

220 *Id.* at 2273-2274 (citing Janus v. Am. Fed'n of State, 138 S. Ct. 2248, 2481 (2018)) (internal quotation marks omitted).

221 *See id.*, at 2319 (dissenting opinion) (explaining that the dissenting opinion stipulated that:

> The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. *See Griswold v. Connecticut*, 381 U. S. 479 (1965); *Eisenstadt v. Baird*, 405 U. S. 438 (1972). In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. *See Lawrence v. Texas*, 539 U. S. 558 (2003); *Obergefell v. Hodges*, 576 U. S. 644 (2015). They are all part of the same constitutional fabric, protecting autonomous decision making over the most personal of life decisions).

The contours of the First Amendment right were declared and specified by the U.S. Supreme Court precedents.[222] Similarly, the contours of the right to privacy and personal autonomy were set in place by the U.S. Supreme Court precedents that were produced and developed for almost half a century.[223] Rejecting such precedents and resorting to tradition and history is not the right approach in deciding a fundamental constitutional right, let alone the reversal of precedents that are built on the nuanced development of constitutional rights throughout the years. That is simply because the ratifiers of the U.S. Constitution did not have women in mind in 1787 when they drafted and ratified the Constitution.[224]

The Court defended its position in overruling *Roe* and *Casey* precedents using three examples where the U.S. Supreme Court had overruled precedents in the past. The majority opinion stipulated that:

> Some of our most important constitutional decisions have overruled prior precedents. We mention three. In *Brown v. Board of Education*, 347 U. S. 483 (1954), the Court repudiated the "separate but equal" doctrine, which had allowed States to maintain racially segregated schools and other facilities. *Id.*, at 488 (internal quotation marks omitted). In so doing, the Court overruled the infamous decision in *Plessy v. Ferguson*, 163 U. S. 537 (1896), along with six other Supreme Court precedents that had applied the separate-but-equal rule. See *Brown*, 347 U. S., at 491. In *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937), the Court overruled *Adkins v. Children's Hospital of D. C.,* 261 U. S. 525 (1923), which had held that a law setting minimum wages for women violated the "liberty" protected by the Fifth Amendment's Due Process Clause. *Id.*, at 545. *West Coast Hotel* signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation. See *Lochner v. New York*, 198 U. S. 45 (1905) (holding invalid a law setting maximum working hours); *Coppage v. Kansas*, 236 U. S. 1 (1915) (holding invalid a law banning contracts forbidding employees to join a union); *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504 (1924) (holding invalid laws fixing the weight of loaves of bread). Finally, in *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624 (1943), after the lapse of only three years, the Court overruled *Minersville School Dist. v. Gobitis*, 310 U. S. 586 (1940), and held that public school students could not be compelled to salute the flag in violation of their sincere beliefs. *Barnette* stands out because nothing had changed during the intervening period other than the Court's

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222 *See The Free Speech Center: First Amendment News and Insights from MTSU*, https://www.mtsu.edu/first-amendment/page/first-amendment-timeline [https://perma.cc/WY36-JWWQ] (outlining Supreme Court cases that defined the scope of the First Amendment over time).

223 *Dobbs,* 142 S. Ct. at 2317 (dissenting opinion).

224 *Id.* at 2324-25.

belated recognition that its earlier decision had been seriously wrong.[225]

These three examples are inherently distinguishable from *Roe* and *Casey*. The *Brown v. Board of Education* decision overruling *Plessy* was valid in coping with favorable social changes at the time regarding racism and segregation.[226] The *Brown* decision did not lower or erase the constitutional protection of black children as a minority class, it offered them a constitutional protection that could never have been imagined by Madison or the ratifiers of the US Constitution in 1787 when slavery and segregation were the norm.[227] Such overruling complies with the proper understanding of *stare decisis* that allows overruling a precedent to cope with social changes to make law more fit for society.

Second, in *West Coast Hotel*, again, the Supreme Court stance in overruling *Adkins* was valid due to the change, through time, in understanding the peculiar social and economic challenges regarding women's employability and wages. The *West Coast* Court explicitly mentioned societal and economic changes before emphasizing the need to protect women—as a class that was exploited at the time—by allowing states to adopt minimum wages for women.[228]

Finally, in *West Virginia Bd. of Ed. v. Barnette*, the Court also did not err in overruling *Minersville School Dist. v. Gobitis*, nor did it misapply the *stare decisis* legal principle. That is because it offered a higher constitutional protection to individuals (protecting public school students from being compelled to salute the flag if it is against their beliefs) rather than withdrawing a

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225 *Id.* at 2262-63.

226 *Id.* at 2337.

227 *Id.* at 2342.

228 *See* West Coast Hotel Co. v. Parrish, 300 US 379, at 398-99 (1937) (explaining how the Court emphasized the social and economic changes in its decision as follows:

> With full recognition of the earnestness and vigor which characterize the prevailing opinion in the Adkins case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? . . . There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community.).

constitutional right they already had (such as under *Dobbs*).[229] Moreover, the passage of three years between *Minersville* and *West Virginia* was not a long period of time that would allow for legitimate expectations or shake legal stability in society.

Thus, none of these three examples justifies reversing *Roe* or Casey. In fact, they support not overruling *Roe* or *Casey* according to the legal principle of *stare decisis*. Yet, the *Dobbs* majority did the reverse: it misapplied the *stare decisis* legal principle by causing an unexpected drastic social change through erasing women's right to abortion as a constitutional right after its legal and social stability since 1973. There was no drastic social change to cope with to overrule *Roe* and *Casey* to allow for such withdrawal of the constitutional right to abortion. *Roe* and *Casey* made the right to abortion a legitimate expectation for women for almost half a century, the U.S. Supreme Court could not simply overrule such precedents in the absence of a more pressing and prevailing opposite social change. In doing that, the Court blundered in misapplying the *stare decisis* legal principle against its main purpose and function by causing the very adverse consequences of social and legal instability that such principle was built to evade.

III. THE U.S. SUPREME COURT'S DOUBLE-STANDARD: REVERSING TWO PRECEDENTS AND REFERRING THE RIGHT TO ABORTION TO BE REGULATED BY STATE LEGISLATURES AND UPHOLDING ONE PRECEDENT TO DENY STATE LEGISLATURES THE CHANCE TO INCORPORATE COMPELLING GOVERNMENT INTERESTS IN REGULATING THE RIGHT TO BEAR ARMS:

After considering both cases in depth, we argue that the Court had failed to recognize the inherent differences between abortion rights and the right to bearing arms. That is because states do not have a *compelling* interest in limiting an abortion to the first fifteen weeks of pregnancy to protect potential life. First, the woman's choice over her own body is a significant interest that cannot be limited except for a compelling governmental interest. The state's

[229] W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *Cf.* Dobbs v. Jackson Woman's Health Org., 142 S. Ct. 2228, 2285 (2022) (In *Dobbs,* the Court withdrew an existing constitutional right to abortion by reversing *Roe v. Wade,* shaking the overall legal stability regarding abortion rights. In contrast, in W. Virginia State Bd. Of Educ., the Court added a constitutional protection – rather than withdrawing an existing one – by allowing students to stay silent while saluting the American flag if the latter act is against their beliefs).

interest – at large – is to protect the life of the fetus after viability not before.[230] That is because at the viability point, a fetus can exist outside of the woman's womb – with some medical assistance.[231] Yet before the viability point, there is no compelling interest on the state's part to ban abortion and infringe on the woman's autonomy.[232] Viability is estimated to take place at about seven months (28 weeks), but it may occur at 24 weeks.[233] The Court in *Roe v. Wade* drew the viability range between 24 and 28 weeks after conception.[234] Thus, the compelling interest of the state to ban abortion before then becomes non-existent. Accordingly, it flows logically that if a state issued a statute to infringe upon the woman's autonomy over her body before the viability point, such statute should be reviewed under a heightened strict scrutiny standard similar to *Roe v. Wade* not under a rational-basis standard as the *Dobbs* Court has done.[235]

In contrast, the US Supreme Court in *Heller* did not adopt the strict scrutiny or the intermediate scrutiny in reviewing *Heller*.[236] Further, Justice Breyer suggested adopting an "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[237] Again, we argue that the Court should have adopted an intermediate scrutiny standard and not a historical test standard in the *NY Rifle* case. That is because there is always a compelling and substantial governmental interest in promoting public safety and preserving people's right to life by regulating gun-licensing under the Second

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230 Roe v. Wade, 410 US 113,164-65 (1973). The Court opined that:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

231 *Id.* at 161, 164.

232 *Id.* at164.

233 WILLIAMS, J. WHITRIDGE, WILLIAMS OBSTETRICS 493 (Louis M. Hellman & Jack A. Pritchard eds., 14th ed. 1971); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1689 (L. R. C. Agnew et al. eds., 24th ed. 1965).

234 Roe v. Wade, 410 U.S. 113, 161 (1973).

235 *Id*. at 170 (Stewart, J., concurring) (citation omitted).

236 *See* District of Columbia v. Heller, 554 US 570, 628-629 (2008) (explaining how the Supreme Court held that the District's law was unconstitutional under any standard of scrutiny typically applied to constitutional rights).

237 *Id.* at 689-90 (citation omitted).

Amendment.[238] Justice Stevens and Justice Stephens dissents in *McDonald* support our contention. Justice Stevens opined that:

> [I]n evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty. *Your* interest in keeping and bearing a certain firearm may diminish my interest in being and feeling safe from armed violence. And while granting you the right to own a handgun might make you safer on any given day—assuming the handgun's marginal contribution to self-defense outweighs its marginal contribution to the risk of accident, suicide, and criminal mischief—it may make you and the community you live in less safe overall, owing to the increased number of handguns in circulation. It is at least reasonable for a democratically elected legislature to take such concerns into account in considering what sorts of regulations would best serve the public welfare.[239]

Moreover, Justice Stephens argued that the right to bearing an arm is intrinsically different from other liberties recognized under the fourteenth amendment.[240] He stated that: "[t]he link between handgun ownership and public safety is much tighter. The handgun is itself a tool for crime; the handgun's bullets are the violence" and

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238 *Id.* at 689. The dissenting opinion supports our contention, it opined:

> Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. That is because almost every gun-control regulation will seek to advance (as the one here does) a "primary concern of every government—a concern for the safety and indeed the lives of its citizens." *United States v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The Court has deemed that interest, as well as "the Government's general interest in preventing crime," to be "compelling," *see id*., at 750, 754, 107 S.Ct. 2095, and the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties, *see, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*) (First 2852*2852 Amendment free speech rights); *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (First Amendment religious rights); *Brigham City v. Stuart*, 547 U.S. 398, 403-404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (Fourth Amendment protection of the home); *New York v. Quarles*, 467 U.S. 649, 655, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) (Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)); *Salerno*, *supra*, at 755 (Eighth Amendment bail rights). Thus, any attempt in theory to apply strict scrutiny to gun regulations will in practice turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.).

239 McDonald v. City of Chicago, 561 U.S. 742, 891-92 (2010) (Stephens, J. dissenting opinion).

240 *Id.* at 893 (Justice Stephens provided that: "the right to possess a firearm of one's choosing is different in kind from the liberty interests we have recognized under the Due Process Clause.").

> it does not appear to be the case that the ability to own a handgun, or any particular type of firearm, is critical to leading a life of autonomy, dignity, or political equality: The marketplace offers many tools for self-defense, even if they are imperfect substitutes, and neither petitioners nor their *amici* make such a contention.[241]

Accordingly, and for these intrinsic differences between both rights, the U.S. Supreme Court significantly erred in adopting a rational-standard test in *Dobbs* and a historical test (and not an intermediate scrutiny standard) in the *NY Rifle* case.

More notably, the stance of the U.S. Supreme Court on both simultaneously decided cases is legally and conceptually flawed. The Court adopted an unexplainable double standard in the *NY Rifle* and *Dobbs* cases. Both cases relied on the Fourteenth Amendment of the U.S. Constitution.[242] In both cases, the government interest is to protect the human life—although less so in the right to abortion under *Dobbs* since the government interest concerns the protection of a potential fetus life pre-viability. And more so in the right to bear arms, since there is compelling government interest in resolving the unique American gun violence epidemic that claims thousands of innocent lives each year.[243] The U.S. Supreme Court was bound by precedents in both cases: *Heller* in *NY Rifle* and *Roe. v. Wade* and *Casey* in *Dobbs*. Again, we argue that *Roe v. Wade* and *Casey* were directly binding due to the similarity of facts in *Dobbs*, whereas *Heller* was not. Regardless, the Court chose to abide by *Heller*'s historical test standard, refused to apply any balancing test to assess the compelling interests of New York, and decided to issue a ruling that obstructs any state legislature from placing peculiar

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241 *Id.* at 893, 895 (Stephens, J., dissenting).

242 New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2271 (2022).

243 As the dissenting opinion in *New York Rifle* provided:

> In 2020, 45,222 Americans were killed by firearms. See Centers for Disease Control and Prevention, Fast Facts: Firearm Violence Prevention (last updated May 4, 2022) (CDC, Fast Facts), https://www.cdc.gov/violenceprevention/firearms/fastfact.html; Since the start of this year (2022), there have been 277 reported mass shootings—an average of more than one per day. See Gun Violence Archive (last visited June 20, 2022), https://www.gunviolencearchive.org. Gun violence has now surpassed motor vehicle crashes as the leading cause of death among children and adolescents. J. Goldstick, R. Cunningham, & P. Carter, Current Causes of Death in Children and Adolescents in the United States, 386 New England J. Med. 1955 (May 19, 2022) (Goldstick).

New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S.Ct. 2111, 2163 (2022) (Breyer, J., dissenting).

suitable limitations on the right to bear arms in the future.[244] In contrast, the Court decided to reverse two long-standing precedents in *Dobbs*: *Roe* and *Casey* – and wasted ink and paper on reasons that do not justify reversing a precedent.[245]

The Court's decision in *NY Rifle* came out at a time the U.S. was experiencing a substantial spike in mass shootings, a problem that does not even exist in most world countries, including developing ones.[246] In contrast, when it came to women's right to abortion before twenty-two weeks of pregnancy under *Roe v. Wade*, the Court decided to do the impossible. The Court chose to disregard the centuries-long prominent legal principle of *stare decisis* – that a precedent shall always be upheld unless there is a substantial and drastic change in society that warrants such reversal.[247] There was no adverse change in the American public opinion regarding woman's right to abortion.[248] Yet, the Court decided to go above and beyond to reverse two landmark precedents, *Roe* and *Casey*, after justifying why they were wrongly decided.[249] But the prominent *stare decisis* legal principle simply does not allow the reversal of a precedent because different justices think that a precedent was wrongfully decided.[250] As such, it seems that the majority does not properly understand the legal principle of *stare decisis* nor its historic origins. *Stare Decisis* is derived from the Latin phrase: "*stare decisis et non quieta movere*," which means "stand by the thing decided and do not disturb the

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244 *Id.* at 2164-68 (dissenting opinion) (listing many statistics about civilian firearm usage and crime rates in the U.S. and concluding that the Second Amendment should allow "States to take account the serious problems posed by gun violence").

245 *See* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (overturning prior Supreme Court precedent).

246 *See New York State Rifle*, 142 S.Ct. at 2164 (Breyer, J. dissenting).

247 The dissenting opinion in *Dobbs* correctly applies *stare decisis*. The dissenting opinion provides that:

> *Stare decisis* is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs.

Dobbs, 142 S.Ct. at 2319 (Breyer, J., dissenting).

248 Carrie Blazina, *Key Facts About the Abortion Debate in America*, PEW RSCH. CTR. (July 15, 2022), https://www.pewresearch.org/short-reads/2022/07/15/key-facts-about-the-abortion-debate-in-america/ [https://perma.cc/7LZF-J835].

249 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2265-79 (2022).

250 Blackstone makes clear in fn. 11 that: "A court or judge ought to be very cautious even in regard to recent cases, much more in regard to older ones, especially such as have been subsequently recognised and acted on. It is best to err on the safe side; and the safe side is stare decisis." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 64 (11th ed.) (1753).

calm."[251] The English common law of the eighteenth century is considered the foundation for the idea of *stare decisis* in American jurisprudence.[252] William Blackstone, an English jurist, stated in 1765 that the theory of English common law precedent created a strong presumption that judges should adhere to prior decisions when the same issues arise again in litigation unless such precedents were "manifestly absurd or unjust."[253]

Further, according to its literal meaning, the most important function and purpose of the *stare decisis* legal principle is to maintain legal stability and legitimate expectations in society.[254] The majority in *Dobbs* did not seem to follow the purpose or functionality of the *stare decisis* legal principle. The majority adopted their own version of *stare decisis* and nothing in their justifications refer to *Roe* or *Casey* precedents as blatantly irrational or unfair.[255] Yet, the majority decided to blatantly disturb the stability of legal status for women who legitimately expected that under *Roe* and *Casey*, they had the constitutional right to freely opt for abortion until twenty-two weeks of pregnancy. Such legal mistake is inexcusable since its adoption in further cases may collapse the whole fabric of legal statuses in society, alongside rendering judicial review useless.

The double standard of the U.S. Supreme Court continues beyond following a precedent and reversing two others. The Court decided to respect the democratic process by referring the right to abortion to be regulated by state legislatures and disrespect the same democratic process by exclusively deciding the right to bear arms without an evidentiary record.[256] The Court decided that the right to bear arms is good for New Yorkers and that New York cannot possibly have any kind of governmental interest under the applied historical test of the Second Amendment.[257] In doing that, the Court indirectly warns any state legislature who might place additional restrictions on gun licensing such as New York's proper cause that their legislation will be repealed. Such double standard is unexplainable for two

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251 James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution, and The Supreme Court*, 66 B.U. L. Rev. 345, 347 (1986).

252 *ArtIII.S1.7.2.1 Historical Background on the Stare Decisis Doctrine,* LIBRARY OF CONGRESS, https://constitution.congress.gov/browse/essay/artIII-S1-5-1/ALDE_00001187/#ALDF_00021140 [https://perma.cc/8KEZ-V726].

253 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 64 (11th ed.) (1753) (describing precedent as a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments).

254 Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 412-13 (2010).

255 Dobbs v. Jackson Women's Health Org., 213 L. Ed. 2d 545, 142 S. Ct. 2265-79 (2022).

256 New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2170 (2022) (dissenting opinion).

257 *Id.* at 2126 (abrogating the means-end scrutiny test).

reasons. First, if the U.S. Supreme Court decided to stand against its own role of judicial review, then it should have referred both rights under *Dobbs* and *NY Rifle* to be regulated by people's representatives. Yet, that did not happen. Second, regulating the right to bear arms is exponentially more problematic to society and requires long substantial hearings that arguably might exceed the Court's capacity.[258] In contrast, the *Roe v. Wade*'s division of trimesters framework was still accepted by most Americans despite relevant issues pointed to by the majority in *Dobbs*.[259] Even if the Court had considered *Roe*'s division of trimesters problematic, it should have developed the methodology stipulated by *Roe* rather than reverse it. What was worth referring to people's representatives was the right to bear arms under the Second Amendment due to its dramatic high risk to human life and extreme complexity. The right to abortion under *Roe* did not endanger the whole American society like gun violence.[260] Yet, the Court stood with all its mighty judicial power for the right to bear arms and referred the right to abortion to people's representatives.

One of the Court's important arguments that might explain the Court's double standard is the existence of the Second Amendment and the non-existence of a similar amendment that guarantees the right to abortion.[261] But this is inherently untrue according to the Court's own reasoning in *NY Rifle*—where it argued that the text of the constitution shall persevere into the future and that it was drafted in broad terms that allow such perseverance.[262] In fact, many of the constitutional rights are unenumerated rights. That does not only encompass constitutional rights such as same-sex marriage under *Obergefell* or the right to interracial marriages, but also extends to the constitutional rights to travel within the U.S., the right to associate with others, the right to choose and follow a profession, and the right to privacy, among others.[263] Should the U.S. Supreme Court also

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258 *Id.* at 2164-68 (dissenting opinion) (listing many statistics about civilian firearm usage and crime rates in the U.S. and concluding that the Second Amendment should allow "States to take account the serious problems posed by gun violence").

259 Lydia Saad, *Majority of Americans Still Support Roe v. Wade Decision*, GALLUP (Jan. 22, 2013), https://news.gallup.com/poll/160058/majority-americans-support-roe-wade-decision.aspx?version=print [https://perma.cc/H7CF-5LUM].

260 N.Y. State Rifle, 142 S. Ct. at 2164-68 (dissenting opinion) (listing many statistics about civilian firearm usage and crime rates in the U.S.).

261 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2300 (2022) (Thomas, J., concurring).

262 New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2132 (2022) (citing *United States v. Jones*, 565 U.S. 400, 404–405 (2012)).

263 *Amendment IX – Non-Enumerated Rights (1791)*, US LEGAL, https://system.uslegal.com/u-s-constitution/the-ninth-amendment/ [https://perma.cc/3ZC4-287A].

reverse all the unenumerated rights? The answer should be in the negative, simply because the Constitution's text language is broad enough to allow for such interpretation that is needed to cope with social advancement. Further, such unenumerated rights are grounded in the Ninth Amendment of the Bill of Rights.[264]

What logically follows is that there must be no distinction between a constitutional right that is explicitly mentioned in the Constitution (such as the Second Amendment right to bear arms) and another constitutional right that could be inferred from the constitutional text (e.g., right to privacy). The right to abortion is inferred from the Fourteenth Amendment, specifically from the word: "liberty" and "equal protection of laws."[265] The historical precedents of the U.S. Supreme Court inferred multiple rights from "liberty," such as the right to use contraceptive measures.[266] And the development of such precedents is what allowed for the legal development of a 1788 Constitution to cope with recent social changes.[267]

Moreover, the right to abortion can be directly derived from "equal protection of laws" under the Fourteenth Amendment. Although the majority in *Dobbs* rejected that banning abortion does not render it a discriminatory attack on women based on sex, we argue that banning abortion conceptually imposes direct discrimination on a class of society (women) based on sex. Would men be directly discriminated against by banning abortion? The answer is no. Would banning abortion be neutral in consequences to both men and women? The answer is no. Would banning abortion hurt one sex over the other? The answer is yes, women. Does it reduce the autonomy of one sex compared to the other? The answer is yes. Then, banning abortion is considered discrimination based on sex and warrants the applicability of the heightened strict scrutiny standard. The Court in *Dobbs* did not engage in much analysis and passingly decided that there is no discrimination involved, citing a precedent on the non-discriminatory nature of medical procedures that are peculiar to one sex.[268] Yet, abortion is inherently different. As the dissenting opinion in *Dobbs* wisely provided, deciding to abort or carry a potential human life touches upon all

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264 *Id.*

265 *Dobbs*, 142 S.Ct. at 2330 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965) on the right to adopt contraceptive measures)).

266 *Id.*

267 *See id.* at 2325 (stating that rights were defined generally in the Constitution to allow their meaning to evolve over time).

268 *Id.* at 2245-46 (*citing Geduldig v. Aiello*, 417 U.S. 484, 496, n. 20 (1974) and *Bray v. Alexandria Women's Health Clinic*, 506 U. S. 263, 273–74 (1993)).

aspects of a woman's life. As such, it is unlike the majority of other sex-peculiar medical procedures. Accordingly, an abortion decision shall be left exclusively for the woman to make, not the government, until viability.[269]

CONCLUSION

The U.S. Supreme Court stance to vital constitutional issues has been shaken after *Dobbs* and *NY Rifle*. The Court manipulated the legal principle of *stare decisis* in overruling *Dobbs* and waived its own powers of judicial review in *NY Rifle*.

What has been done by the U.S. Supreme Court cannot be easily undone. The Supreme Court decided to reinvent the wheel, but in the wrong direction—favoring regression over development. If the Court adopted the same stance as it did in *Dobbs* in reviewing future challenges to constitutional rights such as the right to same-sex marriage, the right to contraceptives, and the right to interracial marriages, the Court would regress the United States back centuries to 1789. In doing that, the Court would further shake the legal stability of the American society, leading to multiple adverse consequences. The U.S. Supreme Court should realize that adopting a historical standard of review is simply not the best for the American people, nor for America as a leading world country in liberty and freedom.

Until further changes in the structure of the U.S. Supreme Court or its majority Justices in *Dobbs* and *NY Rifle*, the American people will have to live and endure under the adverse consequences of *Dobbs* and *NY Rifle*.

Nonetheless, there is little hope for state legislatures to preserve the right to abortion until twenty-two weeks of pregnancy and to restrictively regulate gun licensing by evading judicial review through adopting the design of Texas Bill 8 Act. Adopting such unique design might stand the U.S. Supreme Court scrutiny in the future and prove reliable against the current deconstructive role of the U.S. Supreme Court.

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269 *Id.* at 2343-44 (Breyer, Sotomayor, and Kagan, JJ., dissenting).