Statutory Backups for Endangered Constitutional Rights

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ABSTRACT: This Article concerns the phenomenon of "statutory backup rights," or statutes that provide protections parallel to constitutional rights that are believed to be at risk of judicial abrogation. Proposals for backup rights gained attention in the aftermath of the Supreme Court's 2022 decision in Dobbs v. Jackson Women's Health Organization, *which not only eliminated the constitutional right to abortion but called into question some other constitutional rights as well. Shortly after* Dobbs, *Congress enacted a limited statutory backup for same-sex marriage. States have created backup rights across a range of topics, some of which appeal mostly to those on the right and others of which appeal mostly to those on the left.*

This Article considers a cluster of legal issues concerning the design of statutory backup rights, their pros and cons as mechanisms for protecting rights, and their broader effects on the legal system. It explains how the enactment of a statutory backup can keep the constitutional right away from the courts and, if the courts do take up the constitutional right anyway, bolster the constitutional right on the merits. The bolstering could occur either by revealing the strength of public sentiment or through mechanisms of legislative constitutionalism. Regarding the latter, a backup statute asks little of the judiciary in that it involves merely "confirmatory legislative constitutionalism," that is, a legislative judgment that aligns with current judicial doctrine and seeks to reinforce it against change.

The Article concludes by addressing how backup rights fit into debates over the role of the courts. Backup rights do not directly challenge the judiciary's authority, and in that regard they are not a type of court reform at all, but backup rights do decenter the courts as sources of rights. A practice of enacting

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statutory backup rights can bring legislatures and statutory rights into the foreground, such that they are no longer merely backups after all.

INTRODUCTION

This Article concerns what we might call statutory backup rights. A statutory backup right is a statutorily created right that runs parallel to a constitutional right, particularly a constitutional right that the courts currently recognize but that is regarded as being under threat of judicial abrogation.

Proposals for backup rights garnered attention in the aftermath of the Supreme Court's June 2022 decision in *Dobbs v. Jackson Women's Health Organization*, which not only overruled *Roe v. Wade*'s constitutional right to

abortion but called into question some other constitutional rights as well.[1] Staking out one possible future, Justice Thomas's concurring opinion in *Dobbs* called on the Court to "reconsider all of [its] substantive due process precedents," including those involving contraception, same-sex intimacy, and same-sex marriage.[2] The majority opinion in *Dobbs* tried to reassure the public that the Court was not questioning those other precedents.[3] But, as the dissenters warned, the majority's tradition-based approach to constitutional rights might be hard to confine to the context of abortion alone.[4]

Soon after *Dobbs*, Congress enacted a backup statute to protect the nationwide right to same-sex marriage that the Thomas concurrence had put under a cloud. This was the Respect for Marriage Act, enacted by bipartisan majorities at the end of 2022.[5] The statute is a limited backup right in that it does not require states to permit same-sex marriages, as *Obergefell v. Hodges* currently requires as a matter of federal constitutional law,[6] but the statute does require all states to recognize marriages that are valid under the laws of the state where they occurred.[7] The statute also recognizes the validity of same-sex marriages for purposes of federal statutory programs such as Social Security.[8]

Other attempts to enact backup rights in response to *Dobbs* faltered. Regarding access to contraception, the House of Representatives passed a bill to provide a national statutory right along the lines of the (current) constitutional right, but the bill failed in the Senate.[9] There have been proposals to address other subjects, such as a bill to provide federal statutory protection for in vitro fertilization.[10] On abortion, pre-*Dobbs* attempts to enact

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1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973)).

2. *Id.* at 2301 (Thomas, J., concurring).

3. *Id.* at 2277–78, 2280 (majority opinion).

4. *Id.* at 2327–28 (Breyer, Sotomayor & Kagan, JJ., dissenting).

5. *See generally* Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C).

6. Obergefell v. Hodges, 576 U.S. 644, 680 (2015).

7. 28 U.S.C. § 1738C (Supp. 2024).

8. 1 U.S.C. § 7(a) (Supp. 2024).

9. *See generally* Right to Contraception Act, H.R. 8373, 117th Cong. (2022); Annie Karni, *House Passes Bill to Ensure Contraception Rights After Dobbs*, N.Y. TIMES (July 21, 2022), https://www.nytimes.com/2022/07/21/us/politics/house-contraception.html (on file with the *Iowa Law Review*).

10. *See* Kate Santaliz, *Senate Democrats Introduce Legislative Protections for IVF*, NBC NEWS (June 3, 2024, 5:00 AM), https://www.nbcnews.com/politics/congress/senate-democrats-introduce-legislative-protections-ivf-rcna154946 [https://perma.cc/KR8G-UVG5]; *see also* Myrisha S. Lewis, *Personhood, Politics, Assisted Reproduction, and the Law Post-*Dobbs, 45 PACE L. REV. 83, 96–98 (2024) (discussing such proposals). For a proposed codification of a different kind of right also thought to be at risk, see Elaina Marx, *Trans Medical Care in Prisons, COVID-19, and the Eighth Amendment's Uncertain Future*, 13 CALIF. L. REV. ONLINE 108, 109–10, 115–16 (2023), which urges codification of Eighth Amendment protections surrounding prison conditions. Somewhat different is the recent proposal to codify a right to secularly rooted conscientious objection, as that right comes from judicial interpretations of a statute, albeit interpretations influenced by constitutional concerns.

a statutory backup failed, as have post-*Dobbs* attempts to create a national statutory right to abortion.[11]

This Article considers the design of backup rights, their strengths and weaknesses as strategies for protecting rights, and their effects on the legal system. The most obvious purpose of a backup right, for the supporters of the right, is to provide a hedge against judicially driven changes in constitutional law, but backup rights also have some indirect or abstract benefits as well. The enactment of a statutory backup may serve to preserve the constitutional right it is backstopping, shepherding the constitutional right through a period of risk. Backup rights can keep the constitutional right away from the courts and, if the courts do take up the constitutional right anyway, bolster the constitutional right on the merits. More broadly, and aside from one's views of any particular right being backstopped, focusing more attention on statutes relative to judicially crafted constitutional rights is probably good for the polity.

The political constituency for any given backup right, and the political feasibility of enacting one, depends on the relative ideological positions of the courts and the elected branches of government at the time. During the Biden Administration, most of the discussion of backup rights at the federal level involved rights favored particularly by liberals and progressives. This period yielded the Respect for Marriage Act and proposals concerning reproductive rights. Most of my examples involve such rights. But the general phenomenon of statutory backups has no necessary left–right valence, and there are also plenty of examples, particularly at the state level, involving rights currently favored by conservatives. State laws involving gun rights and religious freedom therefore inform my analysis at points.[12] Given the political alignment following the November 2024 general election, the states will now take on a more important role on the left too, as federal legislation codifying progressive priorities is unlikely for the next several years.[13]

This Article proceeds as follows:

Part I addresses some threshold definitional issues and then focuses on how to design a statutory backup. One important question for drafters is how broad to make the right. One might suppose that supporters of the right would want to make it as broad as the political circumstances and other prudential considerations allow, but there is a legal trade-off in that a broader statute runs a greater risk of exceeding congressional authority. Limited backups with

See William J. Aceves, *The Codification Project: Protecting Conscientious Objection as Secular Protest*, 106 B.U. L. REV. (forthcoming 2026).

11. *See* Mike DeBonis & Rachel Roubein, *Senate Blocks Bill to Codify Right to Abortion*, WASH. POST (May 11, 2022), https://www.washingtonpost.com/politics/2022/05/11/abortion-senate-vote (on file with the *Iowa Law Review*).

12. *See infra* Section I.C (addressing state backups).

13. *See, e.g.*, Grace Panetta, *Democrats Look to State Legislatures as Their Anti-Trump 'Firewall,'* 19TH NEWS (Dec. 18, 2024, 6:00 AM), https://19thnews.org/2024/12/democrats-state-legislatures-anti-trump-firewall [https://perma.cc/U5ZW-M7DM].

complicated fallback provisions drawing on various sources of constitutional authority may fare better in that regard. Beyond that big question of scope, devising effective backup rights also requires attention to some technical details. The Texas statute known as S.B. 8, which empowered private parties to stop abortion in Texas while *Roe v. Wade* was still officially the law of the land, was a clever piece of procedural engineering.[14] An effective strategy for protecting threatened rights likewise needs to attend to the interacting niceties of remedies, interpretive doctrines, and jurisdictional rules, complications that some of the current proposals for backup statutes overlook.[15]

Part II turns to secondary effects of backup rights, explaining how the enactment of a backup statute could serve to keep the threatened constitutional right out of the courts, or at least out of the Supreme Court. That could happen formally through the doctrine of constitutional avoidance and informally by reducing the likelihood of the Supreme Court granting certiorari on the topic. One could think of backup rights as creating a form of protective exile for endangered constitutional rights.

Part III presents another possible effect of enacting a backup right, namely that it could bolster the associated constitutional right on the merits if and when the courts do encounter it. This bolstering could occur either through mechanisms of legislative constitutionalism (in which courts and legislatures share authority over defining fundamental rights) or by showing the courts the strength of the public's policy views. Although the judiciary is not currently receptive to legislative interpretation of the Constitution, a backup statute asks little of the judiciary, for it involves merely "confirmatory legislative constitutionalism," that is, a legislative judgment that aligns with current judicial doctrine and seeks to reinforce it. Part III also addresses some risks of codification.

The conclusion addresses how backup rights relate to debates over the role of the courts and the possibility of Supreme Court reform. Recent years have seen renewed interest in measures like expanding the size of the Court, curtailing its jurisdiction, or imposing term limits on its members.[16] Backup

14. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 543 (2021) (Roberts, C.J., concurring in in part and dissenting in part) (referring to "stratagems designed to shield [the state's] unconstitutional law from judicial review"); *id.* at 549 n.3 (Sotomayor, J., concurring in part and dissenting in part) (describing S.B. 8's "novel procedural machinations").

15. *See infra* Section I.B (describing defects or omissions in some current proposals).

16. *See, e.g.*, Joe Biden, Opinion, *Joe Biden: My Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, WASH. POST (July 29, 2024), https://www.washingtonpost.com/opinions/2024/07/29/joe-biden-reform-supreme-court-presidential-immunity-plan-announcement (on file with the *Iowa Law Review*) (advocating term limits and a binding ethics code); Press Release, Sen. Ron Wyden, Wyden Introduces Sweeping Court Reforms to Restore Public Trust as Supreme Court Faces Legitimacy Crisis (Sept. 26, 2024), https://www.wyden.senate.gov/news/press-releases/wyden-introduces-sweeping-court-reforms-to-restore-public-trust-as-supreme-court-faces-legitimacy-crisis [https://perma.cc/39XW-HQF6] (proposing several reforms, including expanding the Court and imposing a supermajority requirement to hold legislation unconstitutional); *see also* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703,

rights are different in that they do not directly challenge the judiciary's authority. But they do decenter the courts as creators of rights. Backup rights have the virtue of focusing more attention on legislative action, which on all accounts should be the primary locus of policymaking in a representative democracy. That is, a benefit of backup rights is that they tend to bring statutory rights into the foreground, such that they are no longer merely backups after all.

I. DESIGNING BACKUP RIGHTS

A backup statute can be written in a few different ways, each with its own advantages and disadvantages. In laying out the options for how to draft a backup statute, I draw on examples of actual legislative proposals and also describe some more creative possibilities. Some of the relative pros and cons of different approaches will be apparent, but the trade-offs that go into the choice among the forms will resurface in Parts II and III when I turn to the indirect effects of enacting backup statutes.

This exploration of backup rights does not attempt a complete taxonomy of all the ways in which statutes might interact with constitutional rights, but it is worth explaining at the outset how backup statutes compare to some other phenomena. All legislation must comport with the Constitution, of course, and, at a high level of abstraction, there are countless examples of complementary interactions between statutory and constitutional law. Many statutes could be regarded as implementing constitutional rights or constitutional values, often going well beyond what the Constitution itself would require. The national Constitution generally provides rights against government interference but not rights to government support, and so many government subsidies and grant programs could be regarded as facilitating the exercise of rights in ways that constitutional rights do not require.[17] The Administrative Procedure Act's provisions for judicial review, to take another example, could be understood as implementing in a general way constitutional rights to independent review of executive action.[18] Yet the statute provides for review well beyond what due process and Article III require, and, as a matter of its enactment context, it was not meant to protect an existing constitutional right to review that was regarded as being at risk of judicial abrogation.[19] Other statutes facilitate enforcement of

1720–28 (2021) (distinguishing between personnel-oriented judicial reforms and court-disempowering reforms and advocating the latter). *See generally* Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J.F. 821 (2021) (distinguishing among internal, external, and structural reforms).

17. *See, e.g.*, National Foundation on the Arts and the Humanities Act of 1965 § 2(7), 20 U.S.C. § 951(7) (providing support for arts and humanities "to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent").

18. 5 U.S.C. §§ 702, 704 (2018).

19. *See* Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955) (referring to "the generous review provisions of the Administrative Procedure Act"); COMM. ON ADMIN. PROC., OFF. OF THE ATT'Y GEN., FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 80 (1941)

constitutional rights through procedural means, such as statutes providing attorneys' fees for successful plaintiffs in constitutional cases.[20] In the unusual example provided by the Civil Rights Act of 1866 and the Fourteenth Amendment, the typical order of enactment for a backup statute was reversed: The Civil Rights Act came first, and the subsequent constitutional amendment was adopted in part to entrench the Act and to validate congressional power to have enacted it.[21]

Whether we label something as a backup statute depends not just on the statute's content but on the circumstances, and those could change over time. To illustrate with a case of current importance, the Fourteenth Amendment and the federal immigration statutes provide in almost identical language that "persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens."[22] So far as I can tell, the long-standing statutory provision for birthright citizenship was not meant to counter any perceived judicial threat to then-existing understandings of constitutional birthright citizenship; the statute is just being comprehensive in its definition of citizenship by including the constitutional category of citizens alongside a longer list of people who are citizens only by virtue of congressional decision.[23] Yet the same statutory language, if enacted today against the backdrop of President Trump's executive order on birthright citizenship,[24] and at least if surrounded by certain facts about what Congress took the language to mean and to accomplish, could be seen as an effort to preserve a broader understanding of citizenship against the risk that the Supreme Court would uphold the executive order's interpretation of the Fourteenth Amendment.

The closest cousin to backup rights is the phenomenon of restorative statutes like the Religious Freedom Restoration Act ("RFRA").[25] The difference between backing up and restoring is the timeline. With a restorative statute, the statute seeks to reinstate in the form of a statutory right something that has *already* been lost as a constitutional right.[26] A topic can move between the

("The congressional and judicial practice has ordinarily been to provide judicial review for administrative adjudications whether required by the Constitution or not.").

20. *E.g.*, 42 U.S.C. § 1988(b).

21. *See* Hurd v. Hodge, 334 U.S. 24, 32–33 (1948) (summarizing aspects of the legislative history of the Fourteenth Amendment that addressed the Civil Rights Act of 1866).

22. U.S. CONST. amend. XIV, § 1; 8 U.S.C. § 1401(a).

23. For an account of the legislative history, see generally Brief of Members of the U.S. Congress as Amici Curiae in Support of Respondents, Trump v. CASA, Inc., 145 S. Ct. 2540 (2025) (No. 24A884), 2025 WL 1277327.

24. Protecting the Meaning and Value of American Citizenship, Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

25. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4, § 1988, 5 U.S.C. § 504) [hereinafter RFRA].

26. Congress described RFRA as "restor[ing] the compelling interest test" for Free Exercise claims that the Supreme Court had rejected in *Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA § 2(b)(1), 42 U.S.C. § 2000bb(b)(1).

categories of backup and restoration, as abortion recently has: Before *Dobbs*, efforts to "codify" *Roe* would have been a backup statute, but now they are an effort at restoration.

Some of the material in this Article applies equally to backups and related phenomena like restorations, but there are also important differences. One notable difference involves the kind of legislative constitutionalism at issue. As explained in Part III, a backup statute seeks merely to confirm the courts' current constitutional understanding, as opposed to seeking to overcome it, as restorations might do. Another, addressed in Part II, is that a backup statute—or really any statute that roughly parallels a constitutional provision—might have the effect of preventing constitutional adjudication, something that has already happened in the case of a restorative statute.

With those prefatory remarks, we can turn to the design of backup statutes.

A. DEFINING THE STATUTORY RIGHT

A statutory backup needs to set out the substance of the right being protected, but this can be done in different ways. First, the legislature may specify in the statute what activity is protected. Second, it may incorporate a right by reference to case law or similar sources, an approach that itself divides into a few subvarieties. And whichever approach it chooses, it may add a trigger provision that brings the statutory right into force when the constitutional right it is written to protect is abrogated by the judiciary.

1. Specified Content

The most obvious approach to defining the substance of the backup right is to specify in the statute itself exactly what activity is protected: listed methods of contraception, abortion up to *X* weeks with exceptions in certain situations, etc. In some cases, the drafting work would be easy, in some cases hard. A statute allowing any two adults to marry regardless of sex is easy enough to write. Language about abortion could become very complicated; bright-line timing rules can do significant work, but any plausible statute is likely to require exceptions as well as descriptions of which sorts of regulations on abortion procedures are allowed and for what reasons.[27]

The decision about the breadth of the statutory right involves considerations of law, politics, and policy. One would suppose that supporters of the right would favor, as a matter of policy, a statute that makes the right as broad as the political circumstances allow, perhaps even broader than the constitutional right. Defining the statutory right so that it sweeps at least as broadly as the constitutional right has some legal advantages, including that

27. *See, e.g.*, Anna Spoerre, *'Uncharted Territory': How Would Abortion-Rights Amendment Impact Missouri TRAP Laws?*, MO. INDEP. (Feb. 19, 2024, 5:55 AM), https://missouriindependent.com/2024/02/19/abortion-rights-amendment-missouri-election-trap-laws [https://perma.cc/BV9E-C585] (describing uncertainty over which abortion regulations would be invalidated by a state ballot initiative).

it would allow rights holders to rely on the statute rather than putting an endangered constitutional right in front of the courts.[28] But at the same time, a broader statutory right is likely to raise tougher questions about congressional authority to enact the statute, especially if it regulates the states or trenches on areas of traditional state concern.[29] I return to these important trade-offs below.[30]

2. Incorporation

An alternative approach is to incorporate the content of a constitutional right (or a judicial articulation of it) by reference. Instead of spelling out the contours of the right in statutory text, the statute would provide statutory protection "equivalent to the constitutional right recognized in *Case Z*" or through some similar reference. Incorporating a right by reference eases the drafting task for rights that are hard to precisely articulate in legislative language.

Existing law provides some examples of different forms of statutory incorporation of constitutional law. The Federal Rules of Civil Procedure do not attempt to specify in their own words which cases are triable by jury but instead provide that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved."[31] A different kind of example is § 1983, which creates a right of action and remedies against state officials who violate federal rights but which does not itself define the substance of the federal rights it safeguards.[32] There are also examples of statutes that incorporate constitutional *limitations*, as with state "long-arm statutes" that provide courts with personal jurisdiction over nonresident defendants "on any basis not inconsistent with the Constitution of this state or of the United States."[33]

Some statutes straddle the line between specification and incorporation. One kind of example is a statute that appears to set out specified content but with the understanding that the language is meant to codify existing case law, restore an understanding expressed in prior law, or otherwise incorporate an external source. So, for example, RFRA stated in its purpose clauses that it aimed "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)"—a test that had been abrogated in *Employment Division v. Smith*[34]—and RFRA's operative

28. *See infra* Section II.B.1.

29. *Cf.* United States v. Morrison, 529 U.S. 598, 627 (2000) (holding that Congress lacked authority under the Commerce Clause and Fourteenth Amendment to enact a private civil remedy for victims of gender-motivated violence).

30. *See infra* Sections II.A–.B.

31. FED. R. CIV. P. 38(a).

32. 42 U.S.C. § 1983 (referring to "any rights, privileges, or immunities secured by the Constitution and laws").

33. CAL. CIV. PROC. CODE § 410.10 (West 2022); *see also* 9 R.I. GEN. LAWS § 9-5-33(a) (2012) (extending jurisdiction to "every case not contrary to the provisions of the constitution or laws of the United States").

34. *See* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 881–82 (1990).

provisions parallel the language of pre-*Smith* cases.[35] Another kind of statute that may be hard to classify is one that simply repeats relevant constitutional language. One might assume that such a statute is an incorporation, but various factors—the legislative history, for example, or changed circumstances between the date of the constitutional text and the date of the statute—might persuade an interpreter that the statute has distinctive content despite using the same words.[36]

One should distinguish between two different temporal variations on incorporation: static versus dynamic.[37] Static incorporation cements the content of the incorporated right as of a certain date, such as the date the statute is enacted.[38] Dynamic incorporation allows the statutory right to expand or contract over time in parallel with the incorporated constitutional right.[39] For some legislative goals, dynamic incorporation is desirable, but in the context of backup rights, dynamic interpretation could defeat the point of enacting the backup. The voting-rights case of *City of Mobile v. Bolden* shows why.[40] In that case, the Court read section 2 of the Voting Rights Act to restate the Fifteenth Amendment, and then the Court read the Fifteenth Amendment more narrowly than Congress likely would have expected at the time of the Voting Rights Act's enactment, thus dynamically narrowing the statute too.[41] The Court's narrow reading of the statute prompted Congress to go back and specify the statute's coverage so as to expand the statute beyond *City of Mobile v. Bolden*'s narrow understanding of the constitutional right.[42] A hypothetical backup statute enacted before *Dobbs* that incorporated "the constitutional right to abortion" would be defunct after *Dobbs* if given a dynamic reading.

Given the problem just described, drafters of backup statutes should generally avoid dynamic incorporation. If Congress is going to use incorporation,

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35. *See* RFRA §§ 2(b), 3. *But cf.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706, 713–17 (2014) (concluding that RFRA went beyond what the pre-*Smith* First Amendment case law required).

36. *Cf.* Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 807–08 (1986) (explaining that similar language in the Constitution and a statute has been interpreted differently).

37. On static and dynamic incorporation generally, though not focused on incorporation of constitutional rights, see Jonah B. Gelbach, *The Dynamic Dilemma: Dynamics and Disuniformity in Statutory Interpretation*, *in* RESEARCH HANDBOOK ON LAW AND TIME (Frank Fagan & Saul Levmore eds., 2025). A field with a particularly well-developed literature on static and dynamic incorporation is tax law; some state tax laws incorporate federal tax law dynamically and some statically. *See, e.g.*, Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267, 1333–34 (2013).

38. For an example of expressly static incorporation, consider Federal Rule of Civil Procedure 59(a), which allows federal courts to grant new trials in jury cases "for any reason for which a new trial has *heretofore* been granted in an action at law in federal court" (emphasis added).

39. *See, e.g.*, Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 116–19 (2001) (employing a dynamic understanding of "commerce" in the Federal Arbitration Act).

40. *See generally* City of Mobile v. Bolden, 446 U.S. 55 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2, 96 Stat. 131, 134 (codified at 52 U.S.C. § 10301), *as recognized in* Thornburg v. Gingles, 478 U.S. 30, 35–36 (1986).

41. *See id.* at 61–65.

42. *See* Chisom v. Roemer, 501 U.S. 380, 392–95, 403–04 (1991) (describing this history).

it should be expressly static incorporation or, more complicated, a one-way dynamism that provides a statutory right no less expansive than the then-current constitutional right. Or Congress could forsake incorporation and specify the content directly, which admittedly may involve greater difficulties of drafting.

3. Trigger Version

A more creative form of backup right would combine one of the approaches above with a "trigger" mechanism. Readers may be familiar with the trigger laws of a *rights-restricting* variety that some states enacted in anticipation of the overruling of *Roe v. Wade*.[43] Those restrictions on abortion were written so that they laid dormant while *Roe* stood, but they sprung into effect upon *Roe*'s end.[44] The proposal here could be considered a "rights-preserving trigger law," a backup right that comes into force only if and when the constitutional right is abrogated.[45] Alternatively, one could conceive of the trigger variation as an automatic restorative statute, blurring the line between backups and restorations.

A rights-preserving trigger would be unusual, but it's not impermissible. It does not create the notice and retroactivity problems potentially presented by rights-restricting trigger laws, like those outlawing abortion,[46] because the nature of a rights-preserving trigger is that it maintains continuity of rights and obligations, albeit while shifting their foundation to a statute rather than judicial interpretations of the Constitution. Neither does the trigger implicate prohibitions on penalizing judges for their decisions, such as hypothetical provisions that would cut school lunches or military pay if a court ruled in a way the legislature does not like.[47] No such interference with independent judgment occurs here. The "penalty" here is that the Supreme Court does not get to control public policy on an issue through its constitutional rulings: Contraception, same-sex marriage, or whatever activity would remain legal regardless of whether the Court determines that the Constitution protects it.

Just as there is no legal impediment to using a trigger, there is no legal need to use one either. Whether to include a trigger provision is a question of politics.

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43. *See* Jesus Jiménez, *What Is a Trigger Law? And Which States Have Them?*, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/us/abortion-trigger-laws.html (on file with the *Iowa Law Review*) (listing states with trigger laws).

44. The Idaho trigger law, for example, provided that it took effect thirty days after: "(a) The issuance of the judgment in any decision of the United States supreme court that restores to the states their authority to prohibit abortion; or (b) Adoption of an amendment to the United States constitution that restores to the states their authority to prohibit abortion." Act of Mar. 24, 2020, ch. 284, § 1(1), 2020 Idaho Sess. Laws 827 (codified at IDAHO CODE § 18-622(1) (2025)).

45. *See* Recent Legislation, *Reproductive Rights — State Law — Illinois Repeals Anti-Abortion Trigger Law.*, 131 HARV. L. REV. 1836, 1843 (2018) (mentioning the possibility of trigger laws that would protect gun rights if *District of Columbia v. Heller* were overruled).

46. *Id.* (noting these objections to abortion trigger laws).

47. *See* Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 327–36 (2007) (providing examples of coercive provisions of this sort).

On politics, I do not claim any particular expertise, certainly not as compared to political leaders who are actually trying to enact a bill, but it may be worthwhile to explain why a trigger could make political sense in certain circumstances. Making the backup right contingent on abrogation of the constitutional right responds to one of the main arguments offered by congressional opponents of the recent efforts at backup rights: that they are unnecessary because the constitutional right is secure. In the debates over the successful post-*Dobbs* same-sex marriage bill and the unsuccessful contraception bill, opponents said that the bills were unneeded because the Supreme Court would not overrule the cases recognizing those rights. That reason was offered, for example, by Senators Chuck Grassley and Josh Hawley and Representative (now Speaker) Mike Johnson in defense of their votes against the Respect for Marriage Act.[48] In debate on the contraception bill, Representative Kat Cammack called the bill "completely unnecessary," because "[i]n no way, shape, or form is access to contraception limited or at risk of being limited."[49]

Now, it may be that these objections were mostly pretextual. There is some danger in treating disingenuous objections as real. But the supposed lack of necessity was at least attractive enough for some opponents to make it their main argument and to broadcast it widely. The trigger approach confronts that objection head-on, as the statutory right would apply if and only if, as opponents say would not happen, the statutory right indeed becomes necessary. No doubt the introduction of a trigger provision would cause many opponents to shift their opposition to different grounds, revealing that the previous objection was not the only objection and maybe not even a real objection. But it is also conceivable, in a close vote, that a pivotal voter would vote for the trigger version but not the non-trigger backup. And even if no vote changed, it would at least clarify the grounds of opposition for the public. Whether these potential benefits of a trigger outweigh the potential downside of muddying one's own message is, again, a matter of political judgment.

Although the trigger provision is legally permissible, there is a legal consideration that weighs against its use, namely that the trigger variation of a

48. 168 CONG. REC. H6722 (daily ed. July 19, 2022) (statement of Rep. Johnson); Press Release, Sen. Chuck Grassley, While Same-Sex and Interracial Marriages Are Not at Risk, Religious Institutions Would Be Under Senate Bill. (Nov. 16, 2022), https://www.grassley.senate.gov/news/news-releases/while-same-sex-and-interracial-marriages-are-not-at-risk-religious-institutions-would-be-under-senate-bill [https://perma.cc/6RDV-NVG6]; Lisa Mascaro, *House Passes Same-Sex Marriage Bill in Retort to High Court*, AP (July 19, 2022, 8:15 PM), https://apnews.com/article/abortion-race-and-ethnicity-gay-rights-marriage-social-issues-77ec6e2a60b5990ceaf7c396fee42016 [https://perma.cc/CBX6-JBR9] (quoting Sen. Hawley); *see also* Adam Serwer, *Republicans' Cowardly Excuses for Not Protecting Marriage Equality*, ATLANTIC (July 29, 2022), https://www.theatlantic.com/ideas/archive/2022/07/gop-respect-for-marriage-act-obergefell-supreme-court/670985 [https://perma.cc/J587-98A3] (discussing these arguments).

49. 168 CONG. REC. H6930 (daily ed. July 21, 2022) (statement of Rep. Cammack); *see also* Press Release, Sen. John Cornyn, Cornyn Rips Schumer for Wasting Time on Show Votes (June 11, 2024), https://www.cornyn.senate.gov/news/cornyn-rips-schumer-for-wasting-time-on-show-votes [https://perma.cc/2CL9-8ENZ] (stating there was no threat to contraception or IVF).

backup statute may not achieve the collateral benefit of keeping the courts away from adjudicating constitutional issues. This matter is addressed in more detail in Section II.B.2.

B. PROCEDURAL AND REMEDIAL DETAILS

In addition to defining the substantive reach of the statute, drafters need to address some procedural and remedial details. (Readers who are more interested in the big-picture issues are welcome to skip this Section.) Existing backup proposals differ in how thoroughly they address these matters, but for an example of a bill that attends to many such details, we can take the proposed federal Right to Contraception Act.[50] The bill defines a national statutory right to use and provide contraceptives and then addresses enforcement in the following ways, among others. The Right to Contraception Act:

- provides that it supersedes inconsistent state or federal law, specifically including RFRA (§ 5(a));
- provides that it may be raised as a preemption defense in any suit that would infringe on the statutory right to contraception (§ 5(c));
- defines the "government officials" prohibited from violating its protections to include private parties who are authorized to enforce state restrictions, an apparent response to "bounty hunter" provisions like those in Texas's S.B. 8 (§ 6(c));[51]

50. The discussion here refers to the version that passed the House in July 2022. *See* Right to Contraception Act, H.R. 8373, 117th Cong. (2022). A similar bill failed to overcome a Senate filibuster in June 2024. *See* S. 4381, 118th Cong. (2024).

51. This provision appears to be aimed at overcoming problems created by mechanisms like S.B. 8, but the provision ultimately has only limited utility. Recall that an impediment to offensive pre-enforcement litigation against S.B. 8 was that the state disclaimed any enforcement authority by its officials, instead empowering unspecified members of the general public to bring lawsuits to recover a monetary penalty from those who violated the state's restrictions on abortion. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 530–31 (2021); Whole Woman's Health v. Jackson, 642 S.W.3d 569, 583 (Tex. 2022). To see the limited utility of section 6(c) of the proposed Right to Contraception Act in combatting a scheme like S.B. 8, consider the following points:

1. To the extent that section 6(c) is aimed at making people who actually file S.B. 8–style enforcement actions into agents acting under color of state law, those people probably already had that status even without this provision. *See* Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029, 1077–83 (2022).

2. I doubt that the mere definition of a private enforcer as a government official would make much difference in surmounting difficulties of standing in a preenforcement posture. *Cf. Whole Woman's Health*, 142 S. Ct. at 537 (holding that abortion providers lacked standing to sue a private party who disclaimed intent to enforce S.B. 8).

3. The provision might be predicated on the existence of a state-action requirement that is not relevant to the extent that Congress is drawing on the Commerce Clause or other powers besides the Fourteenth Amendment.

- provides for enforcement by the Attorney General (§ 7(a));[52]
- creates a private right of action in doctors and patients (§ 7(b));
- provides for recovery of attorneys' fees by prevailing plaintiffs (§ 7(d)); and
- abrogates state immunity (§ 7(f)).[53]

That is a start, but there are other matters to consider. One can come up with various additions, some of which would make any backup right more effective and some of which are aimed at thwarting S.B. 8-style private-enforcement schemes in particular. In the main text below, I describe the additional features that Congress might wish to consider, leaving the details of their legality to the footnotes. In listing these potential additions, I do not mean to say that adopting all of them, especially in a maximalist form, would be prudent. What is enacted may be repealed, and so creating a durable statutory right may require some compromises that will keep differently minded people on board.

Jurisdiction. The bill provides that the federal district courts "have jurisdiction over proceedings under this Act," (§ 7(e)), which would already be true under general jurisdictional principles for any suit brought by the United States or brought by private parties to enforce the statute.[54] But what if, as is entirely possible, the statutory right is asserted as a defense to an enforcement action in state court? General principles of jurisdiction do not

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To say that this particular clause is not very useful does not mean that the Right to Contraception Act's remedial regime as a whole is inefficacious, especially as augmented by the further features I address in the following discussion.

52. The district court that heard the federal government's challenge to S.B. 8 held that the United States had standing to sue and a cause of action despite the absence of specific statutory authorization, but that provoked some controversy in the Supreme Court oral argument. United States v. Texas, 566 F. Supp. 3d 605, 633–55 (W.D. Tex.), *cert. granted*, 142 S. Ct. 14, *and cert. dismissed*, 142 S. Ct. 522 (2021); Transcript of Oral Argument at 44–45, United States v. Texas, 142 S. Ct. 522 (2021) (No. 21-588), 2021 WL 6051178, at *44–45; *see also* Wasserman & Rhodes, *supra* note 51, at 1094–101 (addressing U.S. government standing). This provision removes doubts regarding the authority of the United States to sue to protect rights holders. One advantage of suit by the United States is that state sovereign immunity does not bar the United States. United States v. Texas, 143 U.S. 621, 644–45 (1892).

53. The heading of the subsection ("Abrogation of State Immunity") and its references to the Tenth and Eleventh Amendments suggest that the attempted abrogation is of the state's sovereign immunity. However, it also refers to "government official[s]" and "immun[ity] under . . . any other source of law," which is potentially expansive enough to strip individual officials of qualified immunity in personal-capacity suits. Congress should clarify this.

The theory under which Congress is abrogating state sovereign immunity is likely that a state restriction on contraception violates the Fourteenth Amendment, which is true under existing law, albeit law that may be at risk. *See* Eisenstadt v. Baird, 405 U.S. 438, 443 (1972). An additional theory of abrogation, which would apply to private-enforcement schemes like S.B. 8, would be that the scheme deprives its targets of a Due Process right to pre-enforcement judicial guidance. *See* Michael T. Morley, *Constitutional Tolling and Preenforcement Challenges to Private Rights of Action*, 97 NOTRE DAME L. REV. 1825, 1866, 1879–81 (2022).

54. *See* 28 U.S.C. § 1331 (providing jurisdiction in civil actions arising under federal law); *id.* § 1345 (providing jurisdiction in civil actions where the United States is plaintiff).

provide a right to remove cases to federal court based on the assertion of a federal defense, including a preemption defense. This is the famous well-pleaded complaint rule.[55] The language in this bill—"jurisdiction over proceedings *under this Act*"—might not be sufficient to overcome that general rule against federal defenses providing jurisdiction. Therefore, Congress could: (1) provide that the assertion of the statute as a defense provides a basis for removal of civil actions to federal court;[56] and (2) provide that state criminal prosecutions or other enforcement actions may likewise be removed on the basis of this defense.[57]

Another jurisdictional response, but one that is probably not warranted, is to provide that the federal courts have exclusive jurisdiction over any case implicating the Right to Contraception Act, including when it is asserted as a defense.[58] Giving the rights holder the option of removal is probably better for rights holders, so that they can choose the more favorable forum in their particular instance.

Anti-abstention. A feature of private-enforcement schemes like S.B. 8 is that they frustrate pre-enforcement challenges: The state disclaims enforcement authority, and the rights holder does not know whom to sue until the private enforcer files a bounty suit.[59] And then once the private enforcer files suit in state court, the rights holder's suit for affirmative relief in a different forum could be blocked by abstention doctrines. Abstention doctrines counsel federal courts to refrain from exercising jurisdiction in several situations, the most relevant here being when the state has commenced a criminal prosecution or civil enforcement action against a would-be federal plaintiff (*Younger* abstention).[60] Similarly, the Anti-Injunction Act prohibits federal courts from

55. *See* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 153 (1908) (articulating the well-pleaded complaint rule for federal-question jurisdiction).

56. Article III jurisdiction is not limited by *Mottley*'s well-pleaded complaint rule, and Congress may extend jurisdiction to cases involving federal defenses. *See* Tennessee v. Davis, 100 U.S. 257, 264 (1879) ("Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted."). The bill providing a statutory right to IVF expressly provides a right to remove, but it confusingly refers to "a right to remove an action brought under this subsection," i.e., the subsection providing a private right of action. Access to Family Building Act, S. 3612, 118th Cong. § 4(b)(7) (2024). An enforcement action is not "brought under" that statute. This provision should instead provide for removal of enforcement actions.

57. The jurisdictional statutes allow removal of state prosecutions that violate federal civil rights, 28 U.S.C. § 1443, but this provision is understood very narrowly, so Congress should make express provision for removal of criminal prosecutions, administrative actions, and other enforcement actions.

58. Congress has authority to assign jurisdiction of federal matters exclusively to federal courts, barring state courts from entertaining them. *E.g.*, 28 U.S.C. § 1334(a) (cases under the Bankruptcy Code); *see* Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 371 (2012).

59. *See supra* notes 50–53 and accompanying text (describing how S.B. 8 and similar measures complicate challenges to their lawfulness).

60. Younger v. Harris, 401 U.S. 37, 41 (1971); *see* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77–78 (2013) (describing scope of *Younger* doctrine). It is not clear whether a suit by a private

enjoining state proceedings, subject to some important exceptions.[61] Furthermore, with or without the pendency of state-court litigation, there are various abstention-like doctrines by which federal courts may sometimes decline to exercise jurisdiction when matters could be resolved in state court.[62]

Congress can address these impediments to affirmative federal litigation by barring federal courts from abstaining and expressly providing that the Anti-Injunction Act does not apply and, indeed, that the federal court should enjoin an enforcement suit.[63] These steps do not completely solve the procedural

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party suing under a statute like S.B. 8 would be considered an enforcement action subject to *Younger* abstention, but it is certainly possible given the exclusivity of private enforcement in such a scheme. *See* Wasserman & Rhodes, *supra* note 51, at 1087–90 (discussing whether *Younger* applies).

61. 28 U.S.C. § 2283. A significant exception in this context is that civil-rights cases under § 1983 are regarded as exceptions to the Anti-Injunction Act. Mitchum v. Foster, 407 U.S. 225, 242–43 (1972).

62. *See* Quackenbush v. Allstate Ins., 517 U.S. 706, 716–19 (1996) (citing examples); *e.g.*, Braid v. Stilley, No. 21-CV-5283, 2022 WL 4291024, at *5–6 (N.D. Ill. Sept. 16, 2022) (dismissing interpleader action involving abortion provider and S.B. 8 plaintiffs on the ground that interpleader is a discretionary, equitable action), *aff'd*, 142 F.4th 956 (7th Cir. 2025) (affirming dismissal on the basis of *Colorado River* abstention).

63. The Anti-Injunction Act itself contemplates exceptions to its general prohibition when "expressly authorized by Act of Congress." 28 U.S.C. § 2283; *see, e.g.*, *Mitchum*, 407 U.S. at 233–36 (citing examples of exceptions). Abstention doctrines involve judicial determinations not to exercise authority that Congress has conferred in general terms (such as through the federal-question and diversity statutes or the Declaratory Judgment Act). Although I am not aware of any directly relevant judicial precedent, the correct view is that courts may not abstain where Congress has expressly prohibited abstention. *See* A.L.I., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 48–51, 282–89 (1969) (recommending the codification and modification of judicially developed abstention doctrines); Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RSRV. L. REV. 1035, 1048 (1989) (stating that "it seems perfectly obvious that if Congress wanted to eliminate the *Younger* doctrine, it could simply amend § 1983 to add genuinely clear language" to that effect). The state interests in state-court adjudication that many abstention doctrines protect can be trumped by Congress when federal law is involved, so much so that Congress may provide for removal to federal court for cases containing federal substantive law, even in state criminal cases where state interests are highest. *E.g.*, 28 U.S.C. § 1443 (authorizing removal of criminal prosecutions in which defendants cannot enforce federal civil rights). To the extent that abstention serves federal judicial interests, an argument for allowing the federal courts to override express congressional commands to adjudicate cases would likely involve judicial self-protection. As Beermann describes the argument (but without endorsing it), "The judicial branch's effectiveness might be undercut by an overload of cases or by continuous adjudication of cases that are so controversial that they excite widespread anti-federal court sentiment." Jack M. Beermann, *"Bad" Judicial Activism and Liberal Federal-Courts Doctrine: A Comment on Professor Doernberg and Professor Redish*, 40 CASE W. RSRV. L. REV. 1053, 1065–66 (1989). The caseload concern, assuming courts could second-guess Congress on it, could not apply here, given the small number of cases compared to overall federal caseload. The controversy concern, if admissible at all, is not solved by abstention. The federal courts would still resolve the same controversial issues in a variety of other postures (where pre-enforcement review is available, when an exception to *Younger* is available, through Supreme Court appellate review, etc.).

Still another approach to bolstering federal authority to stop state enforcement actions would be for Congress to provide for, or clarify the existence of, the Supreme Court's authority to issue prerogative writs to block state courts from hearing enforcement actions. *See* James E. Pfander, *Judicial Review of Unconventional Enforcement Regimes*, 102 TEX. L. REV. 792–96 (2024)

tangles of laws like S.B. 8, but when combined with other measures described in this Section, they go a long way toward defanging the *in terrorem* effect.

Damages. A statute could expressly provide not only for equitable relief (as § 7(c) of the Right to Contraception Act does) but for recovery of damages. The measure of damages could include, along the lines of the "clawback" provisions in some states' abortion-shield laws, the recovery of any penalties and litigation expenses stemming from prior enforcement actions.[64]

If Congress wished to impose damages liability on the state, it would need, first, to draft the statute to be absolutely clear that the state's immunity is abrogated *as to damages*; abrogation for declaratory and injunctive relief would not transfer over.[65] Second, the damages remedy would need to be a "congruent and proportional" enforcement measure under the Fourteenth Amendment.[66] After *Dobbs*, there is no Fourteenth Amendment right in the context of abortion, but there are such rights in other contexts like contraception and same-sex marriage.[67] To hedge against the possibility that the constitutional rights might be abrogated, Congress should not limit any damage remedy to the state itself but should include individuals.

Scope of equitable relief. In response to the Supreme Court's recent ruling disallowing universal injunctions, which was based on the Court's interpretation of the statutory grant of equity jurisdiction,[68] Congress should consider whether it wishes to attempt to authorize universal injunctions, loosen requirements for class certification, or otherwise seek to replicate the effects of universal relief.[69]

Attorneys' fees. Congress should rewrite the attorneys' fees provision, which currently benefits "a prevailing plaintiff," so that it applies to persons pursuing the rights under the Act regardless of their procedural alignment as plaintiff or defendant. (The statute can be used as a defense against a state-law

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(addressing the potential for the Supreme Court to use writs of prohibition to block state courts from entertaining enforcement actions like those contemplated by S.B. 8). If the Court itself is regarded as a threat to the federal right, the Court might not be expected to use such authority effectively. That worry would counsel relying on the lower federal courts and freeing them of abstention and limits on anti-suit injunctions, as described above.

64. *See* David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Shield Laws*, NEJM EVIDENCE, Mar. 28, 2023, at 3 (describing such laws); Maggie Shirley, Note, *Comity and Clawback Statutes After S.B. 8*, 102 TEX. L. REV. 185, 208–18 (2023) (same).

65. Although damages are the ordinary remedy, their availability would not be implied in a suit against the state even when the state lacks sovereign immunity. *Cf.* Sossamon v. Texas, 563 U.S. 277, 285–88 (2011) (holding that a statute that authorized "appropriate relief against a government" did not constitute a waiver of state sovereign immunity to damages liability).

66. Allen v. Cooper, 140 S. Ct. 994, 1003–04 (2020); City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997).

67. *Cf. infra* Section III.A (discussing congressional authority to define constitutional rights and limitations on the same).

68. *See* Trump v. CASA, Inc., 145 S. Ct. 2540, 2550–51 (2025).

69. It is unclear whether the Constitution would permit the federal courts to grant non-party relief, a question I do not address here. *Cf. id.* at 2550 n.4 (declining to address the question).

enforcement action, remember.[70]) Also, Congress should consider expressly providing for expert witness fees to supplement attorneys' fees.[71]

C. STATE BACKUPS

My focus here is national backup rights, but states can and do enact statutory backups too. This Article does not attempt a comprehensive analysis of state backup statutes, much less a state-by-state survey of how they would fit into potentially distinctive state contexts, but a few words will be useful to illustrate some ways in which they differ from federal backups.

First, state backups cover a broader range of rights. During the Biden Administration, the emphasis at the national level was on rights particularly favored on the left, but the widely varying political orientations of the states make for a diversity of constitutional rights that get backstopped. Purplish-blue Virginia, which gave rise to the Supreme Court case striking down bans on interracial marriage sixty years ago, recently adopted a statute that bans discrimination in marriage "on the basis of . . . sex, gender, or race."[72] A majority of the states have a state religious-freedom act of some form.[73] Bolstering a right particularly favored by conservatives, some states have enacted or are considering Second Amendment Preservation Acts or similarly titled protections for gun rights.[74]

Second, adding the dimension of federalism multiplies the potential interactions across different categories of law. Backup rights could exist wholly within a state system, as when a state statute backs up a constitutional right recognized by the state courts. More complex, one can have backups working across systems, such as when a federal constitutional right is backed up by a state statute—or by both state and federal statutes, each with slightly different scopes of coverage and remedial options. State constitutions are generally much more amendable and "statute-like" than the U.S. Constitution, and so states can amend their constitutions to bolster a federal right that they believe

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70. *See supra* notes 55–58 and accompanying text.

71. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 93–96 (1991) (holding that a statute providing for recovery of attorneys' fees did not authorize awards of expert fees).

72. VA. CODE ANN. § 20-13.2 (Supp. 2025); Loving v. Virginia, 388 U.S. 1, 11–12 (1967). The state legislature has approved a constitutional amendment on marriage, which voters will consider in November 2026. Jahd Khalil, *State Senate Approves Constitutional Amendments for Voters' Consideration*, VPM (Jan. 16, 2026, 2:12 PM), https://www.vpm.org/generalassembly/2026-01-16/senate-amendments-abortion-voting-rights-marriage-gerrymandering [https://perma.cc/2U4Q-KZX4].

73. *See Federal & State RFRA Map*, BECKET, https://www.becketlaw.org/research-central/rfra-info-central/map [https://perma.cc/26MS-RJZF] (listing states).

74. *E.g.*, MO. ANN. STAT. §§ 1.410–1.485 (West 2023); TEX. PENAL CODE ANN. § 1.10 (West 2025); H.R. 23-1044, 74th Gen. Assemb., Reg. Sess. (Colo. 2023) (introduced, postponed indefinitely). The federal courts enjoined the Missouri law on the grounds that it violates the Supremacy Clause by purporting to invalidate federal firearms laws. *E.g.*, United States v. Missouri, 114 F.4th 980, 983 (8th Cir. 2024).

the federal courts are underprotecting or may abrogate.[75] Further, even without any textual change to the state constitution, state courts could respond to rights-restrictive U.S. Supreme Court decisions by abandoning "lockstep" interpretations of their state constitutions and instead interpreting state constitutions to protect conduct that is now beyond the scope of the analogous federal provision.[76] Finally, many states have mechanisms for popular democracy through initiatives and referenda, which add another set of institutional interactions to the mix.[77] Using those tools, voters in several states have recently amended state constitutional provisions regarding marriage,[78] with some of the measures expressly pitched as "safeguard[s]" against the Supreme Court overruling *Obergefell*.[79]

State backups have advantages and disadvantages compared to federal statutes. On the advantage side of the ledger, state backups are easier to shield from the federal courts, both because of limitations on Article III jurisdiction[80] and because state police power is broader than congressional authority.[81] On the disadvantage side, state protections are subject to preemption by valid federal law, whether in the form of federal firearms regulations in red states or a reinvigorated Comstock Act in blue states.[82]

A final point about state backup rights is that the states do not have to take federal constitutional jurisprudence as a given to which they may only react. If enough states enact or otherwise adopt a particular protection that

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75. An interesting example is state constitutional amendments that provide that restrictions on gun rights under state analogues to the Second Amendment are subject to strict scrutiny. *E.g.*, ALA. CONST. art. I, § 26 (providing that "[e]very citizen has a fundamental right to bear arms" and "[a]ny restriction on this right shall be subject to strict scrutiny"); *see* Eric Ruben, *Are State Constitutional Clauses that Strengthen Gun Rights Relevant After Bruen?*, DUKE CTR. FOR FIREARMS L. (Feb. 5, 2025), https://firearmslaw.duke.edu/2025/02/are-state-constitutional-clauses-that-strengthen-gun-rights-relevant-after-bruen [https://perma.cc/3U24-AYMZ] (describing these amendments and their background).

76. *See, e.g.*, Hodes & Nauser, MDs, P.A. v. Stanek, 551 P.3d 62, 76 (Kan. 2024) (reaffirming right to abortion under state constitution despite *Dobbs*); *see also* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174–82 (2018) (urging state courts to consider state claims before federal claims and not to reflexively lockstep).

77. *See generally Initiative and Referendum Processes*, NAT'L CONF. STATE LEGISLATURES (July 9, 2025), https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes [https://perma.cc/AS7K-HWCV] (surveying opportunities for direct democracy in the states).

78. Sudiksha Kochi, *Three States Passed Ballot Initiatives Aimed at Protecting Same-Sex Marriage*, USA TODAY (Nov. 6, 2024, 10:19 PM), https://www.usatoday.com/story/news/politics/elections/2024/11/06/ballot-initiatives-on-same-sex-marriage/75732847007 [https://perma.cc/8QGS-YSNZ].

79. TOM CLARK, ASSEMB. COMM. ON JUDICIARY, MARRIAGE EQUALITY, CAL. STATE ASSEMB. 2023–2024, Reg. Sess., at 5 (2023), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240ACA5 [https://perma.cc/7F7X-MHXR].

80. *See* U.S. CONST. art. III, § 2, cl. 1 (limiting the federal courts to listed categories of cases).

81. *See* U.S. CONST. art. I, § 8; United States v. Lopez, 514 U.S. 549, 567–68 (1995).

82. 18 U.S.C. §§ 1461–62; *see* Danielle Kurtzleben, *Why Anti-Abortion Advocates Are Reviving a 19th Century Sexual Purity Law*, NPR (Apr. 10, 2024, 4:11 PM), https://www.npr.org/2024/04/10/1243802678/abortion-comstock-act [https://perma.cc/9V3J-SPB2] (describing potential effects of the federal Comstock Act on the availability of abortion).

they form a consensus or at least a strong trend, that could influence federal constitutional jurisprudence through both formal doctrines that incorporate the people's traditions and informal demonstrations of social values. I return to this point below, in connection with the possibility of legislative influence on constitutional decision-making.[83]

II. BEYOND INSURANCE: AVOIDING CONSTITUTIONAL ADJUDICATION

Although the main purpose of enacting statutory backups, according to their supporters, is to have a sort of insurance policy in case the courts abrogate the constitutional right,[84] that is not all that statutory backups can do. The enactment of the statute can also preserve the constitutional right itself.

The enactment of the backup can preserve the constitutional right in at least two ways. This Part considers how the enactment of a statutory right can keep the courts from confronting the endangered constitutional right at all. Part III will then consider how the enactment might bolster the constitutional right if and when it does come before the courts.

As the rest of this Part II will elaborate, one way to protect an existing constitutional right is just to keep it out of the courts. A statutory backup can further this goal thanks to the doctrine of constitutional avoidance. One strand of the avoidance principle, as articulated in Justice Brandeis's much-cited concurrence in *Ashwander v. Tennessee Valley Authority*, provides that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[85] Specifically, when there are parallel statutory and constitutional claims that provide the same relief, a court should rely on the statutory ground alone.[86] If a federal statute guaranteeing a right to

83. *See infra* text accompanying note 161 (describing the role of state law in certain federal doctrines).

84. *E.g.*, 168 CONG. REC. H6719–20 (daily ed. July 19, 2022) (statement of Rep. Nadler) ("Even if we accept the Court's assurance in Dobbs that its decision does not call other rights into question, Congress should provide additional reassurance that marriage equality is a matter of settled law."); *id.* at H6727 ("If [*Obergefell*] is not overturned, this bill [protecting same-sex marriage] is unnecessary but harmless. If that decision is overturned, this bill is crucial, and we don't know what this Court is going to do."); Clare Foran & Kristin Wilson, *House Passes Bill to Protect Same-Sex Marriage in Effort to Counter Supreme Court*, CNN POL. (July 19, 2022, 6:12 PM), https://edition.cnn.com/2022/07/19/politics/house-vote-same-sex-marriage-protections-supreme-court/index.html [https://perma.cc/D88F-L2W7] (quoting House Majority Leader Steny Hoyer stating that "it is critical to ensure that federal law protects those whose constitutional rights might be threatened by Republican-controlled state legislatures" and that affected people "deserve to have certainty").

85. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

86. As the Court explained in *Lyng v. Northwest Indian Cemetery Protective Ass'n*:

> This principle [of avoidance] required the courts below to determine, before addressing the constitutional issue, whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims. If no additional relief would have been warranted, a constitutional decision would have been unnecessary and therefore inappropriate.

contraception were enacted, a court addressing a state restriction on contraception that violated that right could—and under the avoidance doctrine *should*—rely on the preemptive effect of the federal statute rather than needing to rely on, and potentially diminish, the constitutional privacy rights articulated in *Griswold* and *Eisenstadt*.[87]

Trying to keep cases out of the courts to avoid adverse outcomes is not new. Repeat-player litigants often settle cases or decline to appeal lower-court losses precisely to avoid getting a bad precedent.[88] The enactment of a backup right operates more broadly than these case-level efforts. One could think of the backup statute as a way for the constitutional right to go into a self-imposed "exile" for its own protection until the danger passes. A long-term, broad-based protection from adjudication may be needed for some constitutional rights currently favored by liberals, given that the judicial environment could be inhospitable for decades.[89]

The following sections elaborate on the avoidance strategy and address its limits. The short of it is that the strategy has some value, especially for avoiding the Supreme Court. But enacting a backup would not guarantee complete protection against constitutional adjudication, for some people will assert claims that fall outside of the statutory right and, depending on the constitutional authorities on which Congress relied, congressional power may be in doubt.

A. *AVOIDING THE COURTS VERSUS AVOIDING THE SUPREME COURT*

The surest way to insulate a constitutional right is to keep it out of the courts altogether, but much of the protective benefit can be obtained just by avoiding the Supreme Court. The Court's docket is almost entirely discretionary, so the existence of some cases challenging a constitutional right in the lower

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Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 446 (1988); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014) (explaining that the Court's finding of a RFRA violation made it unnecessary to address the First Amendment claim). The statutory grounds were federal in *Lyng* and *Burwell*, but the same principle applies when the statutory ground is state law. *See* Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 193 (1909) (avoiding federal constitutional questions by relying on state statutory law).

87. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding that a state ban on contraceptives violates constitutional right to marital privacy); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (extending the right to unmarried people).

88. *See* Stephen Wermiel, *Why Cases Settle*, SCOTUSBLOG: SCOTUS FOR L. STUDENTS (Nov. 21, 2013), https://www.scotusblog.com/2013/11/scotus-for-law-students-sponsored-by-bloomberg-law-why-cases-settle [https://perma.cc/ZRV2-DNEJ].

89. *See* Adam Chilton, Dan Epps, Kyle Rozema & Maya Sen, *The Endgame of Court-Packing* 13 (Working Paper, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835502 [https://perma.cc/HB4X-EYQH] (showing that if current trends hold, the Court will not have a Democrat-appointed majority for decades); Ian Ayres & Kart Kandula, *How Long Is a Republican-Nominated Majority on the Supreme Court Likely to Persist?*, BALKINIZATION (July 3, 2022), https://balkin.blogspot.com/2022/07/how-long-is-republican-nominated.html [https://perma.cc/D8ZF-VABT] (noting similar trends).

courts does not require it to get involved.[90] Diminishing the Supreme Court's interest in a topic would be a major victory for a right at risk, because the Court is the main source of the risk. It alone can overrule its precedents.[91]

The degree to which a backup statutory right would tend to dampen the Court's interest in taking cases involving the constitutional right depends in part on the Justices' motives. If they care about achieving concrete policy results (fewer same-sex marriages, for example), the existence of a backup right with a solid constitutional basis would make the decision to abrogate a constitutional right less meaningful in terms of outcomes on the ground. To illustrate, suppose that Texas refused to let same-sex couples marry so as to set up a test case to overrule *Obergefell v. Hodges*.[92] By virtue of the recently enacted Respect for Marriage Act, federal statutory law now recognizes same-sex marriage for federal purposes and requires interstate recognition of valid out-of-state marriages, but it does not require Texas to let same-sex couples marry.[93] In a case involving whether Texas would have to license same-sex marriages, the lower courts could not rely on the statute and would need to reach the constitutional question. When they do so, they should and almost certainly would follow *Obergefell*, which is binding on them, and require Texas to allow the marriage.[94]

Now suppose you are a Supreme Court Justice sympathetic to Texas's position who is deciding how to vote on whether to grant Texas's petition for certiorari seeking to overrule *Obergefell*. Given the Respect for Marriage Act and the law of most states, overruling *Obergefell* would have little policy impact in terms of the availability of marriage. Most states would continue to allow same-sex marriage no matter what the Constitution requires them to do.[95] And even most Texans (not all, to be sure, and not without cost) could get the benefit of same-sex marriage through traveling elsewhere to marry and then returning, the scenario that the Act covers.

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90. *See generally* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000) (discussing the Supreme Court's discretionary and agenda-setting behaviors).

91. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

92. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015) (holding same-sex couples have a constitutional right to marry).

93. *See supra* notes 5–8 and accompanying text (describing the Respect for Marriage Act).

94. The Fifth Circuit has been staking out some novel constitutional ground lately, but even it does not say it can anticipatorily overrule cases that it believes the Supreme Court may overrule. *See* Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 91 F.4th 342, 346 (5th Cir. 2024) ("As middle-management circuit judges, we must follow binding precedent, even if that precedent strikes us as out of step with prevailing Supreme Court sentiment.").

95. Megan Brenan, *Same-Sex Relations, Marriage Still Supported by Most in U.S.*, GALLUP (June 24, 2024), https://news.gallup.com/poll/646202/sex-relations-marriage-supported.aspx [https://perma.cc/73PC-84MN] (showing high public support for the legality of same-sex marriage, though slightly lower support than in the recent past and with a substantial partisan divide in support).

Under these circumstances, would a Justice opposed to *Obergefell* find the petition worth granting? Given the relatively low policy stakes, I would think that the benefit of overruling (restoring the Fourteenth Amendment to what the hypothesized Justice sees as the correct originalist understanding, winning plaudits from certain activists, or whatever motivates this person) would not outweigh the criticism and potential backlash of making an unpopular decision and going back on the *Dobbs* majority's reassurances of *Obergefell*'s safety.[96] That prediction depends on how much the Justices worry about such things as public opinion, of course, a matter that is taken up again below.[97] If I'm correct in my prediction, then even an incomplete backup right can dampen the Supreme Court's interest in a topic, which is all by itself a meaningful achievement for supporters of an endangered right.

B. LIMITATIONS OF THE AVOIDANCE STRATEGY

The avoidance strategy has some value, but it could fail in a few different ways. To stick with the Respect for Marriage Act, it could not prevent all adjudication of the constitutional status of same-sex marriage because, for one thing, the statute does not purport to require every state to permit same-sex marriage as a matter of federal law. Only *Obergefell* currently does that, so some litigants may need to put the constitutional right before the courts. For another, one should expect constitutional litigation over congressional authority to enact the statute. Indeed, a broader statutory right that regulated state marriage laws and required every state to marry same-sex couples would generate stronger challenges to congressional authority to enact the statute, which brings *Obergefell* into question indirectly. There are trade-offs all around. The following section considers these matters and other considerations that determine how effectively the goal of avoidance can be achieved.

1. The Scope of, and Authority for, the Statutory Right

Legislators drafting a backup right face crosscutting pressures when defining the scope of the right. From the perspective of a right's strongest advocates, the natural inclination is the broader the better. From the perspective of keeping the constitutional right away from the courts, however, matters are more complicated.

Consider again the Respect for Marriage Act. Unlike *Obergefell*, the statute does not give same-sex couples the right to marry in all states, as it provides instead that a marriage entered into in a state that does permit same-sex marriage must be regarded as valid in other states.[98] If Massachusetts lets same-sex

96. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2280–81 (2022).

97. *Infra* Section III.B (discussing the role of public opinion and political pressure in influencing the Court).

98. Respect for Marriage Act, Pub. L. No. 117-228, § 4, 136 Stat. 2305, 2305–06 (2022) (codified at 28 U.S.C. § 1738C).

couples marry, then the Respect for Marriage Act requires Texas to recognize those marriages, but the Act doesn't require Texas to license the marriages. The limitation on the statutory right might have aided its passage as a matter of political compromise. The limitation also puts the statute on a more durable constitutional foundation, or at least a more diversified one. It draws on the congressional power to regulate the interstate recognition of marriages under the second sentence of the Full Faith and Credit Clause (and possibly other federal rights, like a right to travel) rather than attempting to directly regulate state marriage laws through the potentially threatened power to enforce the Fourteenth Amendment.[99] But a downside of the statute's firmer constitutional authority is that if a state tried to ban same-sex marriage, a direct challenge to that state's actions would have to rely on the constitutional right of *Obergefell*, frustrating the avoidance strategy.

The risks and benefits balance differently in the case of a statute that sweeps as broad as or broader than the constitutional right. For an example, consider a hypothetical pre-*Dobbs* statute that provided an absolute right to abortion through the late stages of pregnancy. That kind of broad coverage serves the avoidance strategy in one respect, as the constitutional right becomes superfluous whenever the statutory coverage is there. The trade-off is that if Congress had enacted a broad national statutory right to abortion in the years before *Dobbs*, that may have led to a train of events in which the Supreme Court more or less simultaneously overruled *Roe* and *Casey* (as not required by the Fourteenth Amendment) *and* struck down the hypothetical backup statute (as not authorized by the Fourteenth Amendment or the Commerce Clause).[100] That outcome would not be inevitable, for the enactment of the statute could itself influence the Court's constitutional analysis—that's Part III below—but it is certainly plausible.

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99. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. *And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*" (emphasis added)); *see also* Douglas Laycock, Thomas C. Berg, Carl H. Esbeck & Robin Fretwell Wilson, *The Respect for Marriage Act: Living Together Despite Our Deepest Differences*, 2024 U. ILL. L. REV. 511, 526–28 (arguing that the Respect for Marriage Act's interstate-recognition obligation is valid under the second sentence of the Full Faith and Credit Clause); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1493–94 (2007) (arguing that Congress may "enact recognition requirements that might be broader or narrower than those imposed by the courts"); Stephen E. Sachs, *Full Faith and Credit in Court and in Congress*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-iv/clauses/44#stephen-sachs [https://perma.cc/77GR-NWBY] (emphasizing the role of Congress under the second sentence of the Full Faith and Credit Clause). When Congress enacted the Defense of Marriage Act, which provided that states did *not* have to recognize out-of-state same-sex marriages, some commentators questioned Congress's power to eliminate recognition. *See, e.g.*, 142 CONG. REC. 13359–60 (1996) (letter from Professor Laurence H. Tribe to Senator Edward M. Kennedy). But one could embrace that argument while still believing that Congress may expand recognition beyond what courts enforce.

100. *Cf.* United States v. Morrison, 529 U.S. 598, 617, 627 (2000) (holding Violence Against Women Act not authorized by Fourteenth Amendment or Commerce Clause).

Given doubts about congressional power to codify the full extent of certain threatened constitutional rights, it would be wise to draft backup statutes to include various "fallback" provisions rather than a basic severability clause.[101] Supporters of the right could aim high in the first part of the statute, as high as the political situation allows. If courts later determine that Congress lacks the power to enact an all-encompassing, state-regulating statutory right to *X*, it may nonetheless be within Congress's power under various grants of authority to prescribe a narrower right to *X* that applies, for example, on federal property, with regard to federally funded activities, for federal employees, with regard to interstate travel to exercise the right, or when using the channels of interstate commerce to effectuate the right.[102] A backup statute should therefore provide that if the courts conclude that Congress lacks the power to enact the broadest version of the statutory right, the backup then defaults to a series of narrower rights based on other sources of congressional authority. A court facing such a statute would confront a cascade of constitutional questions, some of which could be quite difficult. Including such fallback provisions would do in one step what Congress ultimately achieved in two steps for religious free exercise, where the state-regulating aspects of RFRA were struck down but some of RFRA's protections were reinstated, for federally supported and commerce-affecting activities, through the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[103]

In addition to considering the substance of the statutory right, Congress needs to pay attention to remedies. Litigants will not rely on the statutory right unless it provides at least the same remedies as the constitutional right, including attorneys' fees.[104] RFRA and RLUIPA expressly inserted themselves into existing statutes providing that successful civil-rights plaintiffs may recover

101. *See generally* Dorf, *supra* note 47 (describing fallback law and its forms and dynamics).

102. *See* KEVIN J. HICKEY & WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10787, CONGRESSIONAL AUTHORITY TO REGULATE ABORTION 2–6 (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10787 [https://perma.cc/S9RX-XGF8] (discussing various sources of congressional authority for abortion regulation). In his concurrence in *Dobbs*, Justice Kavanaugh expressed his view that the constitutional right to interstate travel would prevent a state from "bar[ring] a resident of that State from traveling to another State to obtain an abortion." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring). Besides speaking only for himself, that statement does not explicitly address the possibility of a state imposing punishment if the resident returns, a question of state authority that is not free from doubt. *See* Paul Schiff Berman, Roey Goldstein & Sophie Leff, *Conflicts of Law and the Abortion War Between the States*, 172 U. PA. L. REV. 399, 416–55 (2024) (describing the complexities and competing views); David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 22–42 (2023) (similar).

103. *See* Cutter v. Wilkinson, 544 U.S. 709, 714–17 (2005) (explaining that Congress responded to the partial invalidation of RFRA by enacting RLUIPA, which was "[l]ess sweeping than RFRA, and invoke[ed] federal authority under the Spending and Commerce Clauses"); 146 CONG. REC. 14284–85 (2000) (remarks of Sen. Kennedy).

104. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 446 (1988) (addressing whether a decision on the constitutional claim "could have entitled [the plaintiffs] to relief beyond that to which they were entitled on their statutory claims").

attorneys' fees.[105] The recently enacted Respect for Marriage Act, by contrast, fails to address attorneys' fees directly, so successful litigants would need to rely on other routes to getting them.[106]

2. Avoidance and the Trigger Variation

The trigger feature described in Section I.A.3 above would undermine an avoidance strategy. If the applicability of the statutory right is expressly keyed to the overruling of the relevant constitutional precedent, then there is, formally speaking, no nonconstitutional ground available unless and until the constitutional right is overruled. Political leaders would need to weigh this reduction in the utility of constitutional avoidance against whatever benefits the trigger variation might have in achieving enactment.

C. THE POSSIBILITY OF ENSURING AVOIDANCE

The preceding discussion has noted a few limitations of the avoidance strategy. Those limitations might lead one to wonder whether Congress could enact a statutory right that *requires* courts to avoid adjudicating the constitutional right that it is backstopping. To provide a short answer to a very complicated question, the answer is that Congress probably cannot ensure complete avoidance of the constitutional question while simultaneously achieving the necessary enforcement of the statutory backup.

1. Mandating Constitutional Avoidance

Although the courts sometimes talk about the doctrine of avoidance as a "requirement" or in similarly mandatory terms, the doctrine of avoidance is probably better understood as a prudentially rooted presumptive duty that is defeasible by countervailing considerations such as litigant autonomy or judicial economy.[107] For a recent example of avoiding avoidance, the Supreme Court's

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105. *See* 42 U.S.C. § 1988(b) (providing fees to prevailing parties under, inter alia, RFRA and RLUIPA); 5 U.S.C. § 504(b)(1)(C) (providing for fee awards against federal agencies in adjudications involving, inter alia, RFRA).

106. The authority for awarding fees in § 1988 encompasses suits against state officials under § 1983, which in turn provides a right of action for violations of the Constitution "and laws," which has been interpreted to permit the use of § 1983 to enforce some rights-conferring federal statutes. *See* Health & Hosp. Corp. of Marion Cnty. v. Talevski, 143 S. Ct. 1444, 1452 (2023); Maine v. Thiboutot, 448 U.S. 1, 4–11 (1980). A person raising the Respect for Marriage Act as a defendant in an enforcement action, however, would probably not qualify for fees unless they assert and prevail on a counterclaim invoking § 1983, which would not be possible under all procedural postures. It would be better if Congress had made express provision for attorneys' fees in the Respect for Marriage Act, specifying that it applies to litigants who successfully assert or defend claims using the rights it provides.

107. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) (calling avoidance a "prudential rule" and finding it inapplicable where the parties raised only constitutional issues in the lower court); Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 352 (4th Cir.) (Harris, J., concurring) ("revers[ing] our usual order of operations" where the constitutional question was easier than the statutory question), *vacated*, 138 S. Ct. 2710 (2018); Bear Creek Bible Church

decision involving the affirmative-action programs at Harvard University and the University of North Carolina relied primarily on the Equal Protection Clause, which applied only to the state university, rather than Title VI, which applied to both universities, on the ground that the two requirements were the same.[108]

Can Congress require avoidance? Congress has significant authority to regulate the federal courts' decision-making procedures,[109] but there is some doubt about whether that authority would go so far as to mandate reliance on statutory grounds when courts otherwise would not engage in avoidance. A threshold difficulty in answering the question is that it isn't even clear which doctrinal box this question goes in.[110] If we could confidently answer the question for the federal courts, trickier still is whether Congress could demand avoidance in the state courts. Congress has some authority to govern the state courts' handling of federal matters, as exemplified in the cases in which Congress requires that state courts entertaining a federal claim modify their pleading standards or provide a jury when the state would not otherwise do so.[111] But the

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v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 611 n.23 (N.D. Tex. 2021) (declining to employ avoidance "[i]n the interest of judicial economy . . . so that the Court of Appeals may be presented with all issues [in the case]"), *aff'd in part*, *vacated in part sub nom.* Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914, 940 n.60 (5th Cir. 2023) (invoking avoidance and relying on RFRA rather than the First Amendment); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1029 (1994). For an example of more mandatory language, see *Billard v. Charlotte Catholic High School*, 101 F.4th 316, 335 (4th Cir. 2024) (King, J., dissenting in part and concurring in the judgment) ("[T]he constitutional avoidance doctrine and our Circuit's precedent require a reviewing court presented with both constitutional and statutory grounds for relief to resolve an appeal solely on the statutory grounds.").

108. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2156 n.2 (2023). Back in *Bakke*, four Justices had employed avoidance to rely solely on Title VI rather than address the Equal Protection Clause. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 411 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part).

109. *See, e.g.*, Miller v. French, 530 U.S. 327, 341–50 (2000) (upholding remedial limitations imposed by the Prison Litigation Reform Act); *see also* ELIZABETH B. BAZAN, JOHNNY H. KILLIAN & KENNETH R. THOMAS, CONG. RSCH. SERV., RL32926, CONGRESSIONAL AUTHORITY OVER THE FEDERAL COURTS 9–26 (2005) (summarizing case law on this topic).

110. One way to conceive of the issue is as a question of congressional power over judicial interpretive methods. The extent of congressional power to prescribe methods of statutory interpretation is uncertain and contested. *Compare* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002) (broad power), *with* Linda D. Jellum, *"Which Is to Be Master," The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 879–82 (2009) (limited power). Another way to conceive of the issue is that it involves congressional power to mandate that the courts abstain from adjudicating a constitutional claim unless and until an available statutory claim is asserted. *Cf.* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 498–501 (1941) (applying judicial policy of withholding equity jurisdiction until the resolution by state courts of state issues that could moot federal constitutional questions).

111. The famous cases on federal regulation of state-court procedures concern the Federal Employers Liability Act. Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 360 (1952) (jury trial); Brown v. W. Ry. of Ala., 338 U.S. 294, 294 (1949) (pleading standards); *see also* Felder v. Casey, 487 U.S. 131, 134 (1988) (holding that § 1983 preempts a state notice-of-claim statute). *See generally* Kevin M. Clermont, *Reverse-*Erie, 82 NOTRE DAME L. REV. 1, 20–37 (2006) (addressing the application of federal law in state court).

scenario at hand could involve a particularly weak case for federal authority over state procedure: a state-law enforcement action in state court involving a federal defense. In that scenario, could Congress require the interposition of the federal statutory defense (by the defendant or the court), abate enforcement until that happens, or otherwise prevent adjudication of the constitutional issue? That's a genuine question, not a rhetorical one.[112]

As it happens, those difficult questions about power probably do not have to be resolved for present purposes, because even assuming that Congress could mandate the use of constitutional avoidance, including in state courts, overriding litigant choices as necessary, that *still* would not keep the constitutional right away from the courts in all circumstances. That's true for two reasons we have already encountered. First, avoidance would not work when litigants assert constitutional claims that go beyond the statutory right. To use the example from before, this would be the case for a same-sex couple in Texas that cannot travel elsewhere to marry (say, for reasons of disability) or will not travel elsewhere (for dignitary reasons).[113] When the courts adjudicate constitutional claims, there is no guarantee they will limit themselves to narrow rulings about the outer boundary of the right rather than eliminating the constitutional right altogether.[114] Second, some assertions of statutory backup rights would likely be met with the response that the statute itself is unconstitutional; the strength of that response depends, as noted above, on the scope of the backup statute and the constitutional authority invoked to enact it.[115]

2. Statutory Exclusivity

Another way for Congress to attempt to ensure that courts do not address constitutional issues—but one that is also unlikely to succeed in all instances—is to provide that the new statutory right precludes assertion of a constitutional claim. Although § 1983 generally provides a claim for relief against state officials who violate federal constitutional rights, § 1983 is itself only a statute. As such, Congress can by statute preclude its use either expressly or through

112. To be clear, state courts generally follow the avoidance doctrine, like federal courts do. *E.g.*, White v. Town of Wolfeboro, 551 A.2d 514, 515 (N.H. 1988); *see* Lisa A. Kloppenberg, *Does Avoiding Constitutional Questions Promote Judicial Independence?*, 56 CASE W. RSRV. L. REV. 1031, 1032 (2006); *cf.* Zachary B. Pohlman, *State-Federal Borrowing in Statutory Interpretation*, 31 GEO. MASON L. REV. 839, 864–65 (2024) (noting that there are some variations across the states). Again, the question here is not what state courts would generally do but whether Congress could ensure they practice avoidance in all instances, even when litigants do not raise statutory grounds.

113. *See supra* notes 5–8 and accompanying text (describing the Respect for Marriage Act).

114. Indeed, *Dobbs* itself could have been written more narrowly to uphold the Mississippi restriction without overruling *Roe*. That was the point of the Chief Justice's concurrence, but the majority rejected his call for minimalism. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283 (2022).

115. *Supra* Section II.B.1.

implication, substituting a different statutory scheme as an alternative.[116] Here, Congress would expressly designate the new statute as the exclusive remedy.

Although such an approach would reduce the adjudication of constitutional claims, it would not reduce adjudication to zero. There is once again the question of congressional authority and the problem of constitutional claims that exceed the bounds of a limited statutory protection. A statute that substitutes an adequate statutory right for a constitutional right is one thing, but a statute that purports to preclude reliance on the Constitution while leaving the plaintiff worse off would itself raise constitutional doubts.[117] And even if Congress could eliminate any claim for affirmative relief for a constitutional violation, many assertions of constitutional rights occur in the context of defenses to enforcement actions.[118]

3. Regulating Jurisdiction

In light of the discussion above, one might want a more drastic approach to preventing the adjudication of constitutional rights. An airtight solution to the problem of keeping the constitutional right out of the courts would require something beyond what we have discussed so far, something more like a restriction on jurisdiction—or "jurisdiction stripping" as it is often called.[119] The familiar kind of jurisdiction stripping tries to keep litigants from asserting a constitutional claim that the legislature disfavors.[120] Think, for example, of the proposals to strip the federal courts of jurisdiction over claims that the Pledge of Allegiance constitutes an establishment of religion in violation of the First

116. *See, e.g.*, Smith v. Robinson, 468 U.S. 992, 1009–13 (1984) (holding that the Education of the Handicapped Act was intended to provide the exclusive means for asserting claims to a free and appropriate public education). *But cf.* Levin v. Madigan, 692 F.3d 607, 617 (7th Cir. 2012) (departing from other circuits and holding that the Age Discrimination in Employment Act does not preclude constitutional claims for age discrimination).

117. In *Smith*, which held that a statute implicitly precluded the assertion of constitutional claims via § 1983, the Court emphasized that the situation would differ if Congress had attempted to preclude all remedies for conduct that violated the Constitution. *Smith*, 468 U.S. at 1012 n.15; *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) ("I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials.").

118. *E.g.*, Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 626 (1996) (upholding First Amendment defense to campaign-finance violation, in the context of a civil-enforcement action); Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (recognizing right to interracial marriage in the context of a criminal prosecution).

119. The literature on congressional control over jurisdiction is vast. A recent, evenhanded introduction to the issues with citations to the key precedents and some of the scholarly literature is PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT (2021) [hereinafter COMMISSION REPORT], https://www.presidency.ucsb.edu/sites/default/files/documents_with_attached_files/376063/168144.pdf [https://perma.cc/8S9L-CSGQ]. I will cite some contributions to the literature where particularly relevant but will not attempt to be exhaustive.

120. *See* Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 68–69 (1981) (describing the usual pattern).

Amendment.[121] But here we are contemplating jurisdiction stripping with a very different aim, as Congress would provide a statutory right but bar courts from adjudicating the associated constitutional right—with the goal of *preserving* the constitutional right to fight another day.

Achieving the goal of complete prevention of constitutional adjudication would require particularly extensive jurisdiction stripping along a few dimensions. It would require removing jurisdiction from all courts: state courts, lower federal courts, and the Supreme Court. And it would mean blocking all those courts from considering the constitutional issue not just in an affirmative posture, such as a § 1983 suit for prospective relief, but as a defense to a state enforcement action. Congressional control over jurisdiction is a famously contested topic, but the breadth of the necessary curtailment puts this contemplated regulation into the most constitutionally problematic category, even for those who believe in broad congressional power.[122] Faced with such a sweeping jurisdiction strip, the Court might well try to maintain what has become its familiar role as the ultimate authority against a Congress that it perceives as trying to limit its authority for "political" reasons.[123]

The constitutionality of removing jurisdiction is not the only consideration, however. As Epps and Trammell have recently reminded us, jurisdiction stripping has major practical downsides.[124] Congress needs at least some courts to ensure that state legislators and executives follow federal laws, including the backup statutory right itself. And it needs still more courts to ensure compliance from frontline courts, especially keeping in mind that opponents of a right can forum shop as well as proponents.

One might suppose that these practical problems of rights enforcement could be solved through a clever combination of a backup statutory right plus a partial jurisdiction strip. The idea would be to strip the Supreme Court (or, more ambitiously, all courts) from deciding constitutional issues while leaving in place the jurisdiction and duty to enforce the associated statutory right. Through this approach, Congress could try to have its cake and eat it too.

That will not work, however. Despite the many uncertainties of the debate over jurisdiction stripping, one proposition that is as certain as any in that debate

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121. *E.g.*, Pledge Protection Act of 2005, H.R. 2389, 109th Cong. § 2 (as passed by House, July 19, 2006).

122. *See* COMMISSION REPORT, *supra* note 119, at 168–69 (explaining that broader restrictions raise more serious questions). On congressional authority to remove jurisdiction from state courts, see generally Michael C. Dorf, *Congressional Power to Strip State Courts of Jurisdiction*, 97 TEX. L. REV. 1 (2018). On the particular difficulties that surround removing jurisdiction over defenses, see Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953).

123. *See* Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077, 2113 (2023) ("[I]f Congress thought jurisdiction stripping necessary to rein in a rogue Supreme Court, there would be plenty of reason to worry that the Court would choose the plausible interpretation of the Constitution that would preserve its own power.").

124. *Id.* at 2080–82.

is that Congress cannot confer jurisdiction over a case but keep a court from applying the Constitution to the case.[125] "[J]urisdiction always is jurisdiction only to decide constitutionally," as Hart puts it in his dialogue.[126] This principle can be traced in its general form to *Marbury*, where Chief Justice Marshall, shortly after his famous pronouncement about the judiciary's duty "to say what the law is," explains that it would subvert the Constitution's supremacy if the judges, having determined that the Constitution applies to a case, were to "close their eyes" to it, seeing only the contrary statute instead.[127]

Marbury itself did not involve jurisdiction stripping, so a more factually similar Supreme Court precedent for this result is *Yakus v. United States*.[128] There, a World War II price-control law provided that courts hearing enforcement actions against alleged violators could not entertain statutory or constitutional challenges to the validity of the price regulations, thus taking away some defendants' key defenses.[129] The Court upheld the arrangement, but the critical, validating feature of the legislative scheme was that it did not totally foreclose challenges to the regulations: They were subject to judicial review, before enforcement, through a different federal court.[130]

Similarly instructive is the debate over the constitutionality of the provision of the Antiterrorism and Effective Death Penalty Act ("AEDPA") that prohibits federal courts from granting habeas relief to state prisoners except when the state court's ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[131] As against the charge that the statute requires federal courts to ignore their own best understanding of the Constitution when ruling on habeas cases, the argument in favor of AEDPA's constitutionality is that it merely restricts the courts' power to provide the remedy of habeas corpus in circumstances in which the defendant has already had an opportunity for one

125. *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 810–36 (1998) (discussing the principle that a court must decide a case according to the whole law, including the Constitution); *Constitutional Restraints upon the Judiciary: Hearings Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 97th Cong. 124–25 (1981) (statement of William Van Alstyne, Professor of Law, Duke University) (discussing the "completely well settled" principle that "[t]he power to decide a case includes the power to decide the case according to the Constitution").

126. Hart, *supra* note 122, at 1402.

127. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803). A restriction on the Supreme Court's jurisdiction that was one-sided—i.e., the Court can review decisions rejecting claims of federal right but not decisions sustaining them—would be permissible, but it would not accomplish the goal of keeping the Court away from the matter. It could affirm a decision rejecting the federal claim and in so doing overrule precedent.

128. *See generally* Yakus v. United States, 321 U.S. 414 (1944).

129. *Id.* at 418–19.

130. *Id.* at 433–38, 443–47; *see* Hart, *supra* note 122, at 1380.

131. 28 U.S.C. § 2254(d)(1).

full round of appeals without any deference on the law.[132] A statute stripping authority to consider the Constitution while leaving jurisdiction over the case would go beyond these prior statutes and would conflict with the premises on which the courts sustained them.

In sum, Congress again faces trade-offs. One option is to leave jurisdiction intact, for the sake of judicial enforcement of the statutory backup right—but with the risk that the constitutional right could get weakened or overruled. An alternative is to (try to) strip jurisdiction over the topic but then risk inconsistent application and perhaps outright flouting of rights in some quarters. Congress cannot have its cake and eat it too but instead has to take the bitter with the sweet.

* * *

That has been a lot, and some of it was pretty technical. So it is worth taking a step back.

To summarize, this Part has explained one way in which a backup statute could have a benefit beyond insuring against the potential overruling of the constitutional right. Namely, the existence of the statutory backup could help to insulate the constitutional right against erosion by serving to keep the courts, and most particularly the Supreme Court, away from adjudicating the constitutional right. This happens through the doctrine of constitutional avoidance, which counsels courts to rely on statutory grounds where they are available, and by dampening the Supreme Court's ability to effect policy change. Yet it is probably not possible, either legally or practically, to achieve complete success in keeping a constitutional issue out of the courts.

III. BEYOND INSURANCE: BOLSTERING THE CONSTITUTIONAL RIGHT

In addition to going some way toward keeping a constitutional right out of the courts, the enactment of a backup statute could strengthen the constitutional right on the merits if and when it does come before the courts.

As an illustration of this potential interaction, consider the relationship between the First Amendment Free Exercise Clause on the one hand and RFRA and RLUIPA on the other.[133] One effect of the statutes' enactment is

132. The most extensive and illuminating discussion on this point comes from the Seventh Circuit in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997). Some of the judges would have held § 2254(d)(1) unconstitutional on the ground that it interfered with the *Marbury* duty. *Id.* at 885–86 (Ripple, J., dissenting). The majority upheld the statute by distinguishing between restrictions on jurisdiction and remedies (both permissible) and interference with independent interpretive judgment (impermissible). *Id.* at 868–74 (majority opinion).

133. *See supra* Sections I.A.2, II.B.1 (describing these statutes and their background). Recall that RFRA and RLUIPA are not backups, properly speaking, because they were enacted after *Employment Division v. Smith* rejected the strict-scrutiny test for free-exercise claims. Although the statutes are therefore attempts at restoring a right (and possibly expanding it beyond the prior

that courts have less need to address constitutional Free Exercise claims or to revisit *Smith*; that's the avoidance dynamic addressed in Part II.[134] But what about when the courts do address the Free Exercise Clause, such as in a case asking the Supreme Court to overrule *Smith* in a circumstance that the statutes do not reach? Will the enactment of the statutes affect the merits of the constitutional ruling?

On one view, the First Amendment means what it means regardless of RFRA and RLUIPA, but that isn't the only possibility. It could instead be, and there are good reasons to believe, that the enactment of the statutes affects the outcome of the constitutional question and, in particular, makes *Smith* more vulnerable to overruling. Indeed, although the majority in *Fulton v. City of Philadelphia* determined that it need not decide whether to overrule *Smith*, a concurrence urged overruling it in part by pointing out that RFRA and RLUIPA had successfully reinstated the strict-scrutiny standard that *Smith* had described as unworkable.[135] The supposedly unworkable standard has been the law for decades, the concurrence reasoned, and yet the sky hasn't fallen.[136] Further, and though the opinion did not say this, the fact that the federal statutes and numerous state versions of RFRA remain on the books, albeit not enjoying the overwhelming bipartisan support they once did,[137] shows that legislatures would be unlikely to respond angrily to *Smith*'s overruling.

As the example of RFRA and RLUIPA suggests, the result in which the enactment of a backup right bolsters the constitutional right on the merits could work through a few different mechanisms. The following sections elaborate on two mechanisms, one of which draws on constitutional theory and the other on political influence.

A. THE CONGRESSIONAL ROLE IN DEFINING—OR AT LEAST CONFIRMING—CONSTITUTIONAL RIGHTS

Congress through its enactments can, sometimes, play a role in determining what the Constitution's guarantees mean. Most relevant for present purposes is congressional power to enforce the Fourteenth Amendment's command that the states treat people equally, afford them due process, and respect "the

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case law's articulation of it) rather than backstopping, similar logic applies with regard to the point being made here.

134. For some examples of courts using the avoidance doctrine in the context of RFRA or RLUIPA, see Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014); Doster v. Kendall, 54 F.4th 398, 410 (6th Cir. 2022); and Koger v. Bryan, 523 F.3d 789, 801–02 (7th Cir. 2008).

135. Fulton v. City of Philadelphia, 593 U.S. 522, 553–54, 612 (2021) (Alito, J., concurring in the judgment).

136. *Id.* at 612.

137. *See* Tom Gjelten, *How the Fight for Religious Freedom Has Fallen Victim to the Culture Wars*, NPR (May 23, 2019, 5:00 AM), https://www.npr.org/2019/05/23/724135760/how-the-fight-for-religious-freedom-has-fallen-victim-to-the-culture-wars [https://perma.cc/4QZ3-9TFV] (describing declining support for, and increasing partisan polarization around, free-exercise protections like those in RFRA).

privileges or immunities" of national citizenship.[138] As Justice Thurgood Marshall once wrote, in an opinion recognizing the congressional role under the Fourteenth Amendment: "It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality."[139]

As readers familiar with this area of law are well aware, Marshall's position that Congress plays a substantial role in defining Fourteenth Amendment rights is not the prevailing doctrine in the courts today. The Court's view is instead that it is the "ultimate expositor" of constitutional rights, by which it evidently means that Congress has no interpretive role.[140] In *City of Boerne*, which struck down parts of RFRA, the Court wrote that Congress lacks the authority "to determine what constitutes a constitutional violation," that power belonging only to the Court.[141]

Judicial exclusivity in defining constitutional rights is not the only way our system can operate, though, as history and theory provide alternative models. Justice Marshall's statement was consistent with the jurisprudence of the Warren Court, which was more solicitous of congressional efforts to enforce the Reconstruction Amendments, upholding legislation as long as it bore a rational relationship to the judicial understanding of the constitutional provisions.[142] Indeed, the Court's position was that it did not have to determine whether statutorily prohibited conduct would violate the Fourteenth Amendment and, still further, that it would uphold congressional power to ban conduct that the Court had previously suggested might not be unconstitutional.[143] "A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment," the

138. U.S. CONST. amend. XIV, §§ 1, 5.

139. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

140. *See* United States v. Morrison, 529 U.S. 598, 616 n.7 (2000); *see also* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (holding that congressional Section 5 enforcement power cannot redefine the content of the Fourteenth Amendment).

141. *City of Boerne*, 521 U.S. at 519. To be clear, even the Court's view recognizes that Congress's enforcement power goes beyond "merely parrot[ing]" what the Constitution already prohibits; for example, Congress may legislate to deter constitutional violations (violations as understood by the courts, that is), even if doing so reaches conduct slightly beyond the constitutional violation. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000); *see also City of Boerne*, 521 U.S. at 520 (requiring "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

142. City of Rome v. United States, 446 U.S. 156, 177 (1980); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968); South Carolina v. Katzenbach, 383 U.S. 301, 324–27 (1966); *see* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1955–58 (2003).

143. Katzenbach v. Morgan, 384 U.S. 641, 649 (1966).

Court said, "would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment."[144]

Several lines of recent scholarly work, coming from different perspectives, support a role for Congress in determining rights. Some scholars are developing a progressive originalist account of the Reconstruction Amendments that, in line with the older cases but contra *City of Boerne*, gives Congress the leading role in defining the contours of constitutional rights.[145] Some conservative originalists of various stripes have embraced a congressional role too, at least where rights' boundaries are fuzzy.[146] And the increasing interest in "general law" approaches to some constitutional rights—in which the constitutional text reflects but does not define a customary right—may allow some room for congressional influence.[147] Those approaches to legislative influence are all consistent with the maintenance of a strong form of judicial review in which legislative majorities cannot swiftly overturn judicial interpretations of the Constitution. A weaker form of judicial review, where legislative majorities can override decisions, such as some countries practice, would of course give Congress a much more powerful role.[148] Here I will

144. *Id.* at 648; U.S. CONST. amend. XIV, § 5.

145. *See generally* Lawrence Lessig, *The Brilliance in* Slaughterhouse*: A Judicially Restrained and Original Understanding of "Privileges or Immunities,"* 26 U. PA. J. CONST. L. 1 (2023); Nikolas Bowie, Note, *Congress's Power to Define the Privileges and Immunities of Citizenship*, 128 HARV. L. REV. 1206 (2015). These scholars do not claim that Congress can make anything it likes into a Fourteenth Amendment privilege or immunity; rather, they claim that Congress can elaborate on constitutional principles over time and ensure that states distribute privileges equally. Lessig, *supra*, at 20–21; Bowie, *supra*, at 1222–23. I do not attempt in this Article to establish the extent of congressional authority under the Fourteenth Amendment with regard to the likely objects of backup rights. *Cf.* Bowie, *supra*, at 1223, 1227 (identifying protections for same-sex marriage as a permissible exercise of congressional authority). I am instead laying out a few potential mechanisms though which the enactment of a backup right could bolster the constitutional right.

146. *See, e.g.*, Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 184 (1997) ("The question in a Section Five case should be whether the congressional interpretation is within a reasonable range of plausible interpretations—not whether it is the same as the Supreme Court's."). Another broadly originalist recent contribution proposes congressional action as a way to resolve the conflict between contemporary judicial skepticism of balancing and the reality that some liberties are open-ended and general. Sherif Girgis, *Unfinished Liberties, Inevitable Balancing*, 125 COLUM. L. REV. 531, 593–96 (2025).

147. *See* William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1235–36 (2024). They argue that the preexisting "general law" provided the content of the national privileges or immunities, which the Fourteenth Amendment then rendered subject to federal enforcement. *Id.* at 1206–10. On this account, the rights are not subject to direct congressional creation or modification, though the imprecision of the rights may give Congress some practical say over them. *Id.* at 1244–46. Further, it is possible that the content of the rights may change over time in the gradual way the general law evolves. *Id.* at 1247–50; *see also* Jud Campbell, *Determining Rights*, 138 HARV. L. REV. 921, 923 (2025) ("But for the most part, the Bill of Rights left room for ongoing political determinations—that is, determinations largely made on policy grounds by popularly elected representatives.").

148. *See generally* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 24–42 (2008) (contrasting strong-form and weak-form judicial review and providing examples of the latter).

assume the persistence of a model of strong review, but I simply point out that there are relatively nearby options in which review is strong but less exclusive.

Despite *City of Boerne* and its rhetoric of judicial exclusivity, even in the *United States Reports* there remain occasional glimmers of judicial recognition of a congressional role in defining the Fourteenth Amendment's protections. The several-decades-long history of the treatment of pregnancy discrimination in the courts and Congress provides an example of congressional success in revising judicial interpretations. In 1974, the Court held in *Geduldig v. Aiello* that a state's discrimination against its pregnant employees was not unconstitutional sex discrimination.[149] Two years later, in *General Electric Co. v. Gilbert*, the Court extended the logic to Title VII, holding that employers who discriminate on the basis of pregnancy do not violate that statute.[150]

Congress responded swiftly to *Gilbert*'s statutory holding by amending Title VII through the Pregnancy Discrimination Act,[151] but the movement for gender equality did not stop there. After a continuing conversation in legislatures and agencies and among advocacy groups, Congress in 1993 enacted the Family and Medical Leave Act ("FMLA").[152] More than merely a guarantee against discrimination, the FMLA provides affirmative entitlements to time off for new parents and other caregivers, enforceable against both private and public employers.[153]

The FMLA would have to satisfy the Court that its affirmative vision of equality was compatible with the Fourteenth Amendment's enforcement power. Given *City of Boerne*'s position that the Court defines Fourteenth Amendment rights and *Geduldig*'s holding about the limitations of the Equal Protection Clause, it was not at all clear that the Court would uphold the FMLA. Yet the Court upheld the FMLA's family-care provision against the states in *Nevada Department of Human Resources v. Hibbs*, crediting Congress's reasoning that providing equal opportunity for women in the workplace required an affirmative gender-neutral benefit so as to reduce disincentives to hiring women and weaken the stereotype that makes caregiving primarily women's work.[154] Chief Justice Rehnquist wrote for the majority, and although he had been in the

149. Geduldig v. Aiello, 417 U.S. 484, 495–97 (1974).

150. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136–40 (1976).

151. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e).

152. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended in scattered sections of 5 U.S.C. and 29 U.S.C.); *see* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 30–34 (2010) (describing efforts leading to the FMLA); Post & Siegel, *supra* note 143, at 1985–2020 (recounting these legislative enactments and the work of activists).

153. ESKRIDGE & FEREJOHN, *supra* note 152, at 33, 54–56.

154. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736–38 (2003). *But cf.* Coleman v. Ct. App. of Md., 566 U.S. 30, 43–44 (2012) (holding that the self-care provision of the FMLA was not a valid Fourteenth Amendment enforcement statute).

majority in *Geduldig* (and authored *Gilbert*), his opinion for the Court in *Hibbs* did not even cite that evidently embarrassing constitutional precedent.[155]

Through decades of statutes embodying a new vision, the law of sex discrimination has been transformed as a social matter and, ultimately, a judicial one. As Post and Siegel summarize this process of constitutional change:

> The history we have just recounted illustrates the complex and turbulent process by which constitutional law can be created in America. Although courts play an important part in that process, they are by no means the only actors. Our equal protection jurisprudence began to address questions of sex discrimination because a mobilized citizenry advocated a new understanding of constitutional values, because Congress was responsive to this new vision, and because, last of all, the Court was willing to learn from the nation's changing constitutional culture that it was important to prohibit sex discrimination.[156]

If revisions of judicial understandings in light of new legislative policy seem out of reach, then it is fortunate for the proponents of backup rights that the nature of a backup is that it does not ask the courts for much deference. A backup right involves what we might call "confirmatory legislative constitutionalism." It does not seek to change the law but asks only that the courts respect a congressional judgment that *current* judicial doctrine is sound. In this way, a backup statute should have an easier time than RFRA, which asked the Court to embrace a view of the Constitution that it had just repudiated.[157] And a backup statute also compares favorably to the situation in which, to use Isaac Park's terminology, Congress has to engage in "guesswork" by enacting Section 5 legislation on a matter on which the courts have not yet opined.[158] With backup statutes, Congress neither upends nor guesses but instead *agrees*

155. *Geduldig*'s history might not be over. It has not been overruled, and the Court cited it favorably in *Dobbs* in rejecting an Equal Protection argument against the Mississippi abortion law. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245–46 (2022). *Compare* United States v. Skrmetti, 145 S. Ct. 1816, 1820, 1833 (2025) (citing *Geduldig* favorably), *with id.* at 1880 (Sotomayor, J., dissenting) (calling *Geduldig*'s reasoning "infamous" and "indefensible").

156. Post & Siegel, *supra* note 142, at 2020.

157. *See supra* notes 34–35 and accompanying text (discussing RFRA's background as a response to *Smith*); *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (invalidating the Americans with Disabilities Act as applied to the states because "uphold[ing] the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court").

158. *See generally* Isaac Park, *Congressional Guesswork and the Separation of Powers*, 77 FLA. L. REV. 1885 (2025). There are some scenarios in which it is reasonably debatable whether Congress is confirming current doctrine or engaging in guesswork. A statute immunizing someone from sanctions for traveling out of state to get an abortion is an example, given uncertainty about the current state of the constitutional law surrounding that topic. *See generally* Berman et al., *supra* note 103. A backup statute involving access to contraception is confirmatory, by contrast, given the state of the constitutional law represented by cases like *Griswold* and *Eisenstadt*. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972).

with the Court's most recently stated constitutional judgment. To overrule a constitutional precedent backstopped by a statute would require today's Justices both to find their predecessors' views erroneous enough to warrant overruling and to reject congressional action that now endorses them. *Dobbs* did not involve that combination.[159]

It is worth taking a moment here to pull back from the focus on Congress and note again the role of the states and the potential generative force of state backups enacted through legislation or referenda.[160] In several areas of federal constitutional law, the Supreme Court has looked to state enactments, particularly when they amount to a consensus or a clear trend, for guidance on the meaning of open-ended federal constitutional provisions.[161]

Although the discussion so far has emphasized the rights-preserving potential of backup statutes, prudence counsels closing this Section by acknowledging the possibility that a statutory backup once enacted could later be repealed—and through that repeal undermine the constitutional right previously bolstered. One could argue to the contrary that there is a one-way ratchet in which majoritarian support for a minority right should influence courts but that a flip to majoritarian opposition should not, the courts being the especial guardians of minority groups and unpopular rights.[162] It has to be said, though, that a theory in which the political process contributes to constitutional meaning just runs the risk that things can swing either way. A maximalist version of a statutory backup is probably more likely to be repealed than one that offers something valuable to its opponents too, so prudence counsels some moderation. In any case, the work of persuasion is never done.

B. PUBLIC OPINION AND PRESSURE

Quite aside from deep questions about the determinants of constitutional meaning, the brute fact of an enactment of a statutory right shows strong legislative and popular support for a right. A federal statutory right to contraceptive access still hasn't passed despite strong public support.[163] *Roe* never had such a congressional endorsement, of course. Passing a statute is a big deal. Enough of a big deal to influence the Court?

A substantial body of research suggests that the Court has generally been attentive to public opinion and legislative preferences, though recent

159. *See Dobbs*, 142 S. Ct. at 2305–07 (Kavanaugh, J., concurring).

160. *See supra* Section I.C (describing state-law backup rights).

161. *E.g.*, Atkins v. Virginia, 536 U.S. 304, 312–17 (2002) (discerning a national consensus against executing the intellectually disabled and declaring the practice unconstitutional); *see also* Gerald S. Dickinson, *A Theory of Federalization Doctrine*, 128 DICK. L. REV. 75, 104–14 (2023) (canvassing areas where patterns of state legislation have contributed to the meaning of the U.S. Constitution).

162. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

163. *See* Annie Karni, *Republican Opposition to Birth Control Bill Could Alienate Voters, Poll Finds*, N.Y. TIMES (Feb. 26, 2024), https://www.nytimes.com/2024/02/26/us/politics/republicans-birth-control-ivf.html (on file with the *Iowa Law Review*).

reexamination has cast doubt on the effect, and in any event one cannot count on the Court's past predicting the future.[164] Public opinion did not prevent *Dobbs*, of course, but I would venture that the Justices did not expect the strength of the reaction, which went well beyond the scattered protests that would have been expected and actually led to the expansion of access to abortion in a number of states through new legislation and popular initiatives.[165] In the Court's 2024 decision punting on the issue of whether the Emergency Medical Treatment and Active Labor Act preempts state abortion bans in emergency scenarios, Justice Alito seemed to say that some of his colleagues had refused to side with the states because of fear of public backlash.[166]

To be clear, it would be unwise to put too much weight on the efficacy of public opinion and political mobilization in influencing today's Court. The public that the Justices probably care about most is not the general public of opinion polls but legal and social elites, who are themselves highly polarized.[167] Today's Justices can live within a cocoon of like-minded elites and activists, insulating themselves from the effects of broader public opinion. Regarding the risk of legislative responses, the Justices surely know that the combination of congressional polarization, frequently divided government, and our system's many veto points seriously limits Congress's ability to curb the courts.[168]

In thinking about the behavioral incentives created by the enactment of a backup statute, it is worth acknowledging the risk that enactment could, perversely, imperil the constitutional right being backstopped. Given the

164. A leading account of the historical evidence that the courts do not stray too far from public opinion for too long is BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009). For a recent overview of the literature that finds no robust evidence for the proposition that public opinion influences the Court, see generally Ben Johnson & Logan Strother, *The Supreme Court's (Surprising?) Indifference to Public Opinion*, 74 POL. RSCH. Q. 18 (2021). Recently, the ideological distance between the Court and the public has been wide. *See generally* Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative than the Public*, PROC. NAT'L ACAD. SCIS. (June 6, 2022), https://www.pnas.org/doi/full/10.1073/pnas.2120284119 [https://perma.cc/L9WE-AVQE].

165. *See* Tamara Keith, *One Year After the Dobbs Ruling, Abortion Has Changed the Political Landscape*, NPR (June 23, 2023, 5:00 AM), https://www.npr.org/2023/06/23/1183830459/one-year-after-the-dobbs-ruling-abortion-has-changed-the-political-landscape [https://perma.cc/PN74-ZQM7]. Despite losses for Democrats generally in 2024, ballot measures protecting abortion still prevailed in most states where they were considered. *Abortion on the Ballot*, N.Y. TIMES (Mar. 4, 2025), https://www.nytimes.com/interactive/2024/11/05/us/elections/results-abortion.html (on file with the *Iowa Law Review*).

166. Moyle v. United States, 144 S. Ct. 2015, 2028 (2024) (Alito, J., dissenting) ("Apparently, the Court has simply lost the will to decide the easy but emotional and highly politicized question that the case presents."). The statute is codified at 42 U.S.C. § 1395dd.

167. *See* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 40–57, 104–18 (2019).

168. *See* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 880–88 (2011). *But cf.* TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE 193–95, 203–04, 250–52 (2011) (presenting evidence that the Court behaves in a more constrained way when more court-curbing legislation is introduced, regardless of enactment).

enactment of the Respect for Marriage Act, a potential overruling of *Obergefell* would have fewer consequences and likely cause less public uproar than in the world without the (limited) statutory backup. It is conceivable that lowering the stakes of overruling a constitutional right would embolden the Court to do it, rather than dissuading the Court by showing public and legislative support for the right. That is one of the risks that advocates of enacting a statutory backup right should consider, along with the likely greater benefits.

CONCLUSION: BACKUP RIGHTS TO THE FORE

Parts II and III considered ways in which the enactment of a statutory backup could not only provide insurance against changes in constitutional law but could also serve to keep the constitutional right out of the courts and to bolster the constitutional right on the merits. Still, the immediate purpose of enacting such a statute remains insuring against the abrogation of a constitutional right. In what follows, I conclude by asking whether this exploration of backup statutes might provide an occasion for a reconsideration of the relative importance of statutory and constitutional rights.

The discussion so far has operated within the presuppositions of a framework in which constitutional rights occupy a preferred position and courts are the primary expositors and guardians of those rights. After all, that is what makes a statutory right a *backup* to a judicially developed constitutional right. Senator Chuck Schumer illustrated this mindset in action by saying, during the debate over a bill that would provide a federal statutory right to in vitro fertilization treatment, that "in a perfect world, a bill like this would not be necessary."[169] The bill was necessary—unfortunately, in his view—because of court decisions curtailing constitutional protections for reproductive freedoms.[170]

On the view of things reflected in Schumer's comment, the "perfect world" is one in which courts provide rights, making legislation unnecessary. But much as certain optical illusions work by flipping parts of an image between foreground and background, taking another look at backup rights can bring them to the fore, deemphasizing courts and constitutions.

It is already the case that many of Americans' most cherished rights are statutory in nature.[171] *Brown v. Board of Education*, important as it was, does nothing for people suffering discrimination at the hands of private schools, places of business, or private employers.[172] Statutes address that, most centrally the 1964 Civil Rights Act and its many amendments and descendants.[173]

169. 170 CONG. REC. S4075 (daily ed. June 13, 2024) (statement of Sen. Charles Schumer).

170. *See id.*

171. *See generally* ESKRIDGE & FEREJOHN, *supra* note 152.

172. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (providing that the Court's holding was limited to "the constitutionality of segregation in *public* education" (emphasis added)).

173. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at scattered sections of 28 U.S.C. and 42 U.S.C.).

Virtually all affirmative claims on the government—to a healthful environment, a social safety net, a free public education—to the extent these claims exist in current law, come from federal statutes or from state law.[174] While the federal judiciary's countermajoritarian potential is important, especially when it comes to minorities and unpopular rights, the federal judiciary expounding the U.S. Constitution is in truth a limited backstop rather than the primary source of rights. A more active practice of enacting statutory rights would push the courts further into the background.

Although the enactment of backup rights is not a court-curbing measure, their tendency to de-emphasize the courts makes it worth considering how backup rights fit into the debate over reform of the Supreme Court. That debate has yielded a range of proposals, including calls for eighteen-year term limits.[175] The following paragraphs explain how backup rights relate to these reform proposals.

In an important respect, backup rights are modest in that they simply take the courts as they are and respond to their decisions through the use of legislative tools that are, if not exactly routine, comfortably within the mainstream of constitutional politics. In this way, backup rights fit alongside measures like the proposed Supreme Court Review Act, a mechanism that would eliminate the filibuster for legislation that responds to Supreme Court decisions.[176] There is already no filibuster for much budget-related legislation, nor for nominations of federal judges.[177]

More ambitiously, a sustained practice of enacting backup statutes could be a step toward a constitutional politics in which the courts and Congress together define constitutional rights.[178] As acknowledged above, that means something like overruling *City of Boerne*'s stance of judicial exclusivity, or at

174. *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 2 (2013) (noting that observers have leapt "from the assertion that the federal Constitution lacks positive rights to the claim that *America* lacks positive rights, at least at the constitutional level"); Robin West, *The Missing Jurisprudence of the Legislated Constitution*, *in* THE CONSTITUTION IN 2020, at 79 (Jack M. Balkin & Reva B. Siegel eds., 2009) (explaining that the adjudicated constitution will be limited, so progressives should look to the legislature for social equality).

175. *See supra* note 16 and accompanying text.

176. *See* Aaron-Andrew P. Bruhl, *The Supreme Court Review Act: Fast-Tracking the Interbranch Dialogue and Destabilizing the Filibuster*, 25 U. PA. J. CONST. L. ONLINE 1, 3–6 (April 2023), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1040&context=jcl_online [https://perma.cc/U2DJ-CXBE] (analyzing the proposal); Ganesh Sitaraman, *How to Rein in an All-Too-Powerful Supreme Court*, ATLANTIC (Nov. 16, 2019), https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924 (on file with the *Iowa Law Review*) (calling for enactment of such a law).

177. *See* Bruhl, *supra* note 176, at 4, 8–9.

178. *See, e.g.*, AZIZ RANA, THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM 663 (2024) (urging the importance of "moving the locus of constitutional politics from the insulated spaces of the judiciary to arenas, including legislatures, that are more open to the demands and language of mass movements and mobilized publics"); Post & Siegel, *supra* note 142, at 2022–25 (describing a "policentric" vision of constitutional rights).

least softening its application as happened in *Hibbs*.[179] Bringing about that change would be no small feat, but careful and extended deliberations over backup rights may be part of the transition to a practice of shared elaboration of rights. As part of that program, Congress might reform itself so as to enhance its capacity for constitutional deliberation and bolster the credibility of its constitutional judgments.[180] And while we are thinking about how Congress operates, a more democratic and responsive Congress would deserve more respect, too.[181]

Finally, backup rights are compatible with, though they do not require, straightforwardly court-curbing measures such as jurisdiction stripping or legislative overrides of constitutional decisions.[182] Backup rights can combine with jurisdiction stripping in a few ways. For one, Congress could strip jurisdiction over a constitutional right but provide the statutory right in its stead, though as discussed above this substitution is uncertain to work.[183] For another, jurisdiction stripping could be used to try to protect the constitutionality of the backup right itself. Although Congress has significant authority to create statutory rights under the Commerce Clause, the Fourteenth Amendment, the Full Faith and Credit Clause, the spending power, and other constitutional provisions, there are limits to its authority, especially when applied against the states.[184] For that reason, a prudent Congress would craft a backup statute with various narrower fallback provisions.[185] Beyond that defensive move,

179. *See supra* Section III.A.

180. *See* LOUIS FISHER, CONGRESS: PROTECTING INDIVIDUAL RIGHTS 159–66 (2016). *See generally* Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, *in* CONGRESS AND THE CONSTITUTION 242 (Neal Devins & Keith E. Whittington eds., 2005) (proposing reforms to increase Congress's interpretive capacity).

181. *See, e.g.*, COMM'N ON THE PRAC. OF DEMOCRATIC CITIZENSHIP, AM. ACAD. OF ARTS & SCIS., OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY 22–47 (2020) (proposing a number of measures aimed at improving the representativeness and responsiveness of electoral institutions, including ranked-choice voting and multi-member legislative districts); Danielle Allen, Opinion, *The House Was Supposed to Grow with Population. It Didn't. Let's Fix That.*, WASH. POST (Feb. 28, 2023), https://www.washingtonpost.com/opinions/2023/02/28/danielle-allen-democracy-reform-congress-house-expansion (on file with the *Iowa Law Review*) (arguing for expanding the size of the House of Representatives).

182. For recent proposals along these lines, see, for example, Doerfler & Moyn, *supra* note 16 (discussing reforms that disempower the courts and move decision making toward more democratic institutions); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1801–36 (2020) (defending jurisdiction stripping); and Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212 (on file with the *Iowa Law Review*) (calling for Congress to reallocate the power to interpret the Constitution). For analysis of the constitutionality of such measures, see COMMISSION REPORT, *supra* note 119, at 163–69, 189–91.

183. *See supra* Section II.C.3.

184. *See supra* Section II.B.1 (describing doubts about constitutional authority to enact certain federal rights).

185. *See supra* notes 101–03 and accompanying text.

some legislators argue that Congress should insulate a statutory backup from judicial scrutiny by stripping the courts of jurisdiction to consider congressional power to enact the backup right.[186] As explained above, however, Congress likely cannot take away the courts' power to consider the statute's constitutionality while still relying on the courts to enforce the statute.[187] The best Congress could do here may be to reallocate jurisdiction elsewhere, such as to another court believed to be more favorable than the Supreme Court.[188]

Again, though, there is no necessity to associate statutory backups with jurisdiction stripping or similar court-curbing measures. Statutory backups can operate on their own, within the prevailing mindset of judicial primacy, while also by their example working gradually to change that mindset.

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186. Letter from Rep. Mondaire Jones et al., Members of Congress, to Nancy Pelosi, Speaker of the House, and Chuck Schumer, Senate Majority Leader (July 13, 2022) (on file with the *Iowa Law Review*) (urging leaders to "prevent the Supreme Court from reviewing the constitutionality or legality of the [abortion statute]" and other backup rights by removing the Court's appellate jurisdiction); *see also* Sprigman, *supra* note 182, at 1859 (suggesting this possibility).

187. *See supra* Section II.C; *accord* Epps & Trammell, *supra* note 123, at 2134–36.

188. *See* Letter from Jones et al. to Pelosi & Schumer, *supra* note 186. Today only the Supreme Court has appellate jurisdiction over state courts. But Congress can give an inferior federal court appellate jurisdiction from the state courts, similar to how Congress already provides for removal before judgment and for collateral review of state convictions in the federal district courts. *See* THE FEDERALIST NO. 82 (Alexander Hamilton) (concluding that Congress may provide for appeals from state courts to inferior federal courts); *see supra* notes 57–58 (discussing removal to federal court). And, further, Congress can likely funnel appeals from state courts to a particular inferior federal court and remove the Supreme Court's appellate jurisdiction over those cases. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 255–58 (1985) (concluding that Congress could create an unreviewable Article III "Abortion Court"). I say "likely" because this is uncertain territory. A potential obstacle is Pfander's position that the Constitution's creation of "one supreme Court" imposes certain limitations on congressional tinkering with the Court's jurisdiction. James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1435–36, 1504 (2000). *But see* Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 283, 306–17 (2003) (criticizing aspects of Pfander's account).